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THE ANATOMY OF AN INSTITUTIONALIZED EMERGENCY: PREVENTIVE DETENTION AND PERSONAL LIBERTY IN INDIA

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Despite many indications of an emerging transnational consensus on the scope of human rights law, fundamental disagreements persist.[1] These disagreements are, in many respects, structured around important cleavages in the international community such as: North/South,[2] East/West,[3] and capitalist/socialist.[4] Whether these cleavages are understood as cultural, economic, or political, international lawyers must develop a better understanding of the specific practices that generate divergent interpretations of human rights standards. Without such an understanding, these factions seem to underscore an irreducibly political conception of human rights. Indeed, the prospects of a global "community of law" turn on the degree to which fundamental differences can be expressed and negotiated within and across institutional frameworks generated by partial consensus.[5]

Consider an example. Substantive disagreements concerning "due process" and fair trial rights are often characterized as "exceptional measures" that could only be justified by appeals to necessity. Disagreements

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1. *See generally* HUMAN RIGHTS IN GLOBAL POLITICS (Tim Dunne & Nicholas J. Wheeler, eds., Cambridge University Press, 1999) (surveying the theoretical and practical disagreements that characterize the international human rights regime).

2. *See, e.g.*, REIN MÜLLERSON, HUMAN RIGHTS DIPLOMACY 94–8 (1997); R.J. VINCENT, HUMAN RIGHTS AND INTERNATIONAL RELATIONS 76 (1986); Rajni Kothari, *Human Rights as a North-South Issue, in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTIONS 134 (Richard Pierre Claude & Burns H. Weston eds., 1992).

3. *See, e.g.*, HUMAN RIGHTS AND INTERNATIONAL RELATIONS IN THE ASIA PACIFIC (James T. H. Tang, ed., 1995).

4. *See, e.g.*, LOUIS HENKIN, ET AL., HUMAN RIGHTS 116 (1999); Peng Cheah, *Positioning Human Rights in the Current Global Conjuncture*, 1997 PUBLIC CULTURE 233.

5. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 388–90 (1997); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000). This vision of a supranational "community of law" draws on the experiences of the European Community's legal system. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (chronicling the "constitutionalization" of Europe); Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1 (1981).

about the content of these norms are thereby recast as procedural disagreements about the requirements of derogation regimes. Unfortunately, this characterization of controversial practices obscures important cleavages in international society, thus precluding the kind of constructive dialogue essential to fashioning durable, collective visions of the good. Moreover, by masking fundamental disagreements, this characterization precludes fashioning more effective principles of accommodation that might define more clearly the relationship between international and domestic law.[6] In this Article, I explore these themes and defend these conclusions through a detailed examination of the case of preventive detention laws in India. This case is especially instructive because India's conception and institutionalization of preventive detention illustrate several structural deficiencies in international human rights law.[7]

The argument proceeds as follows. In Part I, I identify the theoretical and practical problem that drives the study: the challenge of concretizing international human rights law. Parts II and III present the case of preventive detention as an important manifestation of this problem. In Part II, I offer an introduction to the phenomenon of preventive detention, and the ways in which this practice is understood and assessed by international lawyers. I outline in some detail the development and general structure of preventive detention laws. Although such laws are a common feature of many legal systems, I offer an extended analysis of one such law: India's National Security Act (NSA).[8] I summarize preventive detention law in India by outlining the relevant constitutional, legislative, and jurisprudential developments. In Part III, I analyze the ways in which these laws are justified in India. The evidence marshaled in this Part suggests that preventive detention laws reflect a substantive vision of personal liberty. Finally, in Part IV, I argue that the prevailing modes of analyzing preventive detention laws fail to engage, much less assess, the rationales used to justify the practice. I conclude that the rush to concretize and enforce universal standards has pushed international legal institutions away from developing the conceptual and normative resources to negotiate the tension

6. *See* Jose E. Alvarez, *Multilateralism and its Discontents*, 11 EUR. J. INT'L. L. 393 (2000).

7. Preventive detention is analyzed as an example of a common phenomenon. There are, of course, many other examples. Notwithstanding the well-established rights to freedom of association and "due process of law," several democratic governments have enacted, or are considering, comprehensive anti-terrorism legislation establishing special powers of investigation including so-called "investigatory detention", criminalizing various forms of political association. *See, e.g.*, Terrorism Act, 2000 (UK); Anti-Terrorism Bill, 2000 (South Africa); Antiterrorism Bill, 2000 (India).

8. National Security Act, Act. No. 65 of 1980 (India).

between assertions of national interests and demands for international justice, a central problem in the elaboration of any unifying system.

I. INTRODUCTION: CONCRETIZING HUMAN RIGHTS LAW

The articulation of universally applicable international human rights standards arguably represents the single most important legal development of the twentieth century.[9] Indeed, the notion that all persons are entitled to an identifiable set of basic legal guarantees has been formalized in many international instruments[10] and most national constitutions.[11] Nevertheless, gross and systematic human rights abuses continue apace.[12] Given this lamentable gap between normative commitments and actual state practice, the development of effective institutional arrangements—both international and domestic—to concretize and enforce these standards is perhaps the greatest challenge of the next century.[13] The effectiveness of international human rights law as *law* will turn on the degree to which states can agree on the application of these general principles to specific practices. While numerous supranational and international supervisory bodies[14] have significantly

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9. The literature on the emergence and importance of international human rights is vast. *See generally* LOUIS HENKIN, THE AGE OF RIGHTS (1990) [hereinafter HENKIN, AGE OF RIGHTS], LOUIS HENKIN ET AL., HUMAN RIGHTS (1999) [hereinafter HENKIN, HUMAN RIGHTS]; PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN (1998).

10. For a chronological sample of the most prominent agreements, *see Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 19, 1966, S. EXEC. DOC. E, 95-2, at 1 (1978), 999 U.N.T.S. 171; *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature Mar. 7, 1966, S. Exec. Doc. C, 95- 2, at 1 (1978), 660 U.N.T.S. 195; the *Convention on the Elimination of All Forms of Discrimination against Women*, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33; *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Dec. 10, 1984, 1988 U.S.T. 202, 1465 U.N.T.S. 85; *Convention on the Rights of the Child*, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

11. *See* HENKIN, AGE OF RIGHTS, *supra* note 9, at 16–17 (1990) (observing that human rights began appearing regularly in constitutions during the postwar period and that "universalization" is reflected in national constitutions); *see also* PROMOTION OF HUMAN RIGHTS THROUGH BILLS OF RIGHTS (Philip Alston, ed., 1999).

12. *See generally* Amnesty International, *Annual Report on the State of Human Rights in the World For 1999* (2000); UNITED STATES DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1999 (2000).

13. *See* American Society of International Law, HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY (Louis Henkin & John Lawrence Hargrove, eds., 1994); Laurence R. Helfer, *Concretizing Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 533 (1998) (book review).

14. Human rights courts and tribunals are described as "supranational" tribunals because they adjudicate claims brought by individuals, groups, and other private parties against

refined human rights standards,[15] most lack the institutional capacity to resolve important interpretive controversies decisively.[16] The further

national governments. "International" tribunals, in contrast, adjudicate only claims between nation-states. *See* Helfer & Slaughter, *supra* note 5, at 289.

15. Several United Nations treaty bodies are authorized to hear claims against governments by individuals and groups such as the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, and the Committee Against Torture. *See* DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 50–51 (1991); MICHAEL O'FLAHERTY, HUMAN RIGHTS AND THE UN: PRACTICE BEFORE THE TREATY BODIES 104–09, 158–64 (1996); Helfer & Slaughter, *supra* note 5, at 338–45 (providing an overview of the U.N. Human Rights Committee and its use of the petition procedure to supervise parties' compliance with the International Covenant on Civil and Political Rights); *see also* MATTHEW C.R. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 32 (1995) ("Petition systems . . . are generally considered the most effective means for the protection of human rights."); Rein A. Mullerson, *Monitoring Compliance with International Human Rights Standards: Experience of the UN Human Rights Committee*, 1991–1992 CANADIAN HUM. RTS. Y.B. 105, 107 (1991–1992) ("[I]t is only through the consideration of individual communications that complete conformity of national legislation and practice with the requirements of international law can be assessed.").

These supervisory tribunals provide up to three distinct mechanisms: a reporting procedure, a general comments procedure, and an individual petition procedure. *See* Helfer & Slaughter, *supra* note 5, at 338–43 (describing these procedures); O'Flaherty, *supra*, at 45, 103, 154 (describing procedures developed by various Committees). Other monitoring mechanisms include the review of inter-state petitions, but this procedure has rarely been utilized. *See* Scott Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?*, 10 HUM. RTS. Q. 249 (1988). The Inter-American and European regional human rights regimes have established human rights courts to monitor and ensure state compliance. *See* SCOTT DAVIDSON, THE INTER-AMERICAN HUMAN RIGHTS SYSTEM 99-154 (1997); P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 97–266 (3d ed. 1998); Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, May 11, 1994, Europ. T.S. No. 155 (entered into force Nov. 1, 1998) (merging the European Commission and the European Court of Human Rights). The African Charter's member States have drafted a proposal to establish a human rights court to complement the protective mandate of the African Commission on Human and Peoples' Rights. Draft Additional Protocol to the African Charter on Human and Peoples' Rights, OAU/LEG/MIN/AFCHPR/PROT.1 rev.2 (1997) *at* <http://www1.umn.edu/humanrts/africa/draft_additl_ protocol.html> (visited Sept. 22, 2000).

16. The exception here is the European Court of Human Rights, which has established a remarkable record of compliance. *See* J.G. MERRILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS 12 (2d ed. 1993) ("The most dramatic impact of the Court's work is certainly to be found in the changes in domestic law and practice which have been introduced as a result of cases at Strasbourg . . . ."); Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 218 (1993) (observing that the European Convention is "accept[ed] as a genuine system of law" and that judgments of the ECHR are "routinely honored by the respondent states who both pay the compensation ordered by the Court and also adjust their laws and governmental practices to the Court's interpretations"); *see also* Andrew Z. Drzemczewski, EUROPEAN HUMAN RIGHTS CONVENTION IN DOMESTIC LAW (1983). On the limitations and failures of the existing UN human rights monitoring mechanisms, *see* James

legalization of international human rights institutions will require: (1) the elaboration of increasingly *precise norms*[17] that "unambiguously define the conduct they require, authorize, or proscribe,"[18] (2) the clarification and acceptance of the *obligatory* character of these norms,[19] and (3) the *delegation* of authority to supranational institutions to resolve fundamental interpretive disagreements and to enforce these authoritative interpretations.[20]

Crawford, *UN Human Rights Treaty System: A System In Crisis? in* FUTURE OF UN HUMAN RIGHTS TREATY MONITORING 1–12 (Philip Alston & James Crawford, eds., 2000); Laurence Helfer, *Forum Shopping for Human Rights*, 148 PENN. L. REV. 285 (1999); Helfer & Slaughter, *supra* note 5, at 345–66 (outlining several factors that limit the effectiveness of the U.N. Human Rights Committee). *See also* Philip Alston, *Effective Function of Bodies Established Pursuant to United Nations Human Rights Instruments: Final Report on Enhancing the Long-Term Effectiveness of the United Nations Human Rights Treaty System*, U.N. Commission on Human Rights, 53d Sess., Agenda Item 15, ¶¶ 14–36, U.N. Doc. E/CN.4/1997/74 (1997) (outlining the deficiencies in existing treaty monitoring mechanisms).

