

INDIA

Country Report: Anti-terrorism laws & policing

1. Country summary

- a. **Government:** Federal Republic
- b. **Population:** 1.13 billion people
- c. **Size:** 3 166 414 sq km
- d. **Region:** South Asia

2. General


India gained independence from Britain on 15 August 1947. In this process Pakistan seceded as a separate Muslim nation-state and since that time territorial disputes with Pakistan have resulted in wars in 1947, 1965 and 1971. Various parts of India are subject to ongoing sectarian violence and insurgencies, particularly in the northeastern states and Jammu and Kashmir.

In 2002 thousands of people, predominantly Muslim, were killed in organised and mob violence by Hindu nationalists in Gujarat, which followed an attack on a train killing 59 Hindus.¹ On 7 March 2006, a series of apparently coordinated explosions in the Hindu holy city of Varanasi killed at least 15 people and injured as many as 101.² Most recently, on 11 July 2006, the 'Mumbai train bombings' (a series of seven bombs on the suburban railway in Mumbai) killed 209 and injured over 700.

With regard to the police service, the Supreme Court has very recently handed down a decision directing state governments to take legislative measures to make their police services more accountable, transparent and less prone to abuse. CHRI has been involved in the drafting of the Model Police Bill, in the hope that it will come to replace the 1861 colonial legislation that currently regulates police conduct. To date India's police service has been riddled with corruption. Officers' involvement in the Gujarat sectarian violence is a cause for great concern, as are the disappearances that have occurred in certain regions, often under the auspice of various pieces of emergency or anti-terror legislation prevailing at that time.


3. Relevant legislation

- *Armed Forces (Special Powers) Act 1958 (AFSPA)* – applies specifically to the armed forces, however certain state Acts such as the now-repealed *Jammu and Kashmir Disturbed Areas Act 1992 (JKDA Act 1992)* have previously extended these powers to members of the police service. That act is no longer in force. A government appointed Committee has recommended that this Act be repealed but that a number of its powerful provisions are inserted into the *Unlawful Activities (Prevention) Act (UAPA) 1967*. The Government has deferred its decision on the repeal.
- *Code of Criminal Procedure 1973*

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- *Jammu and Kashmir Disturbed Areas Act 1992 (JKDA Act)* (now repealed) – was previously in force in the state of Jammu and Kashmir only. It contained provisions allowing for the extreme unfettered use of violent force. The legislative provisions do not specifically pertain to terrorism however, the Act’s “statement of objects and reasons” refers to both “militants/terrorists” who pose a great challenge to State administration.
 - *National Security Act 1980 (NSA 1980)* – is a preventive detention law. Although not specifically targeted at terrorism, the NSA allows the central or state governments to detain a person “with a view to preventing him from acting in any manner prejudicial to” national security and public order and allows police to detain persons they consider security risks without charge for up to one year.
 - *Prevention of Terrorism Ordinance 2001 (POTO)* – the presidential decree under which the provisions of the Prevention of Terrorism Act were initially brought into force as an immediate response to the attacks in America in 2001, and UN Security Council Resolution 1373 (repealed).
 - *Prevention of Terrorism Act 2002 (POTA)* (repealed) – in force between 2001 (when it was introduced under presidential decree in the form of the POTO) and September 2004 after which Prime Minister Manmohan Singh repealed it, one month before it was due to lapse, in recognition of widespread abuse that had occurred under its authority. Despite this repeal, Amnesty International estimates that in 2006, over 265 people remain detained without charge or trial under the POTA.³
 - *Unlawful Activities (Prevention) Act 1967 (UAPA)* – amended by the Unlawful Activities (Prevention) Amendment Act 2004 following the repeal of the POTA 2002. The Amendment Act amended the long title of the UAPA 1967 to read: “An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith.” With this 2004 amendment, the UAPA 1967 has become India’s principle national anti-terrorism law.
 - *Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA)* – POTA 2002’s predecessor. This Act was allowed to lapse in 1995, yet in 2006 Amnesty International reported that people remain detained under its provisions.⁴

4. Law summary

This section provides a brief overview of the legislative genesis and political context of each Act in chronological order.



The Jammu and Kashmir Disturbed Areas Act 1990 was enacted at a time when “the militants/terrorists had posed a great challenge to the state administration” (Statement of Objects and Reasons, JKDA Act 1992). That law was of a temporary nature and before its imminent expiration, the Jammu and Kashmir Disturbed Areas Act 1992 (JKDA Act 1992) was introduced to ensure that the (extensive) powers under the 1990 Act were not lost. The JKDA Act 1992 was made under powers delegated by the State Parliament to the President because “in view of the urgency of the matter”, it was “not practicable” to consult the Consultative Committee of Parliament on Jammu and Kashmir Legislation (Statement of Objects and Reasons, JKDA Act 1992).

