Law and Counterterrorism
The Prevention of Terrorism Act in a Strategic Dimension

Swati Pandey

Institute of Peace and Conflict Studies
New Delhi, INDIA
ACKNOWLEDGEMENT

I would like to thank my family, Yale Professors Mridu Rai and Minh Loung, and Andrew Camargo. I also extend my gratitude to the Yale Class of 1995, the Sunrise Foundation, the Smith Richardson Foundation, and the Jewison Foundation, without which I could not have made the trip to India.

Swati Pandey
Using law as a tool to improve national security is always an uneasy procedure in democracies, where security interests may conflict with the more democratic goal of law and order—maintaining civil liberties. The Prevention of Terrorism Act (POTA) is a manifestation of this dilemma: it is one law that seeks to fulfill both goals. Thus, the question that should be asked when evaluating POTA is not, how much civil liberty is lost, nor how much security will be gained. Rather, the question should be: how much is India willing to compromise either of these goals to save the other? Both are integral to India’s character as a sovereign democratic state, but in excess, either could significantly harm that character. POTA—with its harsh measures and implementation loopholes standing next to procedural safeguards of due process—demonstrates Parliament’s understanding of the need to compromise, to aim for that elusive optimal point between a secure, undemocratic state and an insecure, volatile, fiercely democratic one.

Unfortunately, POTA is far from optimal, compromising both security and liberty to an unnecessary degree. Its problem is its lack of strategic context. A coherent counterterrorism strategy would circumscribe the implementation of the law, tying it with other explicitly stated administrative and government efforts that would prevent its misuse and supplement its effects. Much like TADA, its maligned predecessor, POTA is presently vulnerable to abuse and therefore directly contradicts the goal of maintaining liberties. Furthermore, by giving politicians the right to say they are fighting terrorism and making the state stronger, POTA obscures the need for a strategy, the continued absence of which could hinder the other goal of providing security. Indeed, POTA has become part of the misshapen quilt of ad hoc counterterrorism efforts that have served India so poorly in the past. But because it could remain a permanent fixture in Indian law, it is potentially more detrimental. It appears strategic without in fact being so.

This paper will first examine POTA’s historical context as well as compare it to legal counterterrorism efforts in other democracies. Then, it will consider the particularities of POTA and the peculiarities of its implementation in a strategic vacuum, comparing it to counterterrorism policy in the US. Last, it will note a few possible ways in which the law and its implementation can be improved and contextualized. The specifics of the POTA debate will be discussed with reference to the more general problem that POTA represents: the challenge all democratic states face in fighting transnational terrorism, which not only undermines the goals of liberty and security, but also the very idea of the state itself.

I

POTA in Historical Context

INDIAN LEGAL HISTORY

To pinpoint the place of POTA in Indian and global history is to consider the intersection of two historical narratives. The first such narrative is that of the power of law in India. The first ruler of the ancient Maurya empire, Chandragupta, was the first to pay close attention to national security, and preferred wielding the danda, that is using fear in a near-totalitarian way.1 Whereas Chandragupta’s means of achieving such security relied on networks of spies

---

and loyal ministers, it was not until the British ruled India that the country had its first uniform legal system, and more importantly to the story of POTA, the first far-reaching repressive laws, beginning with the power of preventive detention in 1793. By imperial norm and necessity, all British security laws were quite undemocratic, particularly considering that the British did not face a real terrorist threat. Rather, they faced a legitimate struggle for self-rule, and even this did not quite have the impact of modern-day insurgency and terrorism.2

The newly sovereign Indian politicians hotly debated the necessity of maintaining the colonial laws, but the many challenges of Independence and Partition seemed to justify some protective measures. The new democracy armed itself with preventive detention powers, sanctioned by Article 22 of the Constitution and the Preventive Detention Act of 1950.3 In the years following Independence Parliament passed laws like the Armed Forces Special Powers Act and the Disturbed Areas Act, which were often more draconian than POTA.

These special area laws and their many peers, plus the Indian Penal Code and the Criminal Procedure Code inherited from British India, seemed sufficient to Parliamentarians even with handling terrorists. But this changed in 1971, when Prime Minister Indira Gandhi enacted a severe law that was used for counterinsurgency and counterterrorism—the Maintenance of Internal Security Act.4 Because insurgency was considered a more widespread and disruptive problem than terrorism at the time, the Act was quite draconian, especially when amended during the Emergency to allow arrest without any specified charge. MISA also provided for the establishment of an advisory board to hear cases. Ostensibly nonpartisan, the three board members were in fact government appointees selected for their political views.5

In 1984, after the rise of the Khalistan movement, Parliament enacted the National Security Amendment Act, which allowed a year long detention period. Although they refrained from explicitly claiming to be antiterrorist laws, these were among the first of India's countrywide laws that were used against terrorists. The laws also stopped short of defining terrorism specifically.

INTERNATIONAL LEGAL COUNTER- TERRORISM EFFORTS

But, as the Indian state affirmed its strength over domestic insurgencies, countries around the world found their prestige and power being steadily undermined by the rise of non-state individual actors or groups. This is the second historical narrative of which POTA is a part—the rise of transnational terrorism and global response to it.