These structural shortcomings may partially explain the poor compliance record of UN monitoring bodies such as the Human Rights Committee. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 550 (1996) ("The record of compliance by states with views rendered by the Committee under the Optional Protocol is patchy."); DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 504 (1991) ("It is very difficult to provide positive evidence that the existence of the Covenant and the work of the HRC is having any concrete and positive effect on the human rights position in the States parties.").

17. *See* Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401 (2000) (defining the concept of legalization as a form of institutionalization characterized by three dimensions: obligation, precision, and delegation); *id.* at 401 ("Precision means that rules unambiguously define the conduct they require, authorize, or proscribe.") (emphasis omitted).

18. *See* Abbott, *supra* note 17, at 401–03. In this regard, "precision" must be distinguished from "vagueness." *See* Frederick Schauer, *Prescriptions in Three Dimensions*, 82 IOWA L. REV. 911, 912–15 (1997). Commentators have pointed out that many human rights norms are not sufficiently precise to resolve actual moral or legal controversies. *See, e.g.*, Richard Posner, *The Problematics of Moral and Legal Theory*, 111 HARV. L. REV. 1637 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and Domestic Human Rights Litigation*, MICH. L. REV. 2177–84 (1999).

19. *See* Abbott, *supra* note 17, at 401.

20. *See, e.g.*, JUDITH GOLDSTEIN ET AL., *Legalization and World Politics*, 54 INT'L ORG. 385 (2000); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); *see also* THE ROLE OF LAW IN INTERNATIONAL POLITICS, ESSAYS IN INTERNATIONAL LAW (Michael Byers, ed. 2000). One strong indicator of increasing levels of legalization in international institutions is the proliferation of international and supranational tribunals. *See generally* PHILIPPE SANDS ET AL., MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (1999) (compiling basic documents concerning all existing international judicial bodies, as well as several other quasi-judicial, implementation, control and dispute settlement mechanisms). These tribunals include the *International Court of Justice (ICJ)*, *see* U.N. CHARTER, arts. 7.1, 36.3, 92–96; the *International Tribunal for the Law of the Sea* (ITLOS), *see* U.N. Convention on the Law of the Sea (UNCLOS), art. 287, U.N.Doc.A/CONF.62/121 (1982), 21 I.L.M. 1261 (1982); the *European Court of Human Rights*, *see* Convention for the Protection of Human Rights

The challenge is to articulate international legal standards with local social, political, and economic conditions while also maintaining some autonomous content for these global norms.[21] International human rights

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and Fundamental Freedoms, 213 U.N.T.S. 221, *entered into force* on September 3, 1953, (current version at 33 I.L.M. 943); the *Court of Justice of the European Communities (ECJ)*, *see* Treaty Establishing the European Economic Community, *entered into force* January 1, 1958, 298 U.N.T.S. 11; the International Criminal Tribunal for Former Yugoslavia (ICTY), *see Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia,* U.N. SCOR 827, 32 I.L.M. 1203 (1993); the International Criminal Tribunal for Rwanda (ICTR), *see Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda,* U.N. SCOR 955, 33 I.L.M. 1598 (1994); as well as the World Trade Organization's (WTO) dispute settlement mechanism. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 2, UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, 33 I.L.M. 1226 (1994).

21. Consider the example of "national security." Hannes L. Schloemann and Stefan Ohlhoff described the problem succinctly:

> National security is the Achilles' heel of international law. Wherever international law is created, the issue of national security gives rise to some sort of loophole, often in the form of an explicit national security exception. . . . As long as the notion of sovereignty exerts power within this evolving system, national security will be an element of, as an exception to, the applicable international law.

Hannes L. Schloemann & Stefan Ohlhoff, *"Constitutionalization" and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AM. J. INT'L L. 424, 426 (1999). "National security" may be invoked as a justification for the abrogation or qualification of international legal obligations in many issue areas including international trade law. *See* GENERAL AGREEMENT ON TARIFFS AND TRADE, art. XXI (1947); 1 ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 599–610 (updated 6th ed. 1995). Article XXI of the General Agreement on Tariffs and Trade ("GATT") provides for a general exception to all GATT obligations with respect to disclosure of national security information, regulation of fissionable materials, regulation of traffic in arms, and action in pursuance of U.N. Charter obligations related to the maintenance of international peace and security. *See also* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 983–86 (3d ed. 1995); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 748–52 (1969); Michael J. Hahn, *Vital Interests and the Law of GATT: An Analysis of GATT's Security Exception*, 12 MICH. J. INT'L L. 558 (1991).

Human rights law purports to regulate a broad range of domestic practices that impact security concerns. As a consequence, international law explicitly recognizes that national security concerns will shape domestic application of international standards. Consider formalized derogation regimes according to which states may suspend rights protections in national emergencies. In one sense, derogation regimes are uncontroversial in that international law formally recognizes that emergency measures may necessitate the temporary suspension of the rule of law. For example, the major international human rights instruments provide for temporary suspension of certain rights guarantees in times of public emergency. However, derogation regimes "if not strictly confined and controlled, can empty this [the international human rights] system practically of all substance." Georges Abi-Saab, *Foreword* to ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION, v (1998). *See also* INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY: THEIR IMPACT ON HUMAN RIGHTS 413 (1983); ERICA-IRENE A. DAES, INDIVIDUAL'S DUTIES TO THE COMMUNITY AND THE LIMITATIONS ON HUMAN RIGHTS

law, therefore, must be simultaneously universalized and particularized. Indeed, this structural tension is embedded in the very notion of transnational law,[22] and perhaps law in general.[23]

The administration of any rights regime necessitates adjudicating the accommodation between rights and other public interests. For example, limitations on rights protections may be necessary to achieve important societal objectives such as the health, safety, and welfare of the citizenry; the maintenance of public order; or national security.[24] This kind of problem is of little consequence in an institutional environment unregulated by precise, obligatory norms. As international law acquires more of the characteristics of a fully articulated legal system, the issue will assume great significance.[25] The question is whether international law imposes any "limitations on (these) limitations."[26] International lawyers must, therefore, satisfactorily answer two related questions. First, to what degree may states invoke contextual circumstances to justify specific domestic policy choices? Second, to what degree may states invoke contextual factors to justify rights restrictions?

Despite the obvious importance of these questions, there are at present few international legal concepts with the potential to provide

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AND FREEDOMS UNDER ARTICLE 29 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, at 197-202, U.N. Doc. E/CN.4/Sub.2/432/Rev.2 U.N. Sales No. E.82 XIV.1 (1983); *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* (1984), *reprinted in* 7 HUM. RTS. Q. 3 (1985).

22. *See, e.g.*, Mark Tushnet, *The Universal and the Particular in Constitutional Law: An Israeli Case Study*, 100 COLUM. L. REV. 1327, 1328 (2000) (book review) ("Every state has its own particularities, typically reflected in its constitution, and yet every state in the modern world also seems committed to some version of universalism, especially with respect to human rights."); Ruti Teitel, *The Universal and the Particular in International Criminal Justice*, 30 COLUM. HUM, RTS. L. REV. 285, 302 (1999) (describing the "politics of universalism" and the "politics of difference" inherent in the internationalist project and suggesting that "the global human rights regime constitutes a paradoxical normative order").

23. *See, e.g*, Michael Freeman, *Univeralism, Particularism, and Cosmopolitan Justice*, *in* INTERNATIONAL JUSTICE 67 (Tony Coates, ed. 2000) (pointing out the centrality of the tension and advocating a ""cosmopolitan realism"); Brian Barry, *Statism and Nationalism: A Cosmopolitan Critique*, *in* GLOBAL JUSTICE (Ian Shaprio & Lea Brilmayer, eds. 1999); Irma Voros, *Contextuality and Universality: Constitutional Borrowings on the Global Stage — The Hungarian View*, 1 U. PA. J. CONST. L. 651 (1999); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996) (positing that the central issue in western jurisprudence is the tension between the "facticity" and "validity" of law); JAMES TULLY, STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY (1995); Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992).

24. *See infra* Section IV.A.2.

25. *See, e.g.*, HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 573 (2nd ed. 2000) ("[I]nternational organizations with powers of elaboration, implementation, application, and enforcement pose issues of state sovereignty in the most acute form.").

26. HENKIN, HUMAN RIGHTS, *supra* note 9, at 220–24.

satisfactory answers. Consider two representative examples: "derogation regimes" which define the degree to which states may suspend rights protections in formal states of emergency;[27] and "limitations clauses" which authorize restrictive interpretations of human rights norms when necessary to promote important national interests.[28] These concepts are secondary or "interstitial" rules regulating the circumstances in which other rules, here the primary human rights norms, are applicable.[29] These "accommodation principles"[30] determine the degree to which international law authorizes *departures* from established international rules in certain specified circumstances; that is, they permit rights violations in certain identified "states of exception." In this sense, these "accommodation principles" do not in any way mediate substantive disagreements concerning the content of primary rules. For example, a rule establishing that arbitrary detention may, assuming certain elements are satisfied, be utilized in a formal state of emergency does not provide any assistance in determining the meaning of "arbitrary." Moreover, these secondary rules do not provide a framework for adjudicating disputes concerning the circumstances in which the principles themselves are applicable. For example, the "state of emergency" exception does not provide adequate jurisprudential resources for defining the "margin of discretion" that states should enjoy in determining the existence of an emergency or the legal measures necessitated by this emergency.

The "context as justification" problem is, therefore, far more complex than these concepts imply. Many states suggest, for example, that contextual factors support idiosyncratic interpretations of human rights standards. Indeed, this is one way to understand the so-called "Asian

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27. *See generally* ANNA-LENA SVENSSON-MCCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION (1998); JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994); JAIME ORAA, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992). For a full discussion, *see infra* Section IV.A.1.

28. *See generally* Alexander Charles Kiss, *Permissible Limitations on Rights in* THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981). For a full discussion, *see infra* Section IV.A.2.

29. On the definition of "interstitial" norms, *see* Vaughn Lowe, *The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?*, *in* THE ROLE OF LAW IN INTERNATIONAL POLITICS 207, 212–21 (Michael Byers, ed., 2000).

