Exceptional or Not? An Examination of India’s Special Courts in the National Security Context

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How is the Indian government, under its constitutionally democratic system, dealing with the suspected terrorists that it captures and detains? That is the core question this chapter seeks to address. In Part 1, we offer a brief summary on the structure of the regular Indian criminal justice system. As India’s regular courts are considered by many to be broken and incapable of providing justice in a timely manner, the state has opted to construct alternative fora to dispose of criminal matters more expeditiously, including, for our purposes, terrorism-related cases. In Part 2, we provide background on how special courts established under different antiterrorism statutes in India have evolved over the years, including a discussion of the Terrorism and Disruptive Activities (Prevention) Act (TADA) of 1985 and the 2002 Prevention of Terrorist Activities Act (POTA). As we suggest, the special courts under these laws were in fact not so special. Because the lawyers, judges, norms, and even physical facilities were frequently the same as found in the regular courts, there was a great blurring between these two fora. Eventually, both

TADA and POTA were repealed, with the latter occurring in the fall of 2004.

In Part 3, we discuss how the 2008 Mumbai terror attacks reignited the call for sweeping measures to be enacted. The result was the passage of two statutes, the Unlawful Activities (Prevention) Act (UAPA) and the National Investigation Agency Act (NIAA), both of which helped establish the most recent set of NIAA special courts, which we analyze in detail. Finally, in Part 4, we outline the challenges these latest courts present to India’s democracy. We rely on various cases and data that show a conflation and tension among these NIAA courts, other denoted special courts, the regular judiciary, and India’s democratic system of government. We conclude by arguing that in order for special terrorism courts to serve a constructive purpose in India, there must be clarification on the jurisdiction of these fora, which, we believe, would strengthen the government’s justification for maintaining such institutions.

1. Contextualizing Special Courts within India’s Regular Criminal Court System

To understand how India’s special terrorism courts fit within the judiciary, it is important first to explain the structure of the regular criminal courts. The courts of first resort in this system are divided between magistrates courts and sessions courts. Typically, an accused is arraigned in front of a judicial magistrate. Depending on the magnitude of the crime, those accused of lesser offenses are tried in magistrates courts and those charged with more serious crimes are held over for trial in sessions courts. Charges brought against defendants normally emanate from the Indian Penal Code, which dates back to 1860.

Under the Indian Code of Criminal Procedure from 1973, the defendant has the right in a sessions court to appeal both interlocutory and final rulings to an appellate state high court, and then to the Indian Supreme Court. Magistrate defendants have the same right, but must appeal to a sessions court first. However, there is an important exception
to this appeals process. Under the Indian Constitution, where a defendant has been arrested and believes there is a violation of his or her constitutionally protected fundamental rights, a writ petition may be made directly in the state’s high court or even in the Indian Supreme Court to evaluate the merits of the case.²

There is a general contemporary consensus that the Indian criminal justice system is plagued by massive delays in adjudication at all levels within this institutional hierarchy.³ These delays are caused by a variety of factors, including a lack of qualified judges to hear cases, procedural difficulties in disposing of currently pending cases, strategic litigation maneuvers by both private and governmental lawyers, and the manner in which private lawyers collect their fees, which is often per court appearance. Thus, to bypass the log-jammed regular judicial process, over the past three decades there has been a proliferation of alternative fora that would more quickly dispose of cases, such as fast-track courts, “jail adalats,”⁴ more informal police bodies to hear certain criminal matters, and, for our purposes, special terrorism courts. We now analyze the details of this last set of fora.

2. Terrorism Statutes and Their Accompanying Courts: A Snapshot⁵

The roots of antiterrorism statutes in India date back to pre-independence times, with the 1919 Rowlatt Act perhaps the most infamous of India’s