Beginning in 1963 the United Nations drafted 12 conventions that related to specific terrorist offenses such as hijacking. After 9/11 the UN greatly expanded its role in the global counterterrorism effort, establishing the Counter-Terrorism Committee on 24 September 2001, which obliged states to criminalize the financing of terror and to bring perpetrators to justice. The group has played an effective and significant role in motivating international cooperation against terrorism, and has received much international support despite having been established by the UN’s most intrusive resolution to date. Other important resolutions have increased the breadth and exactness of sanctions and created a “comprehensive list” of 355 terrorist


5 Ibid.
persons or entities. The Counter-Terrorism Committee requirements prompted many member states to start considering new legislation as well as formulating their own definitions of terrorism—an issue on which the UN remains undecided because of differences of opinion among its member states—the distinction between a freedom fighter and a terrorist was still a matter for debate. Without this definition, no comprehensive counterterrorism convention is possible.6

FINDING A DEFINITION

Strong domestic law—and a domestically determined definition of terrorism—combined with continued international vigilance seemed to be the most viable option for counterterrorism. India offered its first definition of a terrorist in the Terrorist Affected Areas Act of 1984:

Terrorist means a person who indulges in wanton killing of persons or in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to—(i) putting the public or any section of the public in fear; or (ii) affecting adversely the harmony between different religious, racial, language or regional groups or castes or communities; or (iii) coercing or overawing the Government established by law; or (iv) endangering the sovereignty and integrity of India...7

The definition was specific about the scope of terrorist targets, but it did not include a motive—that is, it did not explicitly say, for example, “with intent to secede from India” or “with a political goal in mind.” Rather, the act mentions what might result from a terrorist act, not what political sentiment motivates the terrorist to commit the crime. This omission was politically useful—a specified motive, such as separatism, might have implicated the Akali Dal, the very group with which Indira Gandhi's Congress Party was trying to negotiate. Convictions—or at least arrests—under the law continued, and while the Akali leaders sat in jail, the Congress Party worked through and signed the Punjab Accord.5 In this case the use, misuse, and incomplete application of the Affected Areas Act, combined with negotiations and military and paramilitary operations, led to a significant decrease in terrorism in Punjab. But the most important element of the Punjab solution was a populace that did not support the Khalistan movement.9 Thus, even if the Punjab efforts could not be described as strategic, they were in a sense successful. Law compromised civil liberty—by keeping Akali leaders in prison for substantial periods without conviction—but enhanced security, because, without the leaders, the movement crumbled.

But the Terrorist Affected Areas Act had little of the force of the Terrorist and Disruptive Activities (Prevention) Act (TADA), which was enacted in 1985 with disastrous results that still haunt the counterterrorism legislation debate today. With TADA came a slightly expanded definition of terrorism to include motives. The Act also established special courts in states where the legal system had almost entirely broken down due to terrorist activity. Strangely, both advocates and critics acknowledged this breakdown of the legal system—the former thought the lack of law and order justified a new law, while the latter maintained that a special law distracted from the need to repair the general system. Ultimately, TADA was allowed to lapse because of the severe human rights violations that occurred under it. The several well-documented cases include many

---

7 “Constitution of India,” 12 September 2003, <http://indiacode.nic.in/cgi/nph- bwcgi/BASIS/indweb/all/iw2/DDW?W%3DSECT EXT%20%20PH%20WORDS%20%27ZONE%27%26M%3D17%26K%3D13164%26U%3D1>
8 Goswami, n. 4, p. 28.
9 Mitra, n. 2.
in which the “disruptive activities clause” was invoked against protestors, students, and bootleggers who could have been booked under the Criminal Procedure Code with much reduced punishments. Furthermore, TADA had little positive effect on India’s counterterrorism effort, and some allege that its backlash may be worse than the violence that spawned it.  

FILLING THE GAP

Between 1995 and 2001 there was no nationwide counterterrorism legislation on the books. What spurred legal action to replace TADA was the trauma of the Indian Airlines flight IC-814. Negotiations, one of the elements that helped resolve the Punjab problem, backfired in this instance. On 24 December 1999, when armed hijackers took over IC-814, the government’s attempt to negotiate failed. The Indian government, forced to choose between releasing 35 jailed terrorists and handing over $200 million and letting 154 innocent passengers perish, ultimately had to release three prisoners before the hostages were freed.

After this, despite continuing international, regional, and bilateral efforts, politicians like L. K. Advani continued to lament the “soft and indolent” nature of the Indian state, demanding a wide-ranging anti-terrorist law to replace the long demised TADA. The existing (pre-9/11) UN conventions had no enforcement power, and few signatories had enacted domestic laws to support all their provisions. SAARC’s Regional Convention on the Suppression of Terrorism, enacted in August 1988, incorporated some UN principles, requiring extradition between states for serious crimes such as conspiracy, hijacking, hostage-taking, and kidnapping. This measure widened the scope of existing bilateral treaties in the region, but also slipped in a provision that let states back out of extradition if they found the requesting state to be acting in bad faith, or on a trivial matter. Because of the abuse of this provision, the failure to follow the other articles, and the absence of a non-compliance penalty, the Convention has failed to achieve results, demonstrating that the political will to harmonize domestic legislation across the region was still absent. And even though India continued to strengthen bilateral commitments with the US, the UK, and other states, the terrorist-supporting states like Pakistan from which it needed the most cooperation were also the least likely to grant it. Stronger domestic legislation appeared to be the only choice available. The only existing laws, severe as they were, did not extend to the entire Indian landmass, nor were they capable of addressing transnational terrorism and its financing.