30. The label itself invokes the competing values at stake here. For an excellent description of the tension between these values, *see* Stephen P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193, 194 (1996) ("It would seem clear that the [relevant] international agreement does not permit a national government's determination *always* to prevail . . . . [H]owever, the very notion of sovereignty suggests that international bodies should respect national government determinations up to some point.").

values" controversy.[31] Furthermore, some states assert that domestic policy preferences cannot be constrained by international human rights law because the former provides the context within which the latter is defined.[32] In the United States, for example, several commentators have suggested that constitutional principles preclude giving independent domestic legal effect to customary international law[33] and certain types of treaties.[34] The emerging tension between internationalism and con-

31. The literature is, of course, vast. *See, e.g.*, THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS (Joanne R. Bauer & Daniel A. Bell, eds., 1999); Bilahari Kausikan, *Human Rights: Asia's Different Standard*, 92 FOREIGN AFF. 32 (1993). Remarkably, substantial evidence suggests that even the most recalcitrant Asian governments have initiated reforms aimed at bringing domestic practices into line with international human rights standards. *See, e.g.*, ANN KENT, CHINA, THE UNITED NATIONS, AND HUMAN RIGHTS (1999).

32. An interesting recent development is the large number of new constitutions that explicitly make international law part of domestic law. *See, e.g.*, PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES (Philip Alston ed., 1999); S. AFR. CONST. art. 35(1); *see also* Human Rights Act, 1998 (U.K.) (incorporating wholesale the European Convention on Human Rights into domestic law). In the United States, "foreign affairs exceptionalism"—the notion that the usual constitutional constraints on the government's power do not apply in matters relating to foreign affairs—has recently come under tremendous strain. *See, e.g.*, G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617 (1997); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221 (1995). The classic in this area remains LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996).

33. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, III, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis Bradley, *Breard, Our Dualist Constitution, and the Internationalist Conception*, 51 STAN. L. REV. 529 (1999). The recent ascendancy of this view has prompted extensive critical commentary. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Gerald L. Neuman, *Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

34. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998) (arguing that federalism concerns should invalidate treaties that do not regulate genuinely international matters); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 2093 (1999) (arguing that "courts should obey the presumption that when the text of a treaty is silent, courts ought to assume that it is non-self-executing," meaning, in his view, that the treaty is not the "supreme law of the land."). For an extended critique to Professor Bradley's position, *see* David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000). For Professor Bradley's rebuttal, *see* Curtis A. Bradley, *The Treaty Power and American Federalism, Part II*, 99 MICH. L. REV. 98 (2000). For critical commentary on Professor Yoo's thesis, *see* Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 COLUM. L. REV. 2095 (1999); Carlos Manuel Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

stitutionalism threatens to compromise the ability of either approach to accomplish its central objective: the realization of humane and effective governance. Elaborating and promoting universal norms requires the accommodation of the particular constitutive features of each nation, culture, and society. International human rights law must, therefore, fashion coherent "accommodation principles" that define more clearly the relationship between international and domestic law.

In this Article, I analyze one increasingly important invocation of this problem—the perceived conflict between "due process" rights and public order. I do this by carefully explicating the ways in which India, the "world's largest democracy," negotiates that tension. India's political and legal history reveals substantial institutional commitments to both universal principles of justice and specific order maintenance strategies necessitated by what is seen as India's unique socio-political predicament. Although this tension pervades Indian law, it is most stark in the practice of preventive detention. In defining and administering preventive detention laws, all three branches of the Indian government have attempted to think through and take seriously both sides of the universal/particular antinomy. As the Indian case makes clear, specific institutional arrangements often reflect a particular way of resolving this tension. I conclude that because the legal and political processes resulting in this resolution are structured by this *dual commitment*, the resultant practices (including preventive detention) must be understood as the institutionalization affirmative interpretations of the *content* of "human rights." As such, the available international "accommodation principles" fail to provide any useful conceptual resources in the effort to harmonize these practices with international legal standards.

The Article provides an in-depth examination of India's order-maintenance strategies and the ways in which these practices have been reconciled with fundamental human rights standards. Case studies, such as this one, permit detailed elaboration of the institutional, legal, and justificatory matrix supporting preventive detention laws without unwieldy explication of the distinguishing features of each law or regime.[35] In addition, Indian law provides a useful reference model in that the constitutive features of its preventive detention regime are, in general,

35. *See, e.g.*, GARY KING ET AL., DESIGNING SOCIAL INQUIRY 209–13 (1994) (explaining the advantages of "crucial case" studies); WHAT IS A CASE? EXPLORING THE FOUNDATIONS OF SOCIAL INQUIRY (Charles C. Ragin & Howard S. Becker eds., 1992) (explaining the concept of a "case"); Diane Vaughan, *Theory Elaboration: The Heuristics of Case Analysis*, *in* WHAT IS A CASE?, *supra*, at 173 (explaining the heuristic function of case studies).

typical of international practice.[36] As a constitutional democracy with a relatively stable political order and a strong, independent judiciary, India also represents an interesting case in that institutional factors favor the protection of human rights, while socioeconomic conditions create significant, sustained challenges for order maintenance.[37] These conditions are ideal for examining the role of international law in the very sort of "interest balancing" India confronts. In the details of the Indian case, we may discern the broad outline of both the limits and possibilities of a liberal international legal order.

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36. Of course, there are important distinctions between preventive detention laws in various countries that might require fine-tuning of the analysis, but I submit that the conclusions suggested in Part IV provide a good starting point. The standard critiques of preventive detention laws are typically cast at too high a level of abstraction to yield effective, politically-sensitive dialogue. The case study offered here is an important correction to this unfortunate methodological tendency. *See* PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY (A. Harding & J. Hatchard eds., 1993) (hereinafter PREVENTIVE DETENTION AND SECURITY LAW).

37. *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 71–89 (1998) (arguing that several conditions favorable to rights protection are present in India including a favorable constitutional structure, judicial support and rights consciousness). Professor Bruce Ackerman has observed that:

> [India] is a country that, by the standard criteria of political science, should never have been able to sustain constitutional democracy—mass impoverishment and illiteracy, linguistic diversity and bloody religious strife, all seem to be inauspicious auguries. And yet, for half a century now, it has managed to confound expectations.

Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 781 (1997). Patrick Heller has also remarked that:

> India's democratic institutions have withstood the test of time and the test of a fissiparous society. The basic procedural infrastructure of democracy—specifically the constitutions and guarantees of the rights of association, the separation of powers, and regular and open elections at both the national and the state level—has become firmly entrenched.

Patrick Heller, *Degrees of Democracy: Some Comparative Lessons from India*, 52 WORLD POL. 484, 492 (2000). *See also* DEMOCRACY IN DEVELOPING COUNTRIES, VOL. 3: ASIA 1 (Larry Diamond et al., eds. 1989) ("India, despite the steady erosion of democratic institutions . . . continues to stand as the most surprising and important case of democratic endurance in the developing world.").

Despite the "robustness" of India's democratic institutions, Professor Heller observes that these institutions have proven ineffective in promoting socio-economic stability which may "increase social tensions, which in turn trigger autocratic political responses and 'movements of rage.'" Heller, *supra*, at 485, *citing* Evelyn Huber, Dietrich Rueschemeyer, and John D. Stephens, *The Paradoxes of Contemporary Democracy: Formal, Participatory, and Social Dimensions*, *in* TRANSITIONS TO DEMOCRACY (Lisa Anderson, ed. 1999).

II. PREVENTIVE DETENTION LAW IN INDIA: A CASE STUDY

The Constitution of India explicitly empowers the Parliament to enact laws providing for preventive detention[38] for reasons connected with, "the security of a State, maintenance of public order, or maintenance of supplies and services essential to the community."[39] The Constitution also provides that these laws need not comply with fundamental procedural rights guarantees.[40] "Preventive detention," as understood in such laws, involves detention without criminal trial.[41] That is, no criminal offense is proven, nor any charge formulated.[42] Clearly deviating from typical criminal procedure, preventive detention laws establish "special powers" allowing for the detention of persons without trial on the suspicion that the detainee poses a threat to "public order" or "national security."[43]

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38. The central government has enacted several preventive detention laws. *See, e.g.*, National Security Act § 13 (1980) [hereinafter NSA] (provides for administrative detention for a period of up to one year); The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act § 8, 1974 (COFEPOSA) (provides for administrative detention for a period of up to six months); The Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act § 13, 1980 (same); The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 (SAFEMA) (same); The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act § 10, 1988 (same). Many state governments have also enacted preventive detention legislation. *See, e.g.*, The Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug-Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 allows for administrative detention for a period of up to twelve months; The Assam Preventive Detention Act, 1980 (providing for administrative detention for a period of up to six months); The Bihar Control of Crimes Act, 1981 (permits administrative detention for a period of up to twelve months); The Gujarat Prevention of Anti-Social Activities Act, 1985 (provides for administrative detention for a period of up to twelve months); The Jammu and Kashmir Public Safety Act, 1978 (providing for administrative detention for a period of up to two years); The Karnataka Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Gamblers, Goondas, Immoral Traffic Offenders and Slum-Grabbers Act, 1985 (allows for administrative detention for a period of up to twelve months); The Maharashtra Prevention of Communal, Anti-social and other Dangerous Activities Act, 1980 (same); The Tamil Nadu Prevention of Dangerous Activities of Bootleggers, Drug-offenders, Forest Offenders, Goondas, Immoral Traffic Offenders and Slum Grabbers Act, 1982 (same).

39. NSA, *supra* note 38, § 3.

40. INDIA CONST. art. 22 (3).

41. *See id.* art 22 (5).

42. Indian courts emphasize the importance of the distinction between *punitive* and *preventive* detention regimes. On this view, rights recognized in constitutional criminal procedure are inapplicable to the preventive detention process because *preventive* detention does not involve the adjudication of criminal charges. *See, e.g.*, *State of Bombay v. Atma Ram* (1951) S.C.J. 208, 212; *Ashok v. Delhi Admn.* (1982) 2 S.C.C. 403, Para. 14.

43. *See infra* Part IV.

A. *Constitutionalizing Preventive Detention Laws in Postcolonial India*

Preventive detention laws have a long and politically-charged history in South Asia. Indeed, preventive detention was a common feature of the colonial legal system in India. In the nineteenth century, a dense network of regulations provided for detention and arrest without trial in certain cases, and detainees were denied the right to petition courts for writs of habeas corpus.[44]

During both World War I and World War II, England enacted emergency legislation providing for preventive detention.[45] The Defence of the Realm Act[46] and the Emergency Powers (Defence) Act[47] authorized the government to detain any individual without trial in the interest of public safety and security. These acts expired at the end of the respective wars. In India, the Defence of India Act provided for similar measures to secure the security and safety of British India.[48] Although this Act expired at the close of World War I, it was soon replaced by peacetime preventive detention laws such as the Rowlatt Act[49] and the Bengal Criminal Law Amendment Ordinance.[50] The Defence of India Act and the Defence of India Rules were enacted after the outbreak of World War II.[51] These provisions authorized the government to detain any person thought to be a threat to public order, national security, or the maintenance of supplies and services essential to the community.[52]

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44. *See, e.g.*, 1 Burma Code 209, Bengal Regulation III (Apr. 7, 1818) (Gov't of Burma 1943). The history of this regulation is quite complex, and its extension and amendment is outlined in 2 Frederic G. Wigley, Chronological Tables and Index of the India Statutes 775–77 (Calcutta 1897). It was extended to most of British India by the State Prisoners Act (No. 34) of 1850.