The Prevention of Terrorism Act 2002 (POTA) was in force for almost three years, from 2001 to 2004. POTA’s provisions originally came into force in under a presidential decree, in the form of the Prevention of Terrorism Ordinance in October 2001; an immediate response to the attacks in America in 2001 and the United Nations Security Council Resolution 1373, instructing all UN member states to take steps against terrorism. In March 2002, the Indian parliament passed the POTA 2002; the Act was in force until 21 September 2004 when Prime Minister Manmohan Singh fulfilled his key election pledge to repeal POTA 2002 and to amend existing laws in recognition that the Act had been used to target political opponents, minorities and marginalised sections of the Indian society.⁵ The POTA 2002 had been due to lapse one month later.

There was much concern that the government used the urgency of the situation to introduce the law at a time when Parliament was not in session so as to justify an Ordinance rather than a Bill. Amnesty International highlights that the parliament was due to reconvene in just four weeks and suggests that “the move of implementing such a stringent text in form of an ordinance seemed more intended to avoid a public debate on the issue.”⁶ The text was not made public until after the President had signed the Ordinance and civil society was offered no formal opportunity to comment.


Despite the POTA’s repeal, there has been much criticism that the amended UAPA 1967 is in fact a ‘reincarnation’ of the POTA 2002.⁷ Its provisions are discussed in more detail below.

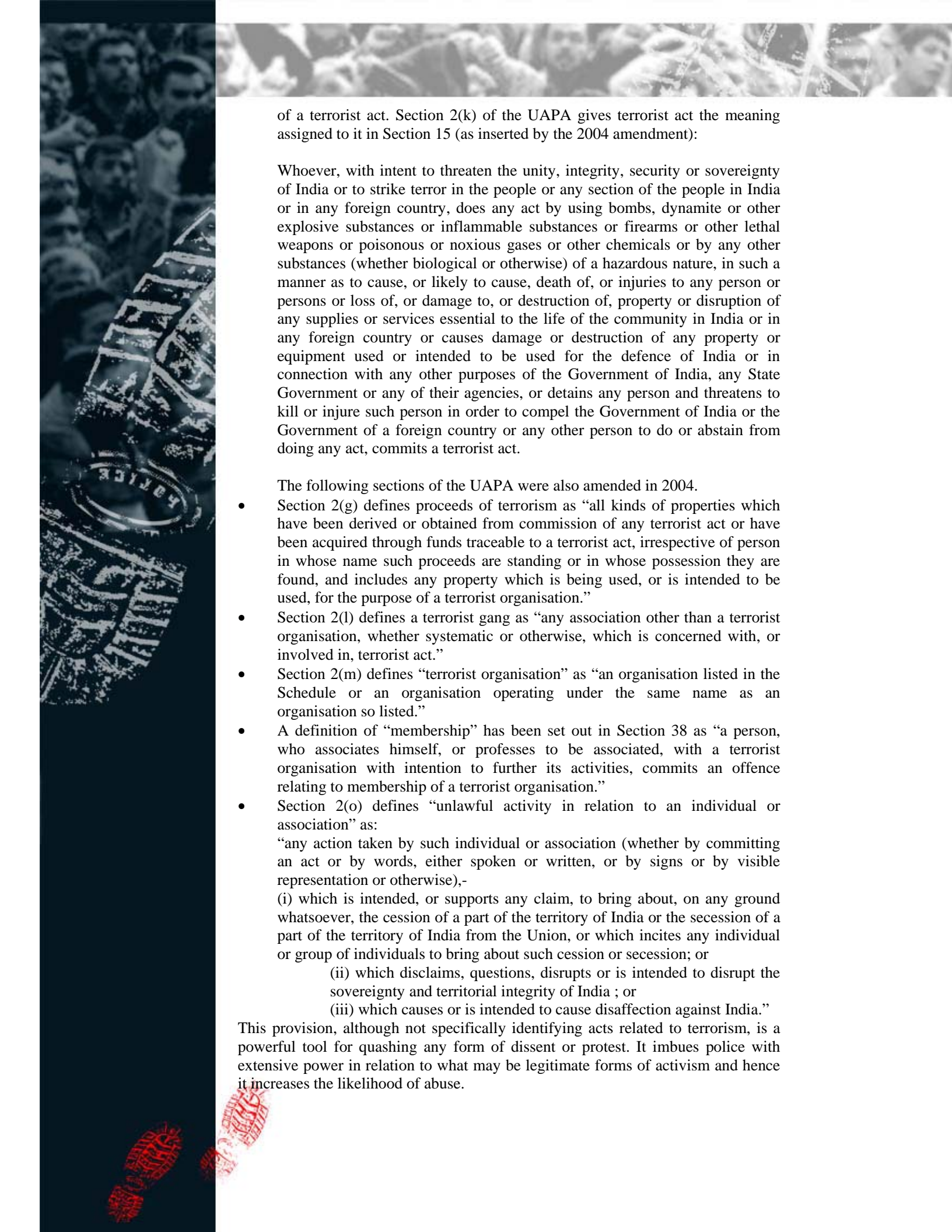
In November 2004 the Central Government set up the ‘Committee to Review the Armed Forces (Special Powers) Act 1958 (AFSP Act)’. The report of the Committee made public by the Hindu newspaper in 2006 (despite being presented to Government in 2005 it had not been disclosed to the public or to civil society and human rights groups).⁸ Although the Committee recommended the repeal of the (AFSP Act), Amnesty International has commented that the suggested amendments to the UAPA 1967 upon repeal will simply further concentrate the legal provisions for sweeping powers in the hands of the Government.⁹