II

POTA in democratic context

To push national security legislation through a democratic system, politicians must wait for the small window of opportunity when political necessity matches political will—that is, when something a state must do to protect itself is also a politically popular measure. Often, it takes a crisis to open, or create, that window of opportunity, and that crisis came in 2001 for the US and India. Within four months the world saw three large-scale, carefully planned terrorist attacks in these countries. Threat perception was high, and the international community demonstrated a marked degree of

---

11 Another hostage incident had caused a smaller uproar in 1989, when the daughter of the then Home Minister Mufti Mohammed Saeed was abducted by terrorists who also demanded the release of prisoners. Prafulla Ketkar, personal interview, 25 July 2003.
14 Goswami, n. 4, pp. 60-62.
15 Mitra, n. 2.
cooperation. More importantly for domestic lawmakers, the public seemed willing to tip the scales in favor of security and sacrifice some civil liberties. In India, the attacks made it impossible to ignore the absence of a comprehensive, countrywide counterterrorism law. Parliament drafted the Prevention of Terrorism Ordinance in 2001. On 28 March 2002, after making a few changes to mitigate its harsher measures, Parliament enacted the Prevention of Terrorism Act.

The true test of democracy, however, lies not in the terrorist attack, but rather in a democracy's response to the attacks: “The danger lies in the possibility of doing the terrorists' job for them, by taking unnecessary steps in an attempt to counter the perceived threat and thereby fundamentally alter the nature of democracy.” So far, neither democracy seems to have a stellar record in maintaining their democratic character under the new laws. In the US, authorities have detained 1200 violators of immigration laws who are also “material witnesses” to terror attacks. The only case that has made it through the legal channels might result in acquittal. Attorney General John Ashcroft charged the “20th hijacker” with conspiracy which will be difficult to prove. The US Department of Justice has also repeatedly attempted to interfere with court procedure by restricting court testimony, citing national security concerns. Without this testimony, which is still under debate, Zacarias Moussaoui might be acquitted.

In India, approximately 682 people have been detained, all with little evidence and most without charge. Two Chief Ministers—Jaiyalalitha in Tamil Nadu and Mayawati in Uttar Pradesh—have used POTA to prosecute political opponents, and there are many more charges against other ruling party officials for its abuse. The most prominent POTA case thus far—that of the December 13 attackers—is currently being appealed in the Delhi High Court, with defendants alleging torture, lack of evidence, and an extra-judicial, politically-influenced ruling by the POTA court.

But public outcry in the US, though present, has not led to its laws to come under review, and in fact has prompted the government—and many of its supporters in civil society—to defend the law. Why, in India, where human rights are not as widespread a concern, has the outrage provoked an early review of POTA, and the release of over 100 accused? And in India, why is the necessity of the law still a matter for debate? In fact, Wardlaw's characterization ignores potential differences in democracies, differences that texture the public response to (or reaction against) whatever steps a government takes to promote security. Such differences may make strong legislation possible without compromising the nature of a particular democracy. I discuss below the similarities and differences between the US and India.

SIMILARITIES

Respect for Law: The leaders of the US and India share a respect for the rule of law. Democracies have historically favored fighting terrorism with special laws because law holds an esteemed position in these

---

<www.bbc.co.uk/worldservice/people/features/ihavearight/to/four_b/casestudy_art09.html>
<http://slate.msn.com/id/2085997/>
societies. Furthermore, law is the quickest way for a state to reassert its authority against a non-state actor, which possesses no such legislative power. Law also provides a “tough” image as opposed to political negotiations or settlements. Last, but most significantly, special laws enhance the state's ability to prosecute terrorists, a process, in the absence of which, poses severe challenges for law enforcement and the legal system. If a terrorist is granted bail, for example, he can pose an immediate and grave danger to many innocents, or he can simply disappear because he usually has few ties to society. Witnesses rarely speak willingly, as testifying against a terrorist is often fatal. Investigations are thus much more difficult because very few would cooperate with law enforcement, either out of sympathy for the terrorist or fear for their lives, and the terrorist must be kept in detention for longer periods to allow for sufficient inquiry to be made. A special law is a good and generally effective way to address these challenges generically, instead of dealing with each terrorist trial case-by-case.