45. *See* A.W. BRIAN SIMPSON, IN THE HIGHEST DEGREE ODIOUS: DETENTION WITHOUT TRIAL IN WARTIME BRITAIN (1992).

46. *See* Defence of the Realm Act, 1914, 4 & 5 Geo. 5. c. 29 (Eng.).

47. *See* Emergency Powers (Defence) Act, 1939, 2 & 3 Geo. 6, c. 62, § 2(a) (Eng.).

48. *See* Defence of India (Criminal Law Amendment) Act, 1915 (Act No. 4) (Ind.), *found in* 8 THE UNREPEALED ACTS OF THE GOVERNOR-GENERAL IN COUNCIL 102–08 (1919).

49. *See* Anarchical and Revolutionary Crimes Act, 1919 (Act No. 11), § 34(b) (Ind.), *found in* 8 THE UNREPEALED ACTS OF THE GOVERNOR-GENERAL IN COUNCIL 330 (1919).

50. *See* Bengal Criminal Law Amendment Act, 1930 (Act No. 6) § 2(1) (Ben.), *found in* 4 West Bengal Code 171–172 (1955). *See generally* CHARLES TOWNSHEND, BRITAIN'S CIVIL WARS: COUNTER INSURGENCY IN THE TWENTIETH CENTURY 145–49 (1986) (describing these provisions).

51. *See* Defence of India Rules 1939, *reprinted in* B. MALIK ET AL., 1 ENCYCLOPAEDIA OF STATUTORY RULES UNDER CENTRAL ACTS 513 (1963). These rules were passed under the Defence of India Ordinance, 1939 (No. V of 1939) under powers preserved by § 21 of the Defence of India Act, No. XXXV (1939).

52. Defence of India Rules 1939, *supra* note 51, at Rule 26.

The postcolonial Constitution of India was ratified by the Constituent Assembly in 1949.[53] India's new constitution explicitly vested the state and federal legislatures with the power to enact laws providing for preventive detention.[54] Specifically, the Parliament and state legislatures could enact laws providing for "[p]reventive detention for reasons connected with Defence, Foreign Affairs, or the Security of India."[55] Preventive detention laws are, however, subject to the restrictions outlined in Article 22 of the Chapter on Fundamental Rights. Clauses (3) to (7) of Article 22 detail the procedural safeguards required for any preventive detention law to be constitutionally valid.[56]

Article 22 provides that no preventive detention law shall authorize the detention of a person for a period longer than three months without the approval of an Advisory Board–a special tribunal constituted specifically for this purpose.[57] These Advisory Boards are to consist of persons who "are, or have been, or are qualified to be appointed as, Judges of a High Court."[58]

Clause (5) of Article 22 requires the detaining authority to communicate to the detainee the grounds upon which the detention order is based "as soon as can be,"[59] and to afford the detainee an opportunity to make a representation against the order.[60] These procedural safeguards are qualified in that the detaining authority may withhold any information the disclosure of which is thought to be against the public interest.[61]

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53. *See* Shri P.M. Bakshi, *India*, *in* VII CONSTITUTIONS OF THE COUNTRIES OF THE WORLD i, 1 (Albert P. Blaustein & Gisbert H. Flanz eds., 1994). Several excellent accounts of the drafting process are available. *See, e.g.*, PANCHANAND MISRA, THE MAKING OF INDIA'S REPUBLIC: SOME ASPECTS OF INDIA'S CONSTITUTION IN THE MAKING 23 (1966) (discussing the political, economic, and social origins of the Indian Constitution); GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1966). The draft Constitution prepared by the Constituent Assembly's drafting committee borrowed substantially from the British and U.S. models. *See id* at 34. *See also* I CONSTITUENT ASSEMBLY DEBATES 4 (1946) (statement of Chairman Sinha noting in his Inaugural Address that the Constituent Assembly would be substantially guided by U.S. constitutional principles).

54. INDIA CONST., Sched. 7, List I, Entry 9 (Central Government Powers); *id.*, List III, Entry 3 (Concurrent Powers). According to the Supreme Court of India, the language of these entries must be given the widest possible scope because they set up a machinery of government and are not mere acts of a legislature subordinate to the Constitution. *See Hans Muller of Nuremberg v. Superintendent, Presidency Jail, Calcutta*, A.I.R. 1955, S.C. 367.

55. INDIA CONST., Sched. 7, List I, Entry 9 (Central Government powers); *id.* List III, Entry 3 (Concurrent Powers).

56. INDIA CONST., art. 22, cl. 3–7.

57. *Id.* art. 22, cl. 4.

58. *Id.*

59. *Id.* art. 22, cl. 5.

60. *Id.*

61. *Id.* art. 22, cl. 6.

Parliament may by law prescribe the "class or classes of cases" in which a person could be detained for a period longer than three months without the approval of the Advisory Board.[62] The Constitution also authorizes Parliament to prescribe the procedure to be followed by the Advisory Board proceedings.[63]

Although Article 22 (3) to (7) specifies the minimum procedural safeguards for all preventive detention laws, these provisions are best read as restrictions on fundamental freedoms. Clause (3) of Article 22 states that the progressive protections accorded by Clauses (1) and (2) of the same Article do not extend to any person arrested or detained under any law providing for preventive detention.[64] Under 22 (1), all persons arrested have the right to consult, and be defended by, a legal practitioner of their choice.[65] According to Article 22 (2), all such persons shall be produced before the nearest magistrate within twenty-four hours of arrest and detention shall not extend beyond this period without the approval of a magistrate.[66] As such, the denial of the protections afforded under Article 22 (1) and (2) to persons detained under preventive detention laws constitutes a significant departure from the Constitution's procedural rights regime.

B. *The Preventive Detention Act and its Progeny*

Pursuant to this constitutional authorization, India's provisional Parliament enacted the Preventive Detention Act (PDA) in 1950.[67] The PDA empowered the government to detain persons without charge or trial in the name of public safety and security.[68] In the first case brought before the Supreme Court of India—*A.K. Gopalan v. State of Madras*—the Court upheld the constitutionality of the PDA.[69] Specifically, the Court held that Article 22 of the Constitution provides an exhaustive code of the procedural safeguards required of preventive detention laws.[70] Although the PDA was challenged on the ground that it violated several fundamental rights provisions—Articles 14,[71]

62. *Id.* art. 22, cl. 7(a).
63. *Id.* art. 22, cl. 7(c).
64. *Id.* art. 22, cl. 3(b).
65. *Id.* art. 22, cl. 1.
66. *Id.* art. 22, cl. 2.
67. Preventive Detention Act, No. 4 (1950).
68. Originally, the Preventive Detention Act (PDA) was to have effect for one year during the transition to full independence. The Act did not expire, however, until 1969. *See* R.K. AGRAWAL, THE NATIONAL SECURITY ACT 5–9 (2nd ed. 1993).
69. *A.K. Goplan v. State of Madras*, A.I.R. 1950 S.C. 27.
70. *Id.* at 30–39.
71. INDIA CONST. art. 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.").

19,[72] and 21[73]–the Court found no constitutional infirmity because the explicit provisions of Article 22 (5) were satisfied.[74]

Although the PDA lapsed in 1969, the Parliament enacted the Maintenance of Internal Security Act (MISA) only two years later.[75] The provisions of the MISA were virtually identical to the provisions of the Preventive Detention Act. Following the infamous emergency of the mid-1970s in which preventive detention was widely used as a political weapon[76], the MISA was also allowed to expire in 1978.[77] Two years later, upon Indira Gandhi's return to power, a new preventive detention law was enacted–the National Security Act (NSA)– which remains in effect today.[78]

In short, with the exception of two brief periods, Indian law has provided for preventive detention since independence.[79] Not surprisingly, preventive detention has insinuated itself into the institutional matrix of Indian law enforcement. The details of India's "peace-time" preventive detention regime demonstrate both the nature and the prevailing modes of justifying this extraordinary practice. The remainder of this Part addresses these issues.

C. *Understanding the Institution of Preventive Detention in Contemporary India: The National Security Act*

The National Security Act (NSA) authorizes the central government and the state governments to utilize preventive detention in certain cases.[80] The central and state governments, as well as district

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72. *Id.* art. 19 , cl. 1:

> All citizens shall have the right: (a) to freedom of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; [and] (g) to practise any profession, or to carry on any occupation, trade or business.").

73. *Id.* art. 21.

74. *Gopalan*, A.I.R. 1950 S.C. 30–42.

75. Maintenance of Internal Security Act, No. 26 (1971).

76. *See* Epps, *supra* note 39, at 74–80.

77. *See* AGRAWAL, *supra* note 68, at 8–14.

78. *Id.*

79. No national preventive detention law was in operation from 1970–71 or 1978–80. The PDA expired on December 31, 1969 and the MISA was not enacted until July 2, 1971. The MISA was repealed in 1978 and the National Security Ordinance (precursor to the NSA) was not promulgated until September 22, 1980. *See* C.M. Abraham, *India: An Overview*, *in* PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY (Andrew Harding & John Hatchard, eds. 1993); *see also* AGRAWAL, *supra* note 68, at 5–16.

80. Section 3 of the Act confers this authority. *See* NSA § 3.

magistrates and police commissioners,[81] are empowered to detain any individual "with a view to preventing him from acting in any manner prejudicial to" various state objectives including national security and public order.[82] Because the NSA raises numerous vexing jurisprudential questions, it has generated a rich, dizzyingly complex body of case law interpreting nearly every phrase of the act.[83] This law arguably deviates from international human rights standards in several respects. For the purposes of my argument, however, only the central components of the regime are important. To understand, in general, the nature and justification of preventive detention laws in India, four issues merit detailed explication: (1) the grounds upon which detention orders may be issued, (2) the "subjective satisfaction" of the detaining authority as the basis for valid detention orders, (3) the quasi-judicial nature of the executive review process, and (4) the procedural rights guaranteed detainees.

1. The Grounds Justifying Detention: Defining "Public Order" and "National Security"

Even in the absence of any alleged wrongdoing, Indian law allows detention of individuals in order to prevent acts threatening "public order" and "national security." Neither the Constitution nor current preventive detention legislation attempts, however, to define either the range of acts considered threatening to "public order" and "national security" or the range of acts (or associations) supporting the inference that an individual is likely to commit such acts. Of course, the lack of any clear prohibitions precludes individuals from adjusting their behavior to conform to the prevailing regime's behavioral expectations. This deficiency poses a fundamental challenge to the legality of preventive detention.