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² For a discussion of forum shopping, see Jayanth K. Krishnan, Lawyering for a Cause and Experiences from Abroad, 94 CAL. L. REV. 575 (2006).
⁴ This term refers to “jailhouse courts.” Galanter and Krishnan, supra note 3.
⁵ This section will rely on Krishnan, India’s PATRIOT Act (2004), supra note 1. For a summary of India’s various antiterrorism statutes, also see Bhanu Pratap Singh, Recent Anti-Terror Changes in Criminal Justice Administration, August 2009, retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1458279.
British statutory legacy.\textsuperscript{6} The Rowlatt Act provided the legal basis for the colonial regime to arrest, detain, try, and convict persons suspected of terrorism. Indeed, the harshness of the law prompted widespread demonstrations, led most notably by Mohandas Karamchand Gandhi, who charged that the colonial action classified Indians as inferior individuals within their own homeland. Following independence, a series of antiterrorism statutes were passed in order to address threats found in various regions of India.\textsuperscript{7}

With respect to the UAPA – India’s antiterrorism statute currently in force – it is the latest incarnation of this same-named law that originally emerged in 1967. Before discussing it, however, two other important pieces of legislation require analysis, the first of which is TADA. TADA was passed following the assassination of Prime Minister Indira Gandhi by extremists in 1984. The law contained a number of provisions enhancing the state’s power to combat terrorism including allowing the police to conduct arrests on the basis of mere suspicion and detaining suspected terrorists for up to one year without bail.\textsuperscript{8}

In terms of the special, or what were called “designated courts” under TADA, the statute gave these fora a mixture of regular court and exceptional powers. For example, as with regular sessions courts, defendants in TADA courts could be tried in absentia.\textsuperscript{9} Further, in terms of staffing, a TADA court judge was required to have the status of a sitting regular sessions judge.\textsuperscript{10} (Practically speaking, in areas of the country that faced higher terrorist threats, the docket of TADA court judges was mainly restricted to only TADA-based cases, whereas in less troubled areas,


\textsuperscript{7} Krishnan, supra note 1, at n.12. For a detailed discussion, see Ujjwal Kumar Singh, The State, Democracy, and Anti-Terrorism Laws in India (2007).

\textsuperscript{8} For a discussion of this point and of the statute, see Krishnan, supra note 1, at 267–69. See generally Manoj Mate and Adnan Naseemullah, State Security and Elite Capture: The Implementation of Antiterrorist Legislation in India, 9 J. Human Rts. 262 (2010).


\textsuperscript{10} Id. § 9(6).
judges wore two distinct hats, those dealing with terrorism matters and those dealing with regular sessions courts cases.)

The overlap, however, also caused confusion. Under Section 12 of TADA, TADA courts could try defendants not only under the statute but also under provisions found within the regular Indian criminal law. 11 So a defendant charged with an offense of terrorism could also be charged with attempted murder under a regular Indian penal statute. The consequence of Section 12 then was extraordinary, because the protections given to defendants in TADA courts were far fewer than those provided by the sessions courts. For instance, the TADA trials could be held in camera, and admissions made under police custody – although not admissible in regular courts – were admissible in the TADA courts. 12 In addition, interlocutory appeals, although permissible in regular sessions courts, were prohibited by TADA. 13 In TADA courts, terrorist suspects had the burden of disproving their guilt to authorities – rather than having their innocence presumed. This standard contravened the fundamental rights of the Indian constitution. Eventually, these reactionary provisions, together with public outrage and the government’s own rather critical assessment, led to the law’s demise in 1995. 14

In the intervening years between the end of TADA and POTA’s passage in 2002, two important antiterrorism bills came before the Indian

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11 Id. § 12. See also Krishnan, supra note 1, at 267–69.
12 Id. § 15. See also Krishnan, supra note 1, at 267–69.
13 The Terrorist and Disruptive Activities (Prevention) Act § 19(1–2). Although final judgments in a TADA court could be appealed within thirty days to the Supreme Court as a matter of right both on law and facts. Krishnan, supra note, at 267–69.
14 Consider, for example, that during the ten-year TADA regime approximately 76,000 people were detained “with only about one percent of these detainees ever being convicted of any crime.” See Krishnan, supra note 1, at 269 (drawing on Commonwealth Human Rights Initiative, Submissions to the Review Committee on POTA, retrieved from http://www.humanrightsinitiative.org/artres/pota_submission.pdf). Furthermore, between 1985 and 1995, when TADA was in force, there were high levels of what were called police encounters. These incidents manifested in two ways: one whereby suspects were killed by officers upon capture; the other, where after arrest, the defendant was killed in a staged attack by the police. The motivation for these encounters was an underlying belief that under TADA gaining convictions in court were remote and often an inordinately lengthy exercise.
Parliament. The first, the Criminal Law Amendment Bill, sought to reinstate much of TADA’s language, but it never mustered sufficient support to pass. The other, the Prevention of Terrorism Ordinance, which later became POTA – the Act – contained provisions that the government cited as reasons for why this new law was rights-enhanced relative to TADA. For example, American Miranda-type safeguards were contained in POTA.15