5. Provisions

a. Definition

The UAPA failed to ‘remedy many of the deficiencies that resulted in the gross misuse of POTA’.¹⁰ Firstly, it incorporates a similarly broad definition





of a terrorist act. Section 2(k) of the UAPA gives terrorist act the meaning assigned to it in Section 15 (as inserted by the 2004 amendment):

Whoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people in India or in any foreign country, does any act by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological or otherwise) of a hazardous nature, in such a manner as to cause, or likely to cause, death of, or injuries to any person or persons or loss of, or damage to, or destruction of, property or disruption of any supplies or services essential to the life of the community in India or in any foreign country or causes damage or destruction of any property or equipment used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies, or detains any person and threatens to kill or injure such person in order to compel the Government of India or the Government of a foreign country or any other person to do or abstain from doing any act, commits a terrorist act.

The following sections of the UAPA were also amended in 2004.

- Section 2(g) defines proceeds of terrorism as “all kinds of properties which have been derived or obtained from commission of any terrorist act or have been acquired through funds traceable to a terrorist act, irrespective of person in whose name such proceeds are standing or in whose possession they are found, and includes any property which is being used, or is intended to be used, for the purpose of a terrorist organisation.”
- Section 2(l) defines a terrorist gang as “any association other than a terrorist organisation, whether systematic or otherwise, which is concerned with, or involved in, terrorist act.”
- Section 2(m) defines “terrorist organisation” as “an organisation listed in the Schedule or an organisation operating under the same name as an organisation so listed.”
- A definition of “membership” has been set out in Section 38 as “a person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation.”
- Section 2(o) defines “unlawful activity in relation to an individual or association” as:
“any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),-
(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or
(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India ; or
(iii) which causes or is intended to cause disaffection against India.”

This provision, although not specifically identifying acts related to terrorism, is a powerful tool for quashing any form of dissent or protest. It imbues police with extensive power in relation to what may be legitimate forms of activism and hence it increases the likelihood of abuse.



b. Arrest

Section 41 of the Code of Criminal Procedure 1973 sets out situations when “any police officer may, without an order from a Magistrate and without a warrant, arrest any person.” These include ‘any person’:


- who has been proclaimed as an offender either under that Code or by order of the State Government;
- who has in their possession any thing which may reasonably be suspected to be stolen property and who may reasonably be suspected to have committed any offence with reference to that thing;
- who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;
- who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or
- where credible information has been received indicating that this person has been concerned in any act committed outside India which, if committed in India would have been a punishable offence, and for which he or she is liable to extradition.

c. Detention/custody

The UAPA does not contain specific detention provisions. Accordingly, the detention of terrorism suspects is authorised in more general legislation, including the *National Security Act 1980* (NSA) and the *Code of Criminal Procedure 1973*. The *National Security Act 1980* is India’s preventive detention law, which allows detention for periods of up to one year (without charge) for persons considered to be a security risk. The *Code of Criminal Procedure* authorises detention without charge for 15 days, which can be extended to 60 to 90 days with magisterial approval.