Mindful of this difficulty, courts have scrutinized executive assertions of threats to the "public order" or "national security" justifying particular detention orders. Unfortunately, courts have been unable to

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81. The executive may delegate the authority to issue detention orders to local district magistrates or commissioners of police for specified periods of up to three months at a time. *See* NSA § 3(3). The act requires district magistrates and police commissioners to obtain approval for the issuance of detention orders under this delegated authority. The detaining authority in such cases must report to the state government within twelve days of issuing the detention order, *see* NSA § 3(4), and the state government, in turn, must report to the central government within seven days of approving the order. *See* NSA § 3(5). Without state government approval, such orders are invalid after 12 days. *See* NSA § 3(4).

82. NSA § 3(1)(a).

83. *See generally* AGRAWAL, *supra* note 68 (cataloguing cases decided under each section and subsection of the act).

establish a consistent jurisprudence providing substantive content to these concepts. In *Ram Manohar Lohia v. State of Bihar*, the Supreme Court attempted to distinguish between the concepts "security of state," "public order," and "law and order."[84] In an astoundingly oft-quoted passage, Justice Hidayatullah underscored that only the most severe of acts could justify preventive detention:

> One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of state. It is then easy to see that an act may affect law and order but not public order just as an act might affect public order but not security of state.[85]

The Court concluded that acts affecting only "law and order" without one of the other two categories cannot be a sufficient justification on which to base a detention order.[86] Of course, this analysis, its heuristic benefits aside, provides little clarification of the contested concepts, as it suggests only that courts may examine the executive's assessments of threats to public security.[87]

The courts do not in general question executive determinations that alleged acts would or do threaten national security.[88] As a consequence, jurisprudence has centered on the distinction between acts contrary to "public order" and acts contrary to "law and order."[89] Attempts to elaborate and refine the *Ram Manohar Lohia* Court's formulation in this

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84. *Ram Manohar Lohia v. State of Bihar*, A.I.R. 1966 S.C. 740.

85. *Id.* at 757.

86. *Id.*

87. The scope of this judicial review is quite limited. *See infra* Section II.C.2.

88. *See, e.g., Masood Alam v. Union of India*, A.I.R. 1973 S.C. 897, 905 (sustaining detention order issued to preserve national security based on executive's determination that detainee had and would continue to "stimulate[] anti-Indian feelings"). In fact, the courts have ratified subtle but important extensions of the concept of "national security." For instance, the Supreme Court has held that "national security" threats include internal disturbances and need not involve a threat to the entire country or even a whole state. *See, e.g., Union of India v. Tulsiram Patel*, A.I.R. 1985 S.C. 1416, 1482. The Court suggested that:

> The expressions "law and order," "public order," and "security of the State" have been used in different Acts. Situations which affect "public order" are graver than those which affect "law and order." Thus, those situations which affect "security of the State" are gravest. Danger to the security of the State may arise from without or from within the State. The expression "security of the State" does not mean security of the entire country or a whole State . . . It also cannot be confined to an armed rebellion or revolt.

Id.

89. *See generally* AGRAWAL, *supra* note 68, at 41–89 (collecting and summarizing several important cases).

regard have made little progress. In *Arun Ghosh v. State of West Bengal*, for example, the Court attempted to specify further the meaning of "public order" by describing the nature of acts contravening the "public order."[90] The Court reasoned that:

> Public order is the even tempo of the life of the community taking the country as a whole or even a specified locality. Disturbance of public order is to be distinguished from acts directed against individuals which do not disturb the society to the extent of causing a general disturbance of public tranquility . . . [Acts of this sort] affect the even tempo of life and public order is jeopardized because the repercussions of the act embrace large sections of the community and incite them to make further breaches of the law and order . . . .[91]

These vague formulations signal the Court's unwillingness to fashion concrete, justiciable standards.[92] Indeed, the Court repeatedly emphasizes that "public order" determinations are extraordinarily fact-sensitive and must be made on a case-by-case basis.[93] These developments have led one commentator to conclude that the expressions "law and order" and "public order" in Indian preventive detention laws "do not admit of any precise definition. The Courts have given such varying interpretations that even after a lapse of so many years it cannot be said with certainty as to which activity of a criminal will fall within the ambit of the expression 'public order.' "[94]

As a consequence of this muddled jurisprudence, the courts have endorsed a very broad interpretation of "acts prejudicial to the maintenance of public order."[95] For example, courts have upheld detention orders based upon the contention that the detainee had: committed robbery,[96] associated with a "notorious gang of

90. Arun Ghosh v. State of West Bengal, A.I.R. 1970 S.C. 1228.

91. *Id.* at 1229–30.

92. There have been some promising developments on this issue, but circular reasoning and inconsistent application have reduced these would-be doctrinal innovations to little more than restatements of existing law. For example, the Supreme Court suggested that only activities beyond the regulatory capacity of the ordinary criminal law could constitute threats to the maintenance of "public order" or "national security." *See, e.g.*, Mustakmiya Jabbarmiya Shaikh v. M.M. Mehta, Commissioner of Police and Others, 1995(3) SCC 237. The Court has, however, subsequently reasoned that any act "prejudicial to the maintenance of public order" is beyond the regulatory capacity of the ordinary law. *See, e.g.*, Amanulla Khan Kudratalla v. State of Gujarat, 1999 S.O.L. Case No. 376 at ¶ 4.

93. *See, e.g.*, State of Uttar Pradesh v. Hari Shankar Tewari, A.I.R. 1987 S.C. 998.

94. AGRAWAL, *supra* note 68, at 43.

95. INDIA CONST., List III, Entry 9; NSA, § 3.

96. *See, e.g.*, Gora v. State of West Bengal, A.I.R. 1975 S.C. 473.

dacoits,"[97] brandished and fired a weapon in a public place,[98] hurled stones at the car of his political opponents,[99] set fire to a school building,[100] threatened violence to coerce a contractor to provide him employment,[101] and fired at police officers.[102]

2. The "Subjective Satisfaction" of the Detaining Authority

The NSA empowers executive officials to issue detention orders "*if satisfied* with respect to any person that such an order is necessary."[103] Clearly, this provision authorizes preventive detention if, and only if, the detaining authority is satisfied that the detention is necessary to prevent threats to public order or national security. Furthermore, according to the prevailing view in the courts, the "subjective satisfaction" of the detaining authority is the statutory prerequisite for the exercise of this power.[104] In *Anil Dey v. State of West Bengal*, the Supreme Court held that the "veil of subjective satisfaction of the detaining authority cannot be lifted by the courts with a view to appreciate its objective sufficiency."[105] Although the courts "cannot substitute [their] own opinion for that of the detaining authority by applying an objective test to decide the necessity of detention for a specified purpose,"[106] they do review whether the satisfaction is "honest and real, and not fanciful and imaginary."[107] The executive is, therefore, required by the courts to "apply his mind" to the decision to issue a detention order.[108] Although

97. *See, e.g.*, Rajendra Kumar v. Superintendent, District Jail of Agra, 1985 Cr. L.J. 999, 1004.

98. *See, e.g.*, Kali Charan Mal v. State of West Bengal, A.I.R. 1975 S.C. 999.

99. *See, e.g.*, Somaresh Chandra Bose v. Dist. Magistrate Of Burdwan, (1972) 2 S.C.C. 476.

100. *See, e.g.*, Babul Mitra v. State of West Bengal, A.I.R. 1973 S.C. 197.

101. *See, e.g.*, Yogendra Singh v. State of Bihar, 1984 B.B.C.J. 727 (Pat); Madhu v. Police Commissioner of Thana, 1985 Cr. L.J. 341, 344 (Bom.).

102. *See, e.g.*, Kanu Biswas v. State of West Bengal, A.I.R. 1972 S.C. 1656; Suresh Jaiswal v. Dist. Magistrate of Lucknow, 1986 A. Cr. R. 591, 594.

103. NSA, § 3.

104. *See, e.g.*, Anil Dey v. State of West Bengal, A.I.R. 1974 S.C. 832.

105. *Id.* at 834.

106. *Id.*

107. *Id.*

108. The Indian courts have clearly utilized the "non-application of the mind" standard to carve out some space for meaningful judicial review of detention orders. Indian law is atypical in this regard. *See* PREVENTIVE DETENTION AND NATIONAL SECURITY LAW, *supra* note 36, at (suggesting that judicial review of detention orders is unusually robust in India); but see Aruna Sen v. Gov't of Bangladesh, 27 DLR (1975) HCD 122 (holding that judiciary should apply an "objective" standard under the Special Powers Act of 1974 when assessing the legality of detention orders). In most jurisdictions, the courts do not assert the power to review detention orders. As one court stated:

this standard accords the executive remarkably wide discretion, the courts have vitiated detention orders under this standard because the detaining authority: failed to consider all the relevant materials,[109] failed to consider the circumstances of the detainee,[110] or improperly considered irrelevant factors.[111]

An important amendment to the NSA limited the scope of the "non-application of mind" standard by directing courts to consider the identified "grounds" of detention as severable.[112] Therefore, a detention order

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> The discretion whether or not the appellant should be detained is placed in the hands of the [executive official]. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

Karam Singh v. Menteri Hal Ehual Dalam Negeri, Malaysia, [1969] 2 M.L.J. 129, 151.

In other jurisdictions, legislation formally insulates the "subjective satisfaction" of the detaining authority from substantive judicial review. In Singapore, for example, court review has been severely restricted by the legislature. *In Chng Suan v. Minister of Home Affairs*, [1989] 1 M.L.J. 69, the Court of Appeals held that a detention order issued under the Internal Security Act was invalid because the wrong officer had signed it. In defending its conclusion, the court argued that the exercise of ministerial discretion in issuing detention orders was objective in nature and subject to judicial review. *Id. Chng* therefore overturned the infamous decision of *Lee Mau Seng v. Minister of Home Affairs*, [1971] 2 M.L.J. 137, which had held that the exercise of discretion under the Internal Security Act was subjective and therefore immune from review on substantive grounds. The government, however, amended the Act within a month of *Chng* to reinstate the regime of "subjective satisfaction" articulated in *Lee Mau Seng*. *See* Thio Li-ann, *Trends in Constitutional Interpretation: Oppugning Ong, Awakening Arumugam?* 1997 SINGAPORE J. LEGAL STUD. 240, 241–46; *see also* H.P. Lee, *Constitutional Values in Turbulent Asia*, 23 MONASH U. L. REV. 375 (1997).

109. As one court stated:

> If material or vital facts which would influence the mind of the detaining authority one way or the other on the question whether or not to make the detention order, are not placed before or are not considered by the detaining authority it would vitiate its subjective satisfaction rendering the detention order illegal.

Ashadevi v. K. Shivraj, 1979(1) SCC 222, 227.