But despite pronounced ameliorations, there remained a number of provisions within POTA violating basic individual rights and freedoms. For example, by not clearly defining the word “terrorism” and its implications, the statute chilled who might associate with one another and with what organizations. The implementation of POTA also resulted in disparate treatment by the state toward particularly vulnerable communities – with politically, religiously, and socioeconomically disadvantaged groups suffering disproportionately.16 Further, as with TADA, POTA established a set of special courts to deal with suspected terrorists: Sections 23–26 of POTA adopted TADA’s positions regarding how the special courts were created; how the benches were staffed; the jurisdiction of the special courts; and the powers of the special courts with respect to non-POTA offenses.17 POTA special court proceedings also provided a statutorily based, presumptive faith standard toward police-produced evidence and police testimony.18 The POTA courts, like the TADA courts, prohibited interlocutory appeals and heard cases in camera.19

15 Note that prohibitions against police coercion of detainees and the right to appeal existed, as well. Krishnan, supra note 1, at 269–73.
16 Id. at 273–77.
18 In a country where the police have been cited repeatedly as hostile – if not overtly derisive, dishonest, and corrupt – toward detained suspects, such a preexisting power imbalance did not auger well for defendants who contemplated exercising their right to remain silent or who sought due process in their trials. See Krishnan and Kumar, supra note 3.
19 On the proceedings being police-favored and in camera, see Krishnan, supra note 1, at 283–88. On the right to appeal and political motivation, see id., at 288–98.
Although POTA courts overlapped with their predecessor courts, they shared commonalities with the regular criminal courts, as well. For example, the qualification requirements and selection processes for prosecutors were the same for both POTA and regular criminal courts.\textsuperscript{20} Moreover, notwithstanding the preclusion of interlocutory appeals, POTA’s appellate process conformed more with the regular courts, allowing for defendants to appeal final judgments to the state high court. Finally, POTA allowed for regular sessions courts to hear POTA cases, where there was yet to be “constituted”\textsuperscript{21} an actual “Special Court.”\textsuperscript{22}

At the same time, the POTA courts did possess certain distinctive features. For instance, the POTA courts did not have the ability to determine which cases they could hear. Instead, these powers were placed with the executive branch. These courts also gave defendants only intermittent access to their lawyers.\textsuperscript{23} Additionally, under Section 8 the statute allowed the POTA courts to seize the property of suspected terrorists, even absent an actual trial.\textsuperscript{24}

Thus, the picture of the POTA courts was complex. On the one hand, they possessed distinctive qualities of their own; on the other hand, they contained substantive overlap with TADA and the regular sessions courts. In 2004, after journalists, policymakers, human rights activists, and scholars uncovered various abuses,\textsuperscript{25} POTA was revoked following the election of the Congress Party-led government. Although India faced subsequent terrorist threats and attacks, it was not until after the 2008 Mumbai tragedy that two major pieces of legislation were passed into law – the UAPA and the NIAA. The next section evaluates these laws and their contribution to the latest set of special courts.