New Powers: Both laws, on the surface, appear to greatly enhance law enforcement powers at the expense of civil liberties. The PATRIOT Act increases the US law enforcement's evidence collection powers, particularly in terms of monitoring communications of suspects. Officers can also obtain nationwide search warrants for information stored in computers. The law also declares that trials will be held in military tribunals. Similarly, POTA gives officers greater powers of detention, allowing the investigating officer more time in which to find evidence. But POTA also provides safeguards against abuse of power. India seems to have learned from experience that powers can be abused, whereas the US provides no safeguards in its law, and seems to have been caught off guard when reports of abuses came out. Like the US, India also allows for trials to occur outside the regular judicial structure—in India's case, in special courts with government-appointed judges.

DIFFERENCES

The Nature of the Threat: That the US and India face distinct terrorist threats is a platitude. Terrorist threat for the US is largely a foreign one—religious fundamentalist terrorists targeting US sites and cultural symbols abroad. But terrorist threat in India is more complicated: there are religious fundamentalists, ethnic separatists, nationalists, and the disenfranchised. All of them have external support networks that provide finances, arms, moral support, and human resources, often from across the border in Pakistan. Furthermore, terrorists are much more intricately connected to the Indian populace—the causes, if not the methods, find sympathy in many parts of the country, especially the Northeast. Because terrorists are so embedded in the populace, India encounters many more ambiguous cases of terrorist association: children forced to carry arms, and families forced to provide food and shelter.

Legal Culture: The US is the most targeted country in the world, but almost all attacks occur on US installations, military and non-military, around the world. Terrorism has always been an international problem for the US, and the US has considered terrorism an act of war instead of a crime (which is how Great Britain conceived of it until 9/11). Because terrorism was categorized as such, counterterrorism in the US has always been a massive project, often utilizing the rather blunt tool of military engagement or bombing campaigns. The US started using

---

22 Lal, n. 3.
24 Ibid.
25 Lithwick, n. 18.
27 But military operations are growing less “blunt” with better technology. Ibid., pp. 57, 97.
legislation more actively after the 1993 World Trade Center bombing, as it was the best and most viable option for "the homeland," where military or even paramilitary efforts were for the most part unthinkable. There were several acts, including the Effective Counterterrorism Act, the Counter Terrorism Technology Research Act, and the Comprehensive Antiterrorism Act, drafted prior to 9/11.

The US has a great advantage in its public’s respect for the legal process, if not always for the lawyers and judges who work the process. The adversarial system is highly respected in the US. Trying a case is considered inherently therapeutic, giving a voice to the victimized and offering the accused a chance to speak for themselves. When the US enacted the PATRIOT Act, most Americans were pleased that accused terrorists would be "put to justice" through a trial.\footnote{Ibid., pp. 80-81.} That the trials would occur in military tribunals—quite unnecessarily, considering the US has a functioning legal system—was also not too much of a problem for most Americans, even though such tribunals curtail the right of appeal.\footnote{Jordan J. Paust, “Military Commissions: Some Perhaps Legal, but Most Unwise,” 22 April 2002, <http://jurist.law.pitt.edu/terrorism.htm>}

Furthermore, law enforcement is widely trusted in the States except in a few urban areas, and the police have a high rate of conviction as well. Also, law enforcement has some greater leeway because the targets of US legislation are more often aliens and foreigners than US citizens, even though the US Constitution "covers within the shield of its protection all classes of men, at all times, under all circumstances."\footnote{Ibid.} As one Indian lawyer puts it, in America, aliens are afraid of the law, not Americans. In India, he added, Indians are afraid.\footnote{A US Supreme Court case dating from World War II, however, allows for investigation and prosecution to proceed against a US citizen as it would for a non-citizen if he is engaged in activities to harm the state. That is, laws that are generally intended for non-citizens can be used against a citizen in the same fashion. “Terror Trials Test US Legal Foundation,” CNN. 6 September 2002, <http://edition.cnn.com/2002/LAW/09/06/ar911.prosecution/> The lawyer spoke on condition of anonymity.}

Indian legal culture is a little harder to describe because it is historically much more complex. Indian jurisprudence has been reinvented with each new sovereign, and within each reinvention, there still remain regional differences and local justice systems to consider. The most significant legal influence on antiterrorist laws, however, is the British colonial legacy. POTA in fact refers to several British laws and expands their punishments, including the Explosives Act of 1884 and the Explosive Substances Act of 1908. Although many British laws were rejected or reformed after Independence, they left a distinct imprint on the legal and law enforcement cultures, accustoming the authorities to the use of harsh measures in investigation and interrogation, even against fellow Indians. Perhaps because of their harsh experiences, their long tenures in conflict areas, and the colonial legacy, the security forces have often resorted to less than democratic measures. In general the police are not widely trusted, and have a notoriously low rate of conviction.\footnote{D.R. Karthikeyan, Personal Interview, 21 July 2003.} Similarly, the legal system is often permeated by political influence, delays and corruption. Without the guarantee of a strong legal system to support the special courts, an officer is likely to use POTA rather than the ordinary law whenever he or she wants a quick conviction and harsh punishment, regardless of whether the suspect is a terrorist.
will call its political and public culture, makes it much more difficult to pass and enforce security legislation. The main distinctions between the US and India lie in their political systems, the public perception of these systems and their leaders, and the relationship between civil society and government.