110. One example is the failure to consider the detainee's custodial status. As one court stated:

> If a man is in custody and there is no imminent possibility of his being released, the power of preventive detention should not be exercised. In the instant case when the actual order of detention was served upon the detenu, the detenu was in jail. There is no indication that this factor or the question that the said detenu might be released or that there was such a possibility of his release, was taken into consideration by the detaining authority properly and seriously before the service of the order. *Binod Singh v. Dist. Magistrate*, 1986(4) SCC 416, 420.

111. *See Piyush Kantilal Mehta v. Commissioner of Police*, A.I.R. 1989, S.C. 491, 496 (holding that the alleged offenses of the detainee–possessing foreign liquor and "high-handed nature"–were irrelevant to the "maintenance of public order" within the meaning of the act).

112. *See* The National Security (Second Amendment) Act of 1984.

must be sustained so long as one valid ground is specified. The amendment came as a response to several court rulings in which detention orders were set aside because one or more of the stated grounds of detention was vague, non-existent, irrelevant, or invalid. Such detention orders were held invalid because the subjective satisfaction of the detaining authority was *ex facie* based on the grounds offered in the order as a whole. Prior to the amendment, courts refused to speculate as to whether the detention order resulted from the cumulative effect of the grounds listed in the order or whether each ground mentioned was thought to be independently viable grounds for detention.[113] The amendment insulates orders from review on this ground; leaving no room for the courts to maneuver on the issue. This lack of flexibility to review detention orders on a case-by-case basis has produced numerous confounding rulings. In *Gayathri v. Commissioner of Police, Madras*, for example, the Supreme Court upheld a detention order despite the fact that the court found one of the grounds of the order invalid.[114] This is not a surprising outcome given section 5-A, except that in this case the District Magistrate issuing the detention order signed an affidavit stating that he had made the order cumulatively on all four grounds identified in it.[115]

In short, the nature and scope of judicial review is difficult to define with any precision in preventive detention cases. In most cases, the courts do, however, closely scrutinize whether detention orders comply with minimal constitutional and statutory requirements. As previously discussed, India's constitution clearly authorizes the use of preventive detention and specifies the full complement of fundamental rights applicable in such cases. Given the substantive and procedural commitments of the constitution and statutory law, Indian courts have little opportunity to constrain the use of preventive detention in meaningful ways.

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113. There are many cases in which detention orders were vitiated on this reasoning. *See, e.g., Bharat Narath v. Gov't of Assam*, 1982 Cr. L.J. 72; *Kishori Mohan Bera v. State of West Bengal*, A.I.R. 1972 S.C. 1749; *Jai Shankar v. State of Rajastan*, 1982 Raj Cr Cas 83; *Krishna Lal Dutta v. State of West Bengal*, A.I.R. 1974 S.C. 955; *Magan Gope v. State of West Bengal*, A.I.R. 1975 S.C. 953; *Biram Chand v. State of U.P.*, A.I.R. 1974 S.C. 1161; *Kuso Sah v. State of Bihar*, 1973 CrLR (SC) 777; *Dwarika Prasad Sahu v. State of Bihar*, A.I.R. 1975 S.C. 134; *Jatindra Nath Biswas v. State of West Bengal*, A.I.R. 1975 S.C. 1215; *Ram Bahadur Rai v. State of Bihar*, A.I.R. 1975 S.C. 223.

114. A.I.R. 1981 S.C. 1672.

115. *Id.* at 1673.

3. The Executive Review Process: Advisory Boards and Quasi-Judicial Review

Although preventive detention is a form of administrative detention and is, therefore, extra-judicial, Indian law does provide for an executive review process. This review scheme includes rules regulating the issuance and confirmation of detention orders, as well as legislation establishing special executive Advisory Boards that conduct a sort of quasi-judicial review of detention orders. The procedures observed in the Advisory Board hearings are particularly important because "[c]onsideration by the . . . Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case."[116] In this Section, I outline this executive review process in some detail. The nature of this process supports two important conclusions. First, the issuance and confirmation of preventive detention orders are not wholly arbitrary in that all detention orders are subjected to a rationalized and institutionalized review process. Second, this process does not, however, involve a trial or hearing in the formal sense.

The NSA prescribes the procedure to be followed in the issuance and execution of detention orders.[117] Under the Act, detention orders are to be executed in the same manner as normal warrants of arrest as specified in the Code of Criminal Procedure.[118] Therefore, detention orders must be in writing, signed by the officer of the court issuing the warrant.[119] The police officer executing the order must notify the person to be arrested of the substance of the order, and if requested, show the detainee the order.[120] The officer making the arrest is also required to bring the detainee before a magistrate without unnecessary delay, and under no circumstance should this delay exceed twenty-four hours.[121]

Under Article 22 (4) of the Constitution, no law providing for preventive detention can authorize the detention of a person for a period longer than three months unless an Advisory Board, constituted under the law, reports that there is, in its opinion, sufficient cause for such detention.[122] The NSA provides for the constitution of Advisory Boards[123] that are to consist of three persons who are, or have been, or

116. *A.K. Roy v. Union of India*, A.I.R. 1982, S.C. 710, 743.

117. NSA, § 4.

118. India Code Crim. Proc. (No. 2 of 1973), §§ 70–81 (A.I.R. Commentaries 1974) [hereinafter Cr.P.C.].

119. Cr.P.C., § 70.

120. Cr.P.C., § 75.

121. Cr.P.C., § 76.

122. INDIA CONST. art. 22 (4).

123. NSA, § 9.

are qualified to be appointed as High Court Judges.[124] At least one member of the Advisory Board must be a High Court Judge, who serves as Chairman of the Board.[125]

Under the Act, the governmental entity issuing the detention order must refer all cases to an Advisory Board within three weeks of the date of the detention order.[126] The government must also forward to the Board any representation prepared by the detainee and the report of the detaining authority.[127]

Furthermore, the procedure of the hearings before the Advisory Boards is outlined in the NSA.[128] The Advisory Board must consider all materials placed before it by the detainee and the detaining authority. After reviewing these materials, the Advisory Board must submit a report to the detaining authority within seven weeks of the date the detention order was executed.[129] This report must include the opinion of the Advisory Board as to whether there is sufficient cause to detain the individual in question.[130] The proceedings of the Advisory Board are closed to the public and its final report is confidential.[131] The detaining authority must release the detainee immediately if in the opinion of the Advisory Board there is not sufficient cause to maintain the order.[132]

The issuance and confirmation of preventive detention orders are not inherently arbitrary in the sense that the structure and procedure of a reasonably elaborate executive review process is clearly established in law. The Advisory Board proceedings are not, however, formal judicial hearings or criminal trials in any sense. Neither the nature of the Board's inquiry nor its procedures resemble judicial proceedings. The Board does not make factual findings in any formal sense,[133] and there

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124. *Id.*
125. *Id.*
126. NSA, § 10.
127. *Id.*
128. NSA, § 11(11).
129. NSA, § 11 (4).
130. *Id.*
131. *Id.*
132. *See* INDIA CONST. art. 22(5)–(7); NSA § 6.
133. R.K. Agrawal, former Secretary of the Home Ministry, summarizes the nature of the Board's administrative task:

> In proceedings before the Advisory Board, the question for consideration of the Board is not whether the detenu is guilty of any charge but whether there is sufficient cause for the detention of the person concerned. The detention, it must be remembered, is based not on the facts proved either by applying the test of preponderance of the probabilities or of reasonable doubt. The detention is based on the subjective satisfaction of the detaining authority that it is necessary to detain a particular person in order to prevent him from acting in a manner prejudicial to certain stated objects.

AGRAWAL, *supra* note 68, at 264.

are no rules of evidence.[134] In addition, detainees do not have the right to counsel, compulsory process, or confrontation.[135] Furthermore, because the government carries a minimal burden of proof, little evidence is typically presented to the Board.[136]

4. Procedural Safeguards: The Detainee's Rights

The Indian Constitution establishes a convoluted regime of procedural rights in preventive detention cases.[137] Article 21 provides that no person may be deprived of their personal liberty except according to a "procedure established by law."[138] Article 22 provides that all persons arrested or detained must be (1) immediately informed of the grounds for their arrest; (2) allowed to consult and be defended by a lawyer; and (3) produced before a magistrate within twenty-four hours.[139] This progressive procedural rights regime, however, is not applicable in preventive detention cases. Indeed, the Constitution makes clear that the rights identified in Articles 21 and 22 (1)–(2) do not constrain the Parliament's power to fashion preventive detention laws.[140] Such laws must, nevertheless, incorporate certain minimal procedural safeguards.[141]

Specifically, the detaining authority is required by Article 22 (5) of the Constitution to communicate to the detainee the grounds of the detention order.[142] Accordingly, the NSA requires disclosure of the

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134. AGRAWAL, *supra* note 68, at 266. *See also* INDIA CONST. art. 22, cl. 7(c).

135. *See id.* at 265–68. Note also that the constitution does not specify the procedures to be utilized in Advisory Board proceedings. *See* INDIA CONST. art. 22, cl. 3-7. In fact, Article 22 makes clear that this power is vested, without substantive limitation, in the Parliament. *See id.* art. 22, cl. 7(c).

136. AGRAWAL, *supra* note 68, at 266. *See also* INDIA CONST. art. 22, cl. 7(c).

137. *See* INDIA CONST. arts. 21–22.

138. *See id.* art. 21.

139. *See* INDIA CONST. art. 22, cl. 1–2.

140. *See* INDIA CONST., art. 22, cl. 3 ("Nothing in clauses (1) and (2) shall apply: (a) to any person who for the time being is in enemy alien; or (b) to any person who is arrested or detained under any law providing for preventive detention.").

141. *See id* art. 22, cl. 3–7. Article 22(5) is most significant for my purposes here.

142. As one court stated:

> The right to be communicated the grounds of detention flows from Article 22(5) while the right to be supplied all the material on which the grounds are based flows from the right given to the detenu to make a representation against the order of detention. A representation can be made and the order of detention can be assailed only when all the grounds on which the order is based are communicated to the detenu and the material on which those grounds are based are also disclosed and copies thereof are supplied to the person detained, in his own language.

See Sophia Gulam Mohd. Bham v. State of Maharashtra, 1999 S.O.L. Case No. 446, at ¶ 14.