\textsuperscript{20} Prevention of Terrorist Activities Act § 28.
\textsuperscript{21} Id. § 35.
\textsuperscript{22} Id.
\textsuperscript{23} Information on the jurisdictional stripping and basic structure doctrine come from Krishnan, supra note 1, at 280–83. On the lawyers point, see id., at 277–80. See also Prevention of Terrorist Activities Act §§ 27, 33, and 34(4).
\textsuperscript{24} Prevention of Terrorist Activities Act § 8.
\textsuperscript{25} For a discussion of this point, see Krishnan, supra note 1.
3. More (or Less) of the Same? UAPA

Following the repeal of POTA, the 1967 UAPA, which was still on the books, was amended in 2004 to include many provisions similar to those in POTA. The UAPA was amended again in 2008 after the Mumbai attacks. The pattern here of retooling and reverting to the continued use of exceptional provisions is important to note across political regimes and contexts. However, there are distinguishing features between the 2008 UAPA and POTA that deserve attention. In Section 4 of the UAPA,

Perhaps the most infamous provisos of POTA are also part of UAPA, including the statutory acquiescence of a six-month pre-charge and pretrial detention period of suspected terrorists, thirty days of which may be served in pure police custody. In addition, and also following from POTA, under UAPA a suspected terrorist defendant has the onus of proving his or her innocence – even for purposes of bail hearings. In fact, under UAPA the charges are deemed to be prima facie true against the defendant in such a bail proceeding (UAPA, sec. 43(D)(5)). Add to the mix that the offences listed in UAPA are classified as cognizable under 43(D)(1) – meaning that the police may arrest those they believe are terrorists on grounds of suspicion alone – and the outcome is a law that looks very similar to POTA. See Nehal Bhutal, Back to the Future, Human Rights Watch, July 27, 2010, retrieved from http://www.hrw.org/en/node/91967/section/7. Also see Singh, supra note 5; Kalhan et al., supra note 6 at 153–73 (for a discussion of pre-2008 UAPA), UAPA, sec. 43(f); and see Ravi Nair, Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes, Econ. & Political Weekly, 10–14, Jan. 24, 2009; UAPA Retains Most of POTA’s Stringent Provisions, TIMES OF INDIA, Dec. 17, 2008, retrieved from http://timesofindia.indiatimes.com/India/UAPA_retains_most_of_POTAs_stringent_provisions/articleshow/3847843.cms; and Rajeev Dhavan, India’s Unlawful Activities Prevention Act (UAPA): The Return of POTA & TADA, SOUTH ASIAN CITIZENS WEB, Dec. 19, 2008, retrieved from http://www.allvoices.com/s/event-2057931/aHR0cDovL3d3dy5zYWN3Lm5ldC9hcncRpY2xlNDI5Lmh0bWw. Finally, there are court-based similarities between POTA and UAPA in terms of UAPA’s Sections 25, 26, and 28 being similar to Sections 7, 8, and 10 of POTA.

One writer has even noted that the 2004 UAPA statute is comparatively “a more moderate instrument.” Stella Burch Elias, Re-thinking ‘Preventive Detention’ from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects, 41 Colum. Hum. Rts. L. Rev. 99, n.381 (2009). As support for this position, there is the assertion that the highly criticized approach of POTA special courts accepting police confessions as admitted evidence was prohibited by the 2004 UAPA. Note, this UAPA provision falls into line with the Indian Criminal Procedure Code section 173. The 2008 UAPA also included allowing a new National Investigation Agency (NIA) to enforce the statute’s provisions. The NIA has as its mission in the streamlining, consolidating,
for example, the statute authorizes a “Tribunal.” The tribunals are one-member benches, and can be created “as and when necessary . . . by the Central Government,” which gives these bodies a rather ad hoc nature. Under UAPA, before the government seeks to categorize an individual or organization as one that participates in terrorist-related activities, it must receive certification from the tribunal. During this proceeding the charged defendant has the ability to rebut the allegation. Once a determination is made, however, it is final and non-appealable.

The statute also states that the UAPA tribunal can create its own procedural rules. But curiously, when conducting investigations, the tribunal is simultaneously and statutorily bound by the same procedural rules that govern the regular courts. There is another perplexing component: assuming that there is terrorist certification granted by the tribunal, the statute mandates that a civil-servant collections officer assess all of the property of the defendant that might be used for “unlawful purposes.” Somewhat similarly to POTA, such property may be seized thereafter by the police while legal proceedings against the defendant are pending. However, confusingly, under the UAPA the accused has the ability to challenge the tribunal forfeiture proceedings in – of all places – a regular court.

and prioritizing of information in order to provide the appropriate responses to deal with domestic and foreign terrorist threats. UAPA defenders also point to the Indian government’s passage of the 2005 Right to Information Act, which they argue promotes full transparency and allows every Indian the right to seek status updates on matters involving the government’s detention of suspected terrorists.