The US is blessed—or damned, depending on one’s perspective—with a two-party system in which the two parties are hardly distinguishable. When one party supports a bill, it is likely that enough in the other party will support it to get it passed. This was especially true of the PATRIOT Act, which was rushed through Congress at a time when both parties wanted to respond immediately and forcefully to the 9/11 attacks. The public also felt similarly. Although there is a healthy amount of skepticism about the government’s motives in its War on Terror, particularly regarding recent developments in Iraq, the majority of Americans support a tough stance on national security issues. A recent Time/CNN poll revealed that the most contested voter population—suburban, upper middle class mothers—said they would vote for whoever was tough on security issues. In general, American civil society is united on security issues, and there are very few truly divisive issues.

India, on the other hand, has a much less stable civil society and political system than the US. It is perhaps the most vibrant of the democracies, with hundreds of political parties that draw politicians from all income levels, castes, and religions. But Indian politicians also have to contend with the “incumbency disadvantage”—an orchestrated opposition that will always contest what the ruling coalition does, if only for the sake of contesting it. Also, few Indians, particularly in the so-called disturbed areas, ever come into contact with the government except in an atmosphere of violence on exercise of authority. As Professor Anuradha Chenoy said, “a human rights violation is something like a traffic ticket.” The opposition to laws like POTA rarely comes from the population against whom it is used, but rather from prominent politicians who are targeted, the opposition in general, or the liberal media and academia.

In fact, this is a general trend with many Indian policies: some group, whether a political party, a religious minority, a certain caste, or a regional populace, often think that a law has been enacted not with the purpose of enhancing security but rather with the purpose of harassing them. My liberty-and-security framework, when applied to India, does not necessarily mean individual liberties, but also includes the rights of collective groups. Individuals in these groups see such laws as a threat to them because they are members of a group, not necessarily because they are individuals with human rights. The political, ethnic, religious, caste and economic diversity of Indian society makes it difficult to enact a law that can be implemented fairly across all groups, and perceived to be fair by them. Perceptions in this situation are often more important to the viability of a law than its actual provisions.

III
The Strategy behind Counter-Terrorism Law

In addition to these differences there is one key distinction: unlike the PATRIOT Act, POTA lacks a strategic context. The PATRIOT Act includes a discussion in its text of how the law will be supported by efforts in other sectors of government.

---

36 Anuradha Chenoy, Personal Interview, 19 July 2003.
Indeed, changes and reforms are occurring across the board and not only in the legal sphere. Because of its strategic context, the PATRIOT Act is more likely to be successful in the long run, despite its immediate problems—the system works, but the details need working out. With regard to POTA, there is no system, the details need working out, and those details are distracting the energies of both government and civil society that should be devoted to strengthening the system.

POTA PARTICULARS

Interestingly, the statement of purpose and objectives—which precedes every piece of Parliamentary legislation—is virtually identical for TADA and POTA. TADA is “an Act to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith or incidental thereto.” POTA, similarly, is “an Act to make provisions for the prevention of, and for dealing with, terrorist activities and for matters connected therewith.” The slight changes in the latter definition demonstrate Parliament’s understanding that TADA was too broad in scope, that “disruptive activities” could be interpreted too broadly, and special provisions implied extra- or super-legal allowances.

But the similarities between their objectives are even more revealing: both laws have the same objectives, but the only substantial change in the text of the laws is that POTA includes semantic changes in definitions and some safeguards against abuse. The most significant change is the removal of the “disruptive activities” clause in TADA, which compromised civil liberty: “‘disruptive activity’ means any action taken, whether by act or by speech or through any other media or in any other manner whatsoever...”. Other changes include easing or strengthening punishment where applicable; shortening detention and investigation periods; and fining or imprisoning police officers who violate or misuse the law. Review committees can be established under Section 40.1 to approve or disapprove the interception of communications.

Also significant are POTA’s review procedures that allow the law itself, rather than the people implementing it, to come under scrutiny. Section 18.5, for example, allows for a review committee to remove an organization from the list of terrorist groups. The law is currently under review by Parliament to determine its necessity and feasibility. The mass of human rights violations that have occurred under it have caused human rights groups such as Amnesty International and venerated institutions like the National Human Rights Commission to demand the law’s repeal. The tensions within and surrounding the law—between harsh measures and safeguards, between the police who demand such a law and human rights groups who decry it—point to the absence of a strategy, and the absence of a context for the law.

LAW AND STRATEGY

At first glance it may seem that a law has no business being strategic. A law is words on paper, its only goal being, usually, to prevent or enable something. But, in fact, a law must be strategic to work. Strategy is often defined as the assessment and allocation of means towards a defined end. A strategic law, then, must accurately consider what means are available to enforce the law, and whether those means are sufficient to reach the goals of that law. For a counterterrorism law, lawmakers should consider the state’s police capabilities, the legal system, and the political leanings of its population to make sure that the law will be successful. If these means are sufficient, then the goals of the law can be reached.