The term "grounds" used in clause (5) of Article 22 means not only the narration or conclusions of facts, but also all materials on which those facts or conclusions which constitute "grounds" are based. *See Prakash Chandra Mehta v. Commissioner & Secretary, Govt. of*

grounds of detention to the detainee as soon as possible, but ordinarily no later than five days from the time of arrest.[143] The NSA also requires, in consonance with Article 22 (5) of the Constitution,[144] that the detainee be given the earliest opportunity to make a representation against the order.[145] The act does not, however, require the detaining authority to disclose any information that it considers against the public interest to release.[146]

The Supreme Court has also reasoned that the rights enumerated in Article 22 (5) imply certain other procedural protections. For example, in *Wasi Uddin Ahmed v. District Magistrate, Aligarh*,[147] the Court ruled that the provision of Article 22 requiring the government to "afford" the detainee the opportunity to make a representation implies the right of the detainee to be informed of his or her rights under this article.[148]

The Court has refused, however, to recognize the right to counsel in preventive detention cases. In the landmark judgment of *A. K. Roy v. Union of India*, the Supreme Court was asked to determine the constitutionality of the NSA.[149] The NSA was challenged on numerous grounds. Among these was the charge that the NSA unconstitutionally denied

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Kerala, A.I.R. 1986 S.C. 687 (holding that "grounds" includes both the "basic facts" and the conclusions that result from those facts).

143. *See* NSA, § 8(8).

> (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than ten days from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.
>
> (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

144. *See* INDIA CONST., Art. 22, cl. 5.

145. *Id.*

146. *See* INDIA CONST., Art. 22, cl. 6.

147. A.I.R. 1981 S.C. 2166.

148. *See id.* at 2173 ("The right to make a representation implies what it means—'the right of making an effective representation'."). The opinion further states:

> The rationale for these decisions is that the right to be supplied with copies of the documents, statements, and other materials relied upon in the grounds of detention without any delay flows as a necessary corollary from the right conferred to be afforded the earliest opportunity of making a representation against the detention, because unless the former right is available the latter cannot be meaningfully exercised.

Id.

See also id. at 2174 ("The right of the detenu to make a representation under Art. 22 (5) would be, in many cases, of little avail if the detenu is not 'informed' of this right.").

149. *A.K. Roy v. Union of India*, A.I.R. 1982 S.C. 710.

detainees their fundamental right to representation by legal counsel in hearings before the Advisory Board. Despite recognizing that "[c]onsideration by the Advisory Board of the matters and material used against the detenu is the only opportunity available to him for a fair and objective appraisal of his case,"[150] the Court held that detainees do not have the right to representation in these hearings.[151]

The Court's reasoning in *A.K. Roy* reveals both the structural tension created by preventive detention in Indian law and the resultant complexity of India's procedural rights regime. The Court first acknowledged that the rights invoked in the petition "undoubtedly constitute the core of just process because without them, it would be difficult for any person to disprove the allegations made against him and to establish the truth."[152] Therefore, the Court reasoned that "[i]f Article 22 were silent on the question of the right of legal representation, it would have been possible, indeed right and proper, to hold that the detenu cannot be denied the right of legal representation in the proceedings before the Advisory Boards."[153] Of course, Article 22 (3) specifies that the rights articulated in clauses (1) and (2) do not apply to preventive detention cases.[154] The Court therefore reluctantly concluded: "It is unfortunate that Courts have been deprived of that choice by the express language of Article 22 (3) (b) read with Article 22 (1)."[155]

Preventive detention law does, therefore, guarantee a limited regime of procedural rights. These guarantees, however, arguably fall well short of established international human rights standards.[156] Given this brief outline of preventive detention legislation, it is easy to understand why critics of these laws suggest that they constitute an institutionalized derogation regime.[157] Governments employing this practice do not, however, share the unstated assumption of these critiques that preventive detention violates established international human rights law. In the next section, I survey the justificatory practices of the Indian govern-

150. *Id.* at 743.

151. *See id.* at 744–45.

152. *Id.* at 744.

153. *Id.* at 745.

154. INDIA CONST. Art. 22, cl. 3(b).

155. *A.K. Roy v. Union of India*, A.I.R. 1982, at 745. The Court qualified the holding in *A. K. Roy* in one important respect. In view of the requirements of Article 14 (equal protection), if the Government is represented by legal counsel the detenu must also be extended the same privilege. *See id.* at 747 ("Permitting the detaining authority or the Government to appear before the Advisory Board with the aid of a legal practitioner . . . would be in breach of Article 14, if a similar facility is denied to the detenu.").

156. *See infra* Part IV.

157. *See infra* Part IV.B (summarizing this view).

ment with a view towards understanding the practice of preventive detention in its best light.

III. LEGITIMATING PREVENTIVE DETENTION LAWS OUTSIDE THE EMERGENCY CONTEXT

The ambiguous legal status of preventive detention is underscored by the complex ways in which the practice is justified. The most important point here is that preventive detention is not justified simply as a permissible derogation from human rights standards necessitated by emergency conditions. Nor is it justified solely as an institutional manifestation of "Asian values"—and therefore a legitimate practice despite any inconsistencies with "western" conceptions of human rights. Rather, preventive detention is often justified as a practice that *is consistent with* fundamental principles of justice and international human rights standards. In order to evaluate this practice in its best light, human rights scholars and advocates must understand the nature of these justifications as well as the ways in which they relate to and build upon the concrete institutional arrangements that define preventive detention.

In the case of India, the political and legal history of preventive detention substantiates these points. The National Security Ordinance was promulgated in September 1980 and was subsequently replaced by the NSA in December of the same year.[158] The Home Ministry outlined the objectives and necessity of these extraordinary measures in the following statement released upon the signing of the ordinance:

> In the prevailing situation of communal disharmony, social tensions, extremist activities, industrial unrest and increasing tendency on the part of various interested parties to engineer agitation on different issues, it was considered necessary that the law and order situation in the country is tackled in a most determined and effective way. The anti-social and anti-national elements including secessionist communal and pro-caste elements and also other elements who adversely influence and affect the services essential to the community pose a grave challenge to the lawful authority and sometimes even hold the society to ransom. Considering the complexity and nature of the problems, particularly in respect of defense, security, public order, and services essential to the community, it is the considered view of the Government that the administration would be

158. *See* AGRAWAL, *supra* note 68, at vii.

> greatly handicapped in dealing effectively with the same in the absence of powers of preventive detention. The National Security Ordinance, 1980 was, therefore, promulgated by the President . . .[159]

There are two ways to interpret this standard justification. To be sure, it could be understood as an informal declaration of emergency conditions requiring the temporary suspension of fundamental rights. On the other hand, the rationale could be understood as a description of India's long-term socio-political predicament, *in light of which the scope of fundamental rights should be defined.* Preventive detention, as a regular feature of domestic law, could be justified as a *necessary* practice in societies afflicted with persistent and severe order-maintenance problems. Thus, these conditions could constitute in some fundamental sense the substantive content of rights. That is, the very notions of "arbitrary" and "due process," it could be argued, would be shaped by prevailing socio-political conditions. The question, in short, is whether public order problems are understood as an *excuse* or a *justification* for preventive detention laws. The latter interpretation of India's defense of the NSA is, I contend, supported by considerable evidence including: (1) the structure and history of emergency law in India, (2) the fundamental rights provisions in India's Constitution, and (3) the justificatory strategies employed by government officials when defending the legality of preventive detention laws in international fora.

A. *Emergency Law and Personal Liberty in India*

Preventive detention laws often are not, as a formal matter, part of a "state of emergency." This is certainly true in India where the Constitution provides for preventive detention outside the emergency context.[160] Some evidence certainly suggests that preventive detention laws, as contemplated by the framers of the Constitution of India, were meant to function only as emergency legislation. As a consequence, this evidence suggests that preventive detention laws are the result of a de facto "state of emergency." Closer inspection reveals, however, that the conception of "emergency" utilized in preventive detention debates differs significantly from the notion of "emergency" associated with human rights derogation regimes.[161]

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159. AGRAWAL, *supra* note 68, at vii.

160. *See* INDIA CONST., Sched. 7, List I, Entry 9 (Central government powers); *id.* List III, Entry 3 (Concurrent Powers); *id.* Art. 22, cl. 3-7.

161. *See infra* Part IV.A.1.

The Constituent Assembly and the parliamentary debates on preventive detention reveal the conditions under which the utilization of this power was considered proper. The Statement of Sardar Patel, Minister of Home Affairs, upon introducing the Preventive Detention Bill reflects the perspective of the framers:

> I shall not weary the House by telling it how exactly the communists in India, who have been by far the largest number of detenus, constitute a danger to the existence and security of the State which has been brought into being by the sacrifices and sufferings of millions of our people. It would be a poor return for those sacrifices and sufferings if we fail to preserve the liberties which we have won after so much struggle and surrender them to the merciless and ruthless tactics of a comparatively small number of persons whose inspiration, methods and culture are all of a foreign stamp and who are as the history of so many countries shows linked financially, strategically, structurally, and tactically with foreign organizations .... I should like to say here that our fight is not with communism or with those who believe in the theory of communism, but with those whose avowed object is to create disruption, dislocation, and tamper with communications, to suborn loyalty, and make it impossible for normal Government based on law to function. Obviously, we cannot deal with these people in terms of ordinary law. Obedience to law should be the fundamental duty of a citizen. When the law is flouted and offences committed, ordinarily there is the criminal law which is put into force. But where the very basis of law is caught to be undermined and attempts are made to create a state of affairs in which, to borrow the words of a distinguished patriot, the father of our Prime Minister, "men would not be men and law would not be law," we feel justified in invoking emergent and extraordinary laws.[162]

This statement suggests that proponents of preventive detention favored empowering the government to deal with extraordinary situations, while remaining silent on the necessity of such laws as a component of the ordinary law. The Minister of Home Affairs also emphasized that preventive detention was necessary and that such laws would contravene the fundamental rights protections recognized in the Constitution:

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162. INDIA PARL. DEB., Vol. II, Pt. II, p. 874–76 (Feb. 25, 1950).

> I am sure the House would like us to be fully armed and equipped with the means of dealing with any emergency that might arise.
>
> . . . .
>
> I shall only plead with the House that during consideration of this measure it fully takes into account the dangers which happily we have so far avoided, the dangers which unhappily still threaten us and the explosive possibilities of the situation with which we are faced at present. When we think of civil liberties of the extremely small number of persons concerned, let the House also think of the liberties of the millions of people threatened by the activities of individuals whose civil liberties we have curtailed.[163]

As such, preventive detention was justified as a "necessary evil." Addressing the Constituent Assembly, Alladi Krishnaswami Ayyar summarized the prevailing sentiment:

> It is agreed on all hands that the security of the State is as important as the liberty of the individual. Having guaranteed personal liberty, having guaranteed that a person should not be detained or arrested for more than 24 hours, the problem necessarily had to be faced as to detention, because detention has become a necessary evil under the existing conditions of India. Even the most enthusiastic advocate of liberty says there are people in this land at the present day who are determined to undermine the Constitution and the State, and if we are to flourish, and if liberty of person and property is to be secured, unless that particular evil is removed or the State is invested with sufficient power to guard against that evil there will be no guarantee even for that individual liberty of which we are all desirous.[164]

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163. *Id.* at. 876–77.