29 Id. § 5(1). Note, the one-member bench must be a sitting member of a state high court.
30 Id. § 4.
32 Id. § 5 (5).
33 Id. § 5 (6)(7).
34 Id. § 8 (2)(3).
35 Id. § 8 (8). Another irony here is that the district court is to follow the criminal procedure code under Section 9. But, under Section 9 there cannot be an appeal from this...
The complications are further enhanced by the relationship UAPA has with the NIAA. The latter permits the formation of NIAA courts to handle legal matters relating to the protection of national security and cases prosecuted under UAPA. As with the POTA courts, these NIAA fora allow judges to be chosen by the central government, although one difference is that the National Investigation Agency (NIA) may play a role in the selection process, as well. There are other similarities to POTA courts regarding jurisdiction, naming of prosecutors, hearings being held in camera, and limitations on appeals. The central and state governments may create these courts at will, as well. Moreover, the practice of discovery – a key tenet of the criminal justice process particularly for defense lawyers – is again not incorporated within these latest NIAA courts.

district court, and notwithstanding this entire discussion, Section 47 generally bars the regular courts from reviewing the actions by the central government. Unlawful Activities (Prevention) Act. For more discussion on UAPA, see Sudha Setty, Comparative Perspectives on Specialized Trials for Terrorism, 63 Me. L. Rev. 131, 164–70 (2010).

36 See Guruswamy, supra note 1. Included within the ambit of these special courts’ jurisdiction (within its appendix [i.e., “schedule”]) are the following specifically-listed offenses:


See National Investigation Agency Act, Schedule 2008. For a discussion of the UAPA and NIAA, see Singh, supra note 5. Also see Ranbir Singh, Critiques of Recent Legislations from Human Rights Perspective in India: Do We Need Special Laws? 8 J. NAT’L HUMAN RTS. COMM’N. 7 (2019).


Additionally, the NIAA courts are allowed to hear regular criminal cases, and conversely, UAPA-related cases need not be tried exclusively in NIAA special courts. This blurring of the lines between the NIAA courts and regular courts is further illustrated by the fact that the individuals who serve as judges in the two fora are often the same people—whereby the role they play ultimately depends on the hat they wear.

Therefore, the question that then arises is under what conditions will a defendant’s case be placed in an NIAA special court, as opposed to a regular sessions court? This is the query we address in the next section.

4. Forum Selection and the Implications of Special Courts for Democratic India

Within the scholarly literature and public policy circles exists an ongoing debate as to how suspected terrorists—particularly in the post-9/11, Madrid, London, and Mumbai eras—should be treated by prosecuting states. There are those who believe that such individuals must be afforded the same rights as any other defendant and thus subscribe to the view that the regular criminal justice process is the proper venue for terrorism-related trials. In contrast, those on the opposite side argue that because defendants charged with terrorism pose a unique risk to the national security of the state, military tribunals that rely on military law are most appropriate.

39 See Unlawful Activities (Prevention) Act § 2(1)(d) (noting regular sessions courts can also hear UAPA-based cases).

40 There is immunity for prosecutors and NIA officials. National Investigation Agency Act § 18.


in between, with different versions of special national security courts offered. In the United States, one of the more well-known, self-described “bipartisan solution[s]”\(^43\) comes from Jack Goldsmith and Neal Katyal, who have proposed creating “a comprehensive system of preventive detention that is overseen by a national security court composed of federal judges with life tenure.”\(^44\) In the Indian context, the tension associated with the presence of special courts has been highlighted, as well. Venkat Iyer documents how the Indian government has, through de jure and de facto means, abusively swept into special court proceedings individuals and groups that otherwise should have been protected by the regular judicial process.\(^45\)

This entire discussion evidences a dilemma, more generally, for democratic states. The question centers on how best to safeguard aggregate security interests while at the same time ensuring that the civil liberties of individuals are not unduly hindered. Iyer’s historical work illustrates a justified fear among today’s rights activists that non-terrorist defendants may be absorbed into Indian special courts, but there is a converse issue, as well. As discussed, Indian prosecutors can charge terrorism suspects with both UAPA-related and Indian Penal Code (IPC) crimes – within