What is most dangerous about a law that lacks a strategic context is that laws may seem strategic, even if they are not. Lawmakers

have a tendency to assume that all the means necessary to enforce a law already exist—particularly if it is a law that only prevents something and does not establish anything. Unless the law provides for it, no attention will go to acquire the means—lawmakers and civil society will only sit back and see whether the law works. If the law is not a temporary measure, then much time—and many security crises and civil rights violations—may occur before the law is finally scrapped. And if any law comes in POTA’s place, it may also be without a strategic foundation.

US STRATEGY

The PATRIOT Act is well suited to the States, finding a balance between liberty and security that is acceptable to the bulk of its citizenry. Most importantly the PATRIOT Act seems to accurately assess the law enforcement means available to the US, allocating new powers while still scrutinizing intelligence agencies, particularly in a scathing review submitted to the Congress on 25 July 2003.\(^{38}\) The Act also creates means where the existing ones did not suffice—hence the Department of Homeland Security. Of course, governments tend to begin such projects, if only to appear to be doing productive, and politically lucrative, work. Many critics claim that the new Department is still struggling to fulfill its mandate of providing better coordination between the security and intelligence bureaucracies.\(^{39}\) But doubts about the Department’s raison d’être were later calmed by President Bush’s report on National Security Strategy (NSS), which revealed a new American grand strategy that finally seemed to take advantage of the US’ “unipolar moment.”\(^{40}\) Whereas Clinton’s NSS emphasized American domestic concerns and a decidedly non-aggressive foreign policy of “promoting democracy,” President Bush’s report simply calls for improving relations with the “great powers” to actually build free and open societies and to protect states from “terrorists and tyrants”.\(^{41}\)

Within this context the PATRIOT Act makes more sense. Its strident measures are in response to what the US sees as its primary post-Cold War threat—hence the linguistic union of terrorists with tyrants. Its wide reach suggests not only that the act is a comprehensive piece of legislation but also that every arm of government involved in its implementation has the same broad underlying goals. The changes taking place in each part of government—intelligence, the diplomatic corps, the military, and law enforcement—are all part of a common effort. The Act’s only provision that seems strategically misplaced is the use of military tribunals, an unnecessary modality that can take away more liberty than required. This part of the law should be amended.

INDIA’S STRATEGY

POTA has yet to be grounded in any such strategy. The Act reflects a miscalculation of means available in terms of the trustworthiness of law enforcement, the independence of the judiciary, and the uprightness of politicians. POTA does provide several safeguards, suggesting an attempt to balance liberty and security. Many of its search and seizure provisions require approval from a high-ranking law enforcement official. Other safeguards establish time limits—informing an authority of seizure within 48 hours, bringing a confessor before a judicial magistrate within the same time, requiring appeal to occur within 30 days of special court judgment, and so forth. The Act also utilizes the “reasonable cause” criterion.


\(^{39}\) Hill, n. 37.


\(^{41}\) Ibid.
when an officer must collect evidence without a warrant, a stricter legal standard than many of the disturbed area laws. Officers who violate the law, or abuse it, are also liable to punishment under Section 58. Regarding the Special Courts, discussed in Section 60, the law provides for government-appointed judges who must also be approved by the Chief Justice of the High Court.\textsuperscript{42}

But the law makes assumptions about the means available for its implementation. First, it assumes the independence of police officers higher up in the bureaucracy. But the checks for evidence collection are routine—the Superintendent of Police in this case is only a “rubber stamp,” not an actual check on police authority.\textsuperscript{43} Second, the Act assumes the independence of the special court judges, but a government appointed judge is not free from political pressure, and may in fact be chosen because of political leanings, as occurred under the Terrorist Affected Areas Act. Similarly, the High Court judge’s approval of the appointee, while checking the executive branch of government, can also be a politicized decision. If evidence is not properly collected at these levels, and the case is ultimately dismissed, the country would have suffered a decrease in security and violated civil liberties by its courtroom and investigation procedures. Third, POTA is completely dependent on the general status of the Indian legal system. Corruption is widespread; rarely do arrests lead to convictions; and the notion of civil rights is only an issue for discussion among the elite. Whether or not to have a death penalty, for example, is a contentious issue in most democracies, but it is rarely discussed in India. This means that few people in civil society will defend a suspect whose rights have been violated, but also that people in positions of power—police, judges, administrators—will worry less about proper implementation of the law and more about imprisonment and punishment. On the other hand, powerful members of civil society who are willing to fight for civil liberties—such as human rights groups—may cause more harm than good by repealing a law that could be beneficial in the short run in favor of working slowly toward a long term goal that could be better accomplished by a strong, temporary law. Fourth, and most significantly, the law does not mention any effort to work toward a comprehensive counterterrorism policy that delineates the role of all branches of government. These other branches are, like the law itself, means toward the end goal of a secure, democratic state. They are entirely ignored by POTA, even though many members of civil society as well as retired government officials have called for revamping the “national security culture”, and the institutions that comprise it.\textsuperscript{44}

\section*{MAKING A STRATEGY}

The search for a comprehensive approach to a threat is a challenge for any nation. In framing a strategy, a leader must consider many factors. How much of the strategy should be the brainchild of a single person, and how much should be grounded in institutions? How can the longevity of a strategy be assured? How can new regimes be obliged to follow a strategy or policy set by their predecessors? Even if a strategy is viable, how can the political will necessary to enact it be mustered? And last, how can countries move from crisis management—with contextual responses—to a coherent, constant strategy?