Under Article 22 of the Indian Constitution, all individuals arrested and taken into custody must be provided the basis for arrest “as soon as may be” and produced before a magistrate within 24 hours. However, the Constitution allows the central and state governments to enact preventive detention laws during non-emergency times, and explicitly states that a person arrested or detained under preventive detention laws does not qualify for the constitutional protections to be brought before a magistrate before 24 hours, the right to counsel or to be informed of grounds for arrest (Constitution of India, Article 22(3)).

Any detention in police custody for longer than 24 hours must be authorised by a magistrate. The detainee must be released on bail unless the investigation cannot be completed in 24 hours and the officer has grounds that an “accusation is well founded”. In that case the officer can extend police custody detention (without charge) for up to fifteen days (Section 167, Code of Criminal Procedure). A magistrate has the power to authorise the detention of the accused beyond fifteen days if “adequate grounds” exist for doing so. The maximum extension is for a period of up to 60 days in judicial custody (or 90 days when the potential prison sentence ranges from 10 years to the death penalty), after which the person must be released on bail (Section 167(2)(a) Code of Criminal Procedure). Under Section 173(2) of the Code of Criminal Procedure, police must file a charge sheet with the particulars of the charge without delay - if the charge sheet is not filed before the end of the extended detention period, the detained must be released on bail.



Section 3(2) of the NSA 1980 confers powers on the central or state governments to make an order directing the detention of a person whom they are satisfied is going to act “in any manner prejudicial to the State”, or to the “maintenance of public order”, or to the “maintenance of supplies and services essential to the community”. Section 3(3) allows state governments to delegate this power to the Commissioner of Police.

- The period of detention may, in the first instance, be up to three months, and may be extended for subsequent three-month periods, for a total period of twelve months (Section 13).
- The order by the Police Commissioner shall remain in force for 12 days prior to approval by the State Government (Section 3(4)).
- The detention orders are to be executed in the manner provided for the execution of warrants of arrest under the Criminal Code of Procedure 1973.
- Section 5 allows the appropriate Government to specify the place, and conditions as to maintenance, discipline and punishment. It is likely that these conditions will fall upon police officers to enforce.

d. Use of force

The JKDA Act 1992 offers a range of circumstances in which police can resort to force upon the declaration by the Central Government of a “disturbed area”. Section 3, Section 4 of the JKDA Act 1992 states:

Any police officer not below the rank of Sub-Inspector or Head Constable in case of the Armed Branch of the Police may, if he is of opinion that it is necessary so to do for the maintenance of public order, after giving such due warning, as he may consider necessary, fire upon, or otherwise use force, even to the causing of death, against any person who is indulging in any act which may result in serious breach of public order or is acting in contravention of any law or order for the time being in force, prohibiting the assembly of five or more persons or the carrying of weapons or of things capable of being used as weapons or of fire arms, ammunition or explosive substances.

Section 5 of the JKDA Act 1992 provides that, in a disturbed area,


any police officer not below the rank of Sub-Inspector may, if he is of opinion that it is necessary so to do, destroy any arms dump, prepared or fortified position of shelter from which aimed attacks are made or are likely to be made or are attempted to be made or any structure used as a training camp for armed volunteers or utilised as a hideout by armed gangs or absconders wanted for an offence.

e. Immunity

Section 49 of the UAPA 1967 (as amended by the UAPA 2004) provides protection to police for action taken in good faith:

No suit, prosecution or other legal proceeding shall lie against-

- (a) the Central Government or a State Government or any officer or authority of the Central Government or State Government or District Magistrate or any officer authorised in this behalf by the Government or the District Magistrate or any other authority on whom powers have been conferred



under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder; and

- (b) any serving or retired member of the armed forces or paramilitary forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism.

In 2006, CHRI observed: “Given the fact that it is ‘practically impossible to prove that a police officer has acted without good faith in abusing the provisions’ of the Act, or that a member of the armed forces has acted in bad faith in the course of an operation directed at combating terrorism, these provisions embed a strong culture of impunity.”¹¹

Section 6 of the JKDA Act 1992 gives legal immunity to persons acting under the Act: “No suit, prosecution or other legal proceedings shall be instituted except with the previous sanction of the State Government against any person in respect of anything done or purporting to be done in exercise of the powers conferred by Sections 4 and 5.” It should be remembered that Sections 4 and 5 permit police officers to “fire upon, or otherwise use force, even to the causing of death against any person” who is committing any act which may result in a serious breach of public order; and to destroy arms dumps or fortified positions or shelters respectively.