44 Id. Such courts, according to these two scholars, would adopt certain aspects of the regular process (such as prohibiting unjustifiable pretrial detention periods, allowing for appeals, and treating noncitizen and citizen terrorism defendants alike), recognizing the challenges that confront states in this age of terrorism. As such, they argue, American national security courts might permit: interrogations of suspects without lawyers, extended periods of detention in certain cases, closing trials to the public, and broadening prosecutorial scope and evidence-gathering methods. See generally Jack L. Goldsmith, Long Term Terrorist Detention and Our National Security Court (Brookings Inst., Working Paper, Feb. 4, 2009), retrieved from http://www.brookings.edu/~/media/files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf.

the delay-ridden regular criminal courts, which are often seen as being heavily favorable to prosecutors and hostile to defendants’ rights. In some cases prosecutors will even tack on other charges from various state and local criminal laws, as well as from more narrowly tailored laws that have been passed by the central or state government.46

Perhaps no better known case interweaving UAPA, the IPC, and other narrowly tailored laws within a sessions court is that of Ajmal Amir Kasab, the lone surviving shooter in the November 2008 Mumbai attacks. A total of eighty-six counts were filed against Kasab, with the prosecution accusing the defendant of being directly responsible for murdering 72 people and injuring more than 100. Among the more prominent laws that Kasab was charged with violating were:

Sections 34 and 120 of the IPC that relate to criminal conspiracy;
Section 121 of the IPC that criminalizes waging war on the Indian state;
Section 302 of the IPC that criminalizes murder; and
the Arms Act, Explosives Act, and Passport Act.

With respect to UAPA, Kasab was charged under Section 15, which explicitly prohibits committing any terrorist acts. Kasab was also charged under UAPA with murder, conspiracy to commit murder, and waging war against the Indian government.47 Ultimately, in a nearly 1,600-page opinion in State of Maharashtra v. Kasab that was delivered in May of 2010, Kasab was found guilty on all eighty-six charges brought against him, receiving the death penalty on five of these charges.48 In February

46 On narrowly tailored laws, see Krishnan and Kumar, supra note 3. A group of special laws that have been particularly used in conjunction with UAPA are the Indian Arms Act, the Indian Customs Act, the Indian Explosive Substances Act, and the Indian Foreign Exchange and Passport Acts.
48 One of these five capital convictions fell under UAPA’s jurisdiction, that of being found guilty for engaging in terrorist activities. (The others were part of the IPC.) See
of 2011, the Bombay High Court upheld the verdict, and then in August of 2012 the Supreme Court of India affirmed the ruling, as well. Kasab was subsequently hanged on November 21, 2012.

The case of Kasab highlights a crucial point. The matter did not unfold in an official UAPA tribunal or NIAA special court; it started and concluded within a sessions court. To be sure, the latest version of UAPA and the NIAA were formally passed into law only at the end of 2008 in response to the Mumbai attacks. But the Kasab trial did not begin until early 2009, which provided sufficient time for the government to try him in an NIAA forum – especially if all that was needed was for a sessions judge to don NIAA robes and apply the new law to the case at hand.

However, the case was brought in a sessions court. In press accounts there was frequent mention made to this being a special court; however, this specialness was because of the fact that the proceedings took place not in a traditional courtroom, but instead – for security purposes – in a makeshift room within the famous Arthur Road Jail in Mumbai where the defendant was being detained. Another reason the court


Although, note the Kasab court could be viewed as a special court for another reason: a regular sessions court may take on the role of a special court for trials that involve prosecutions relating to the NIAA or national security statutes, such as, for example, the UAPA. National Investigation Agency Act § 22. Furthermore, where a sessions court wears such a special court hat, all other cases “shall . . . remain in abeyance.” National Investigation Agency Act § 19(1). For these reasons, the argument is that the judge’s court functioned as a special court. However, this argument does not carry the day, given that the Kasab trial was public and few features of a special court were in place, in the vein of past POTA or TADA courts.
was deemed special was because the sessions court judge who heard the matter had his docket reduced to one – that of the Kasab case. However, it was essentially a regular criminal court – rather than a separate terrorist forum or military tribunal – that heard the landmark Kasab case. This fact only underlines our argument that, in India, even in the highest profile terrorism case since independence, special courts play an unexceptional and not-so-prominent role in the adjudication process.