These general problems are exacerbated by some specific challenges to strategy-making in India. First, unlike the US, India has not been accustomed to declaring its security strategies publicly, which US presidents are required by law to do since 1986, and have been accustomed to since World War I.\textsuperscript{45}

\begin{flushright}
\textsuperscript{42} The Prevention of Terrorism Act, 2002, 28 May 2003.\textsuperscript{\textcopyright} http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm\textsuperscript{44}
\textsuperscript{43} Jha, n. 23.\textsuperscript{45}
\end{flushright}
Also, the US, as a hegemon, requires a global design, while India does not have such pressures, despite the pressure of being the regional hegemon and its great power ambitions. India, some would suggest, should focus on internal issues. Second, some critics maintain that India lacks a "strategic culture", but the hypotheses as to why this is so are less than fulfilling. Some argue that religious beliefs prevent policy activism, as does the Gandhian legacy. More likely is the notion that India lacks an "establishment"—an elite group that guides its national agenda from administration to administration, offering some continuity and hence the possibility of formulating and applying a long term strategy. Indian experts today are too distant from policy makers, and thus have little influence on policy implementation. India’s political system also makes strategizing difficult: elections come frequently, coalition politics make consensus onerous, and regional or domestic concerns take precedence over nationwide security issues.

Recommendations

Keeping these challenges in mind, how can POTA increase security without excessively curtailing liberty (individual or group)? Many of the above problems seem intractable, but some changes can be made now to make POTA more effective. The following recommendations could help give POTA a strategic context, strengthen the means available to make the law work in the short term, and support the law with a comprehensive counterterrorism policy in the longer term.

THE WRITTEN LAW

When Parliament allowed TADA to lapse, the law had become notorious for its easily abused provisions. It contained few safeguards against police misuse, allowing officers excessively wide discretion in charging student activists, prostitutes, and petty criminals under TADA. POTA appears to take into account these concerns, and offers various safeguards to prevent misapplication of the law: in many instances, the investigating officer must be of a certain rank, and must procure approval from an officer of a higher rank. Any officer who willfully misuses the law is subject to fine and imprisonment. Despite these good intentions of the Parliament, a few further measures would help in the application of the law.

- A narrower definition of terrorism would remove ambiguities that currently allow the arrest of protestors, as would an expanded organization list. Right now the police are left free to interpret what “any act or thing” means, or what “involvement” includes.

- Section 7 should be amended—currently it allows the police to seize all the property of a POTA accused, making beggars of the accused and his or her family before a conviction. The law should minimize the amount of property to be seized.

- Section 60 should be amended to require a Review Committee to evaluate requests for arrests, searches, evidence collection, and property seizure, thereby putting the burden of proof on the government, instead of the accused. Currently, POTA’s procedural safeguards only require approval of a Superintendent of Police but, as mentioned above, this process is so


routine that it rarely merits a second thought from the officer. After the arrest, search, and property seizure—when irrevocable damage has already been done to the reputation of the accused—POTA only requires approval from a joint secretary; as it stands there is no check on the executive branch in POTA.\(^49\) Also, because an early review will prevent the high numbers of falsely accused, it will lead to more convictions based on solid evidence, bolstering the reputation of the police in the long run.

- The appointment of special court judges should be free from political pressure. Approval should be required from the High Court bench, and/or by a non-governmental Review Committee.

- Parliament should review POTA yearly, clarifying that the goal of the review should be amendment and supplementing the law rather than its simple continuation or repeal.

- Parliament should also make it clear in the text of POTA that the law—and particularly the special court provisions—are temporary, and that the government is taking steps to improve the regular legal system, particularly in disturbed areas, and to integrate the people of those areas into the political and legal processes.

THE IMPLEMENTATION OF THE LAW

Law Enforcement: Some positive trends have already changed the law enforcement atmosphere but much remains to be done. The biggest problem with law enforcement is the politicization of the police forces.\(^50\) Because of political pressure, police at low or middle ranks answer more often to a political party than to a superior officer. To insulate officers at the lower levels, the police forces should institute rewards including medals, titles, promotions, and/or salary increases, for policemen who enforce the law without violating liberty, Law enforcement can also be improved by incorporating regular human rights courses and civilian oversight of its operations. Both these practices have already begun in some areas and, if continued and extended, should make for improvement in the administration of POTA. Similarly, policemen who act outside the law, or who succumb to political pressure, should be punished. POTA does demand punishment of officers who violate the law, but these punishments are not stringent enough, nor are they acted upon in a timely manner.\(^51\)

Legal System: POTA is strategic in its use of special courts—such a measure is necessary in a country where the legal system does not function in a time bound manner. But the special courts can also backfire if they submit to political pressure, as some allege occurred in the S.A.R. Geelani case.\(^52\) Parliament can redress this by providing for a review committee—again, of civilian legal experts, judges, administrators—to look over the case before it goes to trial in a special court, and demand further investigation if necessary.\(^53\) The government can consider insulating the judiciary from political pressure by creating a nationwide judicial service, requiring judges to be posted to unfamiliar areas where they may not have political ties or obligations. Also, to facilitate the trial process, India should create a witness protection program akin to the one in the US.\(^54\) POTA does ensure that witnesses’ identities can be kept secret, that the courts’ decisions can be secret, and trials held in camera—but this does little to protect the witness in the long run, particularly if the accused, or members of his terrorist organization, can see the witness or obtain information about the witness from the judiciary or police.