Section 197 of the Code of Criminal Procedure 1973 does not allow courts to consider offences alleged to have been committed by police officers while “acting or purporting to act in the discharge of his official duty”, unless government sanction is given. Regrettably, “[i]n practice, these provisions amount to de facto impunity because government sanction is almost never granted, especially in the cases of abuses perpetrated in a national security context. Amnesty International reported that of almost 300 cases from Jammu and Kashmir investigated by the police and forwarded to the union government for sanction, not a single case has been granted sanction.”¹² The discretionary power of police to decide whether or not to forward a case to the government for sanction is also a problematic one, and this too has been highlighted by Amnesty in regard to police obstructing victims’ families’ attempts to obtain redress (see below Part 5 of this report).


f. General

The following sections are the result of 2004 amendments made to the UAPA.

Death Penalty: Section 16 provides that the punishment for a ‘terrorist act’, if it results in death, shall be the death penalty or imprisonment for life, in addition to a fine.

Terrorism Related Offences: Section 17 criminalises conspiring, attempting to commit, advocating, abetting, inciting or knowingly facilitating the commission of a terrorist act or any act preparatory to the commission of a terrorist act.

Section 19 criminalises harbouring terrorists (or concealing or attempting to harbour or conceal).



Section 20 criminalises being a member of a “terrorist gang or a terrorist organisation.”

Section 21 (as amended by the UAPA 2004) of the UAPA 1967 criminalises holding proceeds of terrorism (any property derived or obtained from the commission of any terrorist act).

Section 22 (as amended by the UAPA 2004) of the UAPA 1967 criminalises threatening a witness.

Section 35 allows for Central Government to, by order in the Official Gazette, add an organisation to the Schedule of “terrorist organisations” if it believes that the organisation commits or participates in acts of terrorism; prepares for terrorism; promotes or encourages terrorism; or is otherwise involved in terrorism.

The government itself reviews an appealed designation, or, at the next phase of appeal, a “Review Committee constituted by the Central Government” consisting of a Chairperson who has been or is a Judge of the High Court and who is appointed by the Central Government (Sections 36 and 37).

Further offences are: to associate with or to profess to be associated with a “terrorist organisation” (Section 38); to invite support for the terrorist organisation (not necessarily monetary) and to arrange, manage or address a meeting for a terrorist organisation (Section 39); to raise funds for a “terrorist organisation” by inviting other people to provide money or other property, receiving money or other property, or providing money or other property knowing, or having reason to suspect that it will or might be used for the purposes of terrorism (Section 40).

¹ Human Rights Watch (2005) *India: Leaders Must Prevent Sectarian Violence Government, Religious Groups Should Call for Calm in Wake of Ayodhya Attack*, 5 July:

<http://hrw.org/english/docs/2005/07/05/india11276.htm>.

² Somini Sengupta (2006) ‘Bombings in Indian Raise Fear of Sectarian Violence’ (7 March 2006), *New York Times*, 7 March: <http://www.nytimes.com/2006/03/07/international/asia/07cnd-india.html?ex=1299387600&en=e70e6102edaed18a&ei=5088&partner=rssnyt&emc=rss>.

³ Amnesty International (2006) *India: Continued detention two years after the repeal of POTA*, AI Index: ASA 20/026/2006, 20 September: <http://web.amnesty.org/library/index/engASA200262006?open&of=eng-IND>.

⁴ Ibid.

⁵ Ibid.

⁶ Amnesty International (15 November 2001), *India: Briefing on the Prevention of Terrorism Ordinance*, AI Index: ASA 20/049/2001 <http://web.amnesty.org/library/Index/ENGASA200492001?open&of=ENG-IND>.

⁷ Human Rights Features (2004) *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA’s Second Coming*.

⁸ Amnesty International (2006) *Briefing: The Armed Forces Special Powers Act (AFSPA) Review Committee takes one step forward and two backwards*, AI Index: ASA 20/031/2006, 23 November:

<http://web.amnesty.org/library/Index/ENGASA200312006?open&of=ENG-2AS>.

⁹ Ibid.

¹⁰ Human Rights Features (2004) *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA’s Second Coming*.

¹¹ Commonwealth Human Rights Initiative (October 2006) *“The Need to Reconcile Security and Human Rights*, Prepared by Avanzo, C and Prasad, D.

¹² Amnesty International (2005) *Briefing on the Armed Forces (Special Powers) Act 1958*.