Another recent high-profile case offers a similar conclusion. In Chhattisgarh Government v. Binayak Sen the defendant, a well-known doctor and member of the People’s Union of Civil Liberties, was charged with violating state, IPC, and UAPA offences, mainly as they related to the aiding and abetting of an outlawed terrorist group known as the Naxalites. Although Sen vigorously denied committing any crime, the state government branded him a Naxal terrorist. Because this case began prior to the establishment of the NIAA courts and after POTA was repealed, it is understandable why Sen would have been placed in the regular criminal justice process.

Subsequently, however, a series of strange procedural developments began to unfold. Sen’s case started in a sessions court in August 2007, then was transferred to one of the mentioned fast-track courts a month later, but then was moved back to the sessions court in October 2009. At the time that Sen’s case returned to the regular court, the NIAA fora were available to hear his matter, but the prosecution refrained from filing the case there. After having his case languish for more than three years, Sen was convicted in 2010. He is now appealing the judgment.

Both the Kasab and Sen cases raise the fundamental question of why the NIAA courts were not used to prosecute the respective defendants. If any two cases might appear to present a golden opportunity to employ

51 See Binayak Sen v. State of Chhattisgarh, Petition for Special Leave to Appeal (2011) Supreme Court of India Crl. Nos. 2053/2011. In April of 2011, the Supreme Court allowed Sen to post bail as the appeals process moves forward, and on April 17, 2011, Sen was released from custody.
Table 1. *Cases Prosecuted in Courts on Charge-Sheets Filed by the National Investigation Agency (as of the end of 2011)*

<table>
<thead>
<tr>
<th>Prosecutions Occurring</th>
<th>No. of Cases</th>
<th>Various Statutes under Which Defendants Have Been Charged</th>
</tr>
</thead>
<tbody>
<tr>
<td>NIAA special courts</td>
<td>11</td>
<td>The Indian Penal Code, 1860; The Unlawful Activities (Prevention) Act, 1967 (as amended 2008); The Arms Act, 1959; The Explosive Substances Act, 1908; The Prevention of Damage to Public Property Act, 1984.</td>
</tr>
<tr>
<td>Other special courts</td>
<td>4</td>
<td>The Indian Penal Code, 1860; The Unlawful Activities (Prevention) Act, 1967 (as amended, 2008); The Arms Act, 1959; The Explosive Substances Act, 1908; Maharashtra Control of Organized Crime Act, 1999</td>
</tr>
<tr>
<td>Charge-sheet filed but unclear in what forum case is</td>
<td>10</td>
<td>The Indian Penal Code, 1860; The Unlawful Activities (Prevention) Act, 1967 (as amended, 2008); The Arms Act, 1959; The Explosive Substances Act, 1908; Maharashtra Control of Organized Crime Act, 1999; The Prevention of Damage to Public Property Act, 1984.</td>
</tr>
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these special courts, it would seem to be these two. Furthermore, if cases like *Kasab* and *Sen* are not being heard in the NIAA courts, then which ones, if any, are? Conversely, are there other terrorism-related cases that are being tried in the regular criminal courts rather than in these established special fora? To answer these questions, we examined the current set of terrorism cases being investigated by the country’s main antiterrorism agency – the NIA. In India, when investigating officials believe cases should proceed to trial, the investigators will draft what is called a “charge-sheet” and then consult with prosecutors. At that point, prosecutors will determine whether to actually go forward in court. As Table 1 shows, the data drawn directly from the NIA’s own Web site are both revealing and curious for a few reasons.
First, between 2009 and the end of 2011, there were twenty-five NIA charge-sheeted cases filed within the entire country. Moreover, the table highlights the point made regarding how defendants in both the NIAA courts and other courts – in Table 1 referred to by the government as “special courts” – can face overlapping charges that derive from the regular penal code, UAPA, and other narrowly tailored laws. But again, there is confusion about the government’s process. What are these other special courts? What is their jurisdiction? Are they courts that formally (say, on certain days of the month) serve as regular criminal courts, but on other days operate as special antiterrorism courts? It is also unclear why the NIAA courts do not hear only cases that relate to terrorism or, more specifically, that are within their statutory authority, and why these other special criminal courts have terrorism cases pending before them at all.