Government: The first step that Parliament needs to consider is creating a cohesive, transparent Counterterrorism Coordination

49 Jha, n. 23.

50 Karthikeyan, n. 32.
Center, something like the US Office of Counterterrorism. The Center could then be responsible for coordinating efforts across different branches of government, and also reaching out for a civil society input. Its role would not only be to suggest policy, but to craft it and oversee its implementation. Thus far, India has relied on “fire-fighting” to tackle its terrorist threat, but these threats are getting increasingly well-organized and orchestrated, requiring at least an equivalent, if not a more organized, response from government.\(^{55}\)

But the government is also the hardest area to reform. It is the politicians who benefit from their influence over law enforcement and the legal system. How can Parliament build the political will necessary to wrest its own power from lower-level law enforcement officials and the judiciary? It is unlikely that the government will work to make these changes, and to alter its own functioning, without some crisis or public scrutiny. Two events—the Surankote intelligence failure and the 22 July 2003 attack in the J&K valley—have led to some scrutiny, but has not sufficiently motivated the government. The moment most likely will come on the heels of a major crisis when public demand is high, and when the government is stronger. The easier, short-term reforms, however, might only come about by sustained efforts by some politicians and encouragement from academia, think tanks, and a vigilant and well-informed media and public.\(^{56}\)

Strategic Community: The longer term reforms might not require a crisis, if a larger strategic community builds up in India—and this is clearly on the way. More and more experts, bureaucrats, politicians, academics, and think tanks are focusing on strategy and on grand strategy.\(^{57}\) This community would not only have close ties with government, but would help to ensure the continuity of strategy over time, under different regimes—a bona fide establishment.\(^{58}\) There is no recipe for this type of development; no certain ingredients can make it arise. In India it seems that a transforming strategic community would be natural, considering the diversity of its population and their goals for the country. In any case, it would be more stable than Parliament, because it would not depend on a fickle voting public for its job security.

The need for coherence in India’s counterterrorism efforts is becoming clearer by the day. POTA is a symptom of a greater problem—the law’s failures are due to the absence of a strategic context, of a comprehensive policy to deal with a terrorist threat that cannot be answered by law alone. The debate about POTA’s necessity reveals that not many critics of the government are considering the larger issue—it is not whether there is need for POTA, but what is missing in POTA that could make it work, to make it more useful and successful than the ordinary law in prosecuting terrorists in accordance with democratic norms. Indeed, a law should not be repealed simply because it does not work.\(^{59}\) But a law is doomed if it is left to operate in a vacuum. Only when POTA is grounded in a strategic context—in which means are not misjudged—can the law successfully balance civil liberties with the security measures necessary to combat terrorism.

---

\(^{55}\) Lal, n. 3.

\(^{56}\) Mitra, n. 2.


\(^{58}\) Koithara, n. 46, p. 390.

\(^{59}\) The Supreme Court ruled as such in Rajasthan v Union of India.
References


“Constitution of India.” 12 Sept. 2003 <http://indiacode.nic.in/cgi/nph-bwcgi/BASIS/indweb/all/4w/D/ww?3DSECTEXT%20%20PH%20WORD%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%20%.html>


Kak, Sanjay, Personal Interview, 16 July 2003.


Lithwick, Dahlia, “Ashcroft’s Folly,” Slate Magazine, 24 July 2003,
<http://slate.msn.com/id/2085997/>

Mishra, H.B, Terrorism: Threat to Peace and Harmony (New Delhi: Authors’ Press, 1999).


Mohan, Ram, Personal Interview, 17 July 2003.

“National Security Still a Priority,” 29 May 2003,


Paust, Jordan J., “Military Commissions: Some Perhaps Legal, but Most Unwise,” 22 April 2002,
<http://jurist.law.pitt.edu/terrorism.htm>


“The Prevention of Terrorism Act, 2002,” 28 May 2003,
<http://www.satp.org/satporgtp/countries/india/document/actandordinances/POTA.htm>

“Review panel on POTA set up,” The Hindu, 23 July 2003

SAARC Regional Convention on the Suppression of Terrorism, UN Treaty Collection, 27 June 2003,
<http://untreaty.un.org/English/Terrorism/Conv18.pdf>


“Terror Trials Test US Legal Foundation,” CNN, 6 September 2002,


About the Author
Swati Pandey is a senior at Yale University, graduating with a BA in Ethics, Politics and Economics in May 2004. She began studying South Asia security issues in her sophomore year, focusing on the problem of terrorism. She continued this work while interning at IPCS in Summer 2003 and used that research for her senior thesis project on English newspapers’ portrayal of SAR Geelani trial and the POTA debate.