Otherwise put, there does not appear to be a uniform rationale for when prosecutors will bring cases to the NIAA courts or to these other special courts or to the regular courts. Our hypothesis is that much of the decision-making process has to do with which actual courts are present within a particular jurisdiction that is trying the defendant. Again, if it is simply a matter of a sessions court judge wearing a NIAA hat and then calling the court an NIAA court, why that could not be done in all jurisdictions is unclear; further empirical work is required on this front. One point of information that the table does not provide is the extent to which state-level police officials are charge-sheeting defendants with UAPA offenses in regular sessions courts. As discussed, this was the approach in the government’s case against Binayak Sen, but broader patterns in this regard also require further empirical research.

Hence, this discussion underscores a conflation between – and confusion within – various types of courts in India. Under previous antiterrorism statutory regimes, such as POTA and TADA, the government...
created special courts to hear and try cases against suspected terrorists. These alternative courts, as discussed, suffered from a host of problems, not the least of which was their lack of transparency and ad hoc manner in which they functioned. With the UAPA and NIAA working in conjunction with one another to create yet another iteration of special courts, the thought was that a new process would finally emerge, one that would result in fairer, more efficient justice for defendants and victims of terrorism-related activities. However, the outcome to date has been that only a limited number of cases have gone before the NIAA courts, with, ironically, the most high-profile terrorism trials placed within the regular criminal justice process.

Conclusion

This chapter has surveyed India’s different antiterrorism laws, with an emphasis on special courts and trial processes both before and after the 2008 Mumbai attacks. Special courts in India have been incorporated into different pieces of legislation for decades. As we have argued, however, the statutory language creating these courts, as well as how they function in practice, are blurred together with the regular criminal justice courts. This obscurity has important ramifications. Particularly with the NIAA courts, there appears to be an inherent arbitrariness in which cases enter these fora and which ones are filed in the regular criminal courts. To some extent the selection process may be because of the fact that certain jurisdictions simply do not have NIAA courts present, and thus because the legislation allows for terrorism cases to be tried in the regular criminal courts, there is a practical need to shunt them into these latter venues. But this lack of availability argument is belied by data from the NIA, which shows that there are thirty-five NIAA courts spread throughout the country.53

Another reason for directing terrorism cases into the regular criminal process may relate to an affirmative choice by the state that, in most situations, justice is best rendered by civilian courts. The Indian Home Minister noted after the Kasab trial that because that process worked so well, no expansion of the current UAPA law was needed. To many, such prosecutorial decisions might appear laudable, but consider an alternative explanation: because the regular criminal courts, with all their pathologies and delays, are already so heavily tilted against the defendant prosecutors may see these fora as decidedly advantageous to try terrorism cases. After all, prosecutors know these regular courts best and are familiar with the other actors working within them as well as the statutory procedures, evidentiary standards, and governing norms. Empirical verification of this proposition is required, but that the government brought two of its most high-profile terrorism cases, Kasab and Binayak Sen, in non-NIAA courts gives this hypothesis certain plausibility.

Thus, it remains unclear what accounts for whether cases are tried in regular criminal courts or special courts. In our view neither of the options serves as an optimal forum for defendants suspected of and charged with acts of terrorism. In the broken regular criminal court system defendants languish, prosecutors delay, and outcomes are not determined until well into the future. The history of special courts in India also shows that the safeguards within them are few, transparency is minimal, and abuses are common. That both sets of courts have overlapping jurisdictions, not to mention overlapping actors, only further complicates the relationship. As the analysis reveals, the special courts and regular criminal courts both suffer from serious foundational problems that need immediate remedy if the interests of justice are to be truly served. In sum, rather than being exceptional or special, India’s terrorism courts, as we have shown, in reality are ultimately – and sadly – more ordinary than not.