164. *See also* IX CONSTITUENT ASSEMBLY DEBATES 1536 (1949). Many members of parliament also emphasized the idea that preventive detention was a "necessary evil" in debates on the Preventive Detention Act. M.P. Masani of Bombay, for example, provides a representative quote:

> I think the fullest expression needs to be given to the very widespread feeling in this House that it is enacting this measure with the greatest reluctance and the greatest regret. This Parliament will lay itself open to the most serious misconstruction if that sense of reluctance and disquiet is not given adequate expression. In passing this Bill the House will be incurring a grave obligation to the citizens of this country to see that nothing is done under this measure which goes a single inch beyond the needs of the case . . . .

INDIA PARL. DEB., *supra* note 162, at 895–96.

These statements certainly suggest that preventive detention is justified by reference to an undeclared state of emergency. There is good reason to suspect, however, that India's framers had something more in mind. First of all, India's Constitution contains express provisions regulating the declaration of emergency and the range of rights that could be suspended in the event of such a declaration. The Constituent Assembly debates on Articles 352–359 also suggest that these provisions closely track prevailing international law.[165]

R.K. Chaudhuri highlighted this argument in the Parliamentary Debates on the Preventive Detention Act: "Maintenance of public order is an ordinary function of the police and the magistracy. No war has been declared up till now. No state of emergency has been declared. Even then we need not require this piece of legislation 'to maintain public order' in this country."[166]

Furthermore, the "emergency conditions" referenced in the preventive detention debates do not serve as an adequate justification for "public order" detentions.[167] The National Security Act allows for the detention of individuals who might "prejudice the maintenance of public order"[168] and as such contemplates governmental powers that extend far beyond those justified by "national security" rhetoric.

In addition, courts do not construe preventive detention laws as "emergency legislation." As is the case in most jurisdictions, emergency legislation in India is interpreted differently than ordinary legislation.

> [T]here is a fundamental difference in the matter of interpretation of Emergency and peace time legislation. To meet a grave pressing national emergency in which the very existence of the State is at stake, laws are enacted rather hastily and such legislation should be construed more liberally in favor of the State than peace time legislation.[169]

On several occasions, however, the Supreme Court of India has made clear that preventive detention legislation is to be strictly construed. In *Magan Cope v. State of West Bengal*, the Supreme Court emphasized this well-settled view:

> Times out of number, it has been emphasized by this Court that since the Act [here the reference is to the Maintenance of Internal Security Act] gives extraordinary powers to the executive to

165. *See infra* Part IV.A.1 (outlining international legal standards).
166. INDIA PARL DEB., *supra* note 162, at 901.
167. *See id.* (statement of R.K. Chaudhuri).
168. *See* NSA, *supra* note 38, § 3.
169. *Union of India v. Bhanu Das Krishna Gavde*, A.I.R. 1977 S.C. 1027.

> detain a person without trial, meticulous compliance with the letter and requirements of the law is essential for the validity of an order of detention . . . [170]

In *A.K. Roy v. Union of India*,[171] the Court held that the National Security Act was constitutional but insisted that the extraordinary power of preventive detention be narrowly constructed: "Detention without trial is an evil to be suffered, but to no greater extent and in no greater measure than is minimally necessary in the interest of the country and community."[172]

The Court has also suggested that the Constitution's restrictions on personal liberty should be interpreted not as necessary derogations but rather as inherent limitations on the scope of fundamental rights:

> [I]n the national interest an obligation is cast on the State even to curtail the most sacred of the human rights, viz., his personal liberty. The source of power to curtail this flows from Article 22 of the Constitution of India within the limitation as provided therein. Every right in our Constitution within its widest amplitude is clipped with reasonable restrictions. . . . The protection of life and personal liberty enshrined in Article 21 itself contains the restriction which can be curtailed through the procedure established by law, which of course has to be reasonable fair and just. Article 22 confers power to deprive of the very sacrosanct individual right of liberty under very restricted conditions. Sub-clauses (1) and (2) confer right to arrest within the limitations prescribed therein. Sub-clause (3) even erases this residual protective right under sub-clauses (2) and (3) by conferring right on the authority to detain a man without trial under the preventive detention law. This drastic clipping of right is for a national purpose and for the security of the State.[173]

Finally, India's political history also supports the conclusion that preventive detention is not understood or justified as emergency legislation. In India, the status of the rule of law in states of emergency takes on special significance. Former Prime Minister Indira Gandhi, pursuant to Article 352 of the Indian Constitution,[174] declared a state of emergency on 26 June 1975 on the pretext that the survival of the country

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170. *Magan Cope v. State of W.B.*, A.I.R. 1975 S.C. 953, 954–55.

171. *A.K. Roy v. Union of India*, A.I.R. 1982 S.C. 710.

172. *Id.* at 740; *see also Vijay Narain Singh v. Bihar*, A.I.R. 1984 SC 1334, 1336 (Reddy, J., concurring).

173. *Ahamed Nassar v. State of Tamil Nadu*, 1999 S.O.L. Case No. 631, ¶ 32.

174. INDIA CONST., Art. 352.

was endangered by "internal disturbances."[175] Fundamental rights guaranteed by the Indian Constitution were suspended including Article 32—the right to petition the courts for writs of habeas corpus.[176] In the most infamous ruling of its short history, the Supreme Court held that the presidential order under Article 359 of the Constitution[177] suspending certain fundamental rights was constitutional.[178] Tens of thousands were arbitrarily detained during the emergency without the ability to petition the courts for redress.[179] Indeed, "the Emergency" is rightly regarded as the low point of India's postcolonial political history.[180]

During the emergency, the government used the prevailing preventive detention law, the MISA,[181] to imprison the political opposition.[182]

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175. *Id.*, Art. 352(1).

176. *Id.*, Art. 32.

177. Article 359 reads:

> Suspension of the enforcement of the rights conferred by
>
> Part III during emergencies: (1) Where a proclamation of emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the right conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

INDIA CONST., Art. 359.

178. *See A.D.M. Jobalpur v. Shivakant Shukla*, A.I.R. 1976 S.C. 1207. The Supreme Court held that the judiciary could not be petitioned for redress even where a detention order was passed mala fide. In *Union of India v. Bhanudas*, the Court held that the Presidential orders suspending fundamental rights "impose blanket bans on any and every judicial enquiry or investigation into the validity of an order depriving a person of his personal liberty." AIR 1977 SC 1027, 1029.

179. *See* S.N. BHATTACHARJEE, ADMINISTRATION OF LAW AND JUSTICE IN INDIA 163 (1982); PANNALAL DHAR, PREVENTIVE DETENTION UNDER INDIAN CONSTITUTION 144–45 (1986) (recounting reports that the total number of detainees neared 100,000).

180. *See generally* MARY C. CARRAS, INDIRA GANDHI: IN THE CRUCIBLE OF LEADERSHIP 204–14 (1979); KULDIP NAYAR, THE JUDGMENT: INSIDE STORY OF THE EMERGENCY IN INDIA (1977); N. SAHGAL, INDIRA GANDHI'S EMERGENCE AND STYLE 162–211 (1978); H.M. SEERVAI, THE EMERGENCY, FUTURE SAFEGUARDS AND THE HABEAS CORPUS CASE: A CRITICISM (1978); ARUN SHOURIE, SYMPTOMS OF FASCISM (1978).

181. Maintenance of Internal Security Act, No. 26 (1971).

182. Ironically, preventive detention laws were defended in the Parliamentary Debates of 1950 as an effective means by which the Government could *prevent* emergencies in the first place. Thakur Das Bhargava argued in favor of the Preventive Detention Act stating:

> All the same, we must realize that there is an emergency. So far as the emergency is concerned, there can no two opinions in this country .... This is a situation which is not an emergency as envisaged in Article 352 of this Constitution which is a more serious affair .... Under Article 359 all the fundamental rights must remain in suspense when the emergency is declared under Article 352. Thus this Bill is designed to avert that emergency. We do not want that emergency to overtake

The Constitution was amended in the aftermath of the 1975 Emergency so as to limit the ability of the President to suspend fundamental freedoms under Article 359.[183] The Forty-Fourth Amendment Act of 1978 amended Article 359 by proscribing the suspension of Articles 20 and 21 of the Constitution even under a declared state of emergency.[184] Thus, the fundamental freedoms guaranteed by Articles 20 and 21—the fair trial and personal liberty provisions of the Constitution—are recognized as non-derogable by the amendment.[185] Article 20 prohibits ex post facto laws, double jeopardy, and involuntary self-incrimination.[186] Article 21 ensures that no person shall be deprived of life or personal liberty ex-

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> us. This is only intended to avert that emergency so that we may be able to control the situation. By doing so the emergency can be averted.

INDIA PARL. DEB., *supra* note 162, at 898. Shri Kamath then stated that: "I only wanted safeguards." *Id.* To which Thakur Das Bhargava replied:

> This Bill is an adequate safeguard if the emergency should come. If the emergency comes, where will the civil liberties be? Therefore let us try to meet the situation and avert the emergency . . . With a view to avert such an emergency, the present situation is sought to be controlled by this measure, so as not to allow such an emergency to arise and if it did to overcome it. It is not so to speak an emergency measure. It is a measure which is designed to see that such an emergency does not arise and if it does to overcome it also.

Id. at 898–99.

183. *See* Constitution (Forty-Fourth) Amendment Act, 1978. Although approved by the Parliament, the Executive has not given effect to the amendment as required by the Constitution. The Supreme Court considered whether a writ of mandamus should be issued compelling the Central Government to give effect to Section 3 of the Forty-fourth Amendment Act of 1978. *See AK Roy v. Union of India,* A.I.R. 1982 S.C. 710. The majority opinion validated sections (1) and (2) of the Amendment Act, allowing the executive to bring different provisions of the Act into force on different dates, and subsequently held that mandamus could not be issued. The Court noted that the opinion:

> should not be construed as any approval on our part of the long and unexplained failure on the part of the Central Government to bring section 3 of the 44th Amendment Act into force. We have no doubt that in leaving it to the judgment of the Central Government to decide as to when the various provisions of the 44th Amendment should be brought into force, the Parliament could not have intended that the Central Government may exercise a kind of veto over its constitutional will by not even bringing the Amendment or some of its provisions into force . . .

Id. at 733.

The Forty-fourth Amendment Act also repeals Article 22(7)(a) of the Constitution, which gives Parliament this power. Parliament will no longer be able to prescribe "the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board," once the Amendment is brought into full effect. *See* INDIA CONST., Art. 22(7)(a); Constitution (Forty-Fourth) Amendment Act, 1978.

184. *See* Constitution (Forty-Fourth) Amendment Act, 1978.

185. *See id.*

186. *See* INDIA CONST., Art. 20.

cept according to procedure established by law.[187] Under the amendment, these rights cannot under any circumstances be suspended in the name of national security, public safety, or other forms of emergency.

One might expect that this amendment would have occasioned a radical overhaul of preventive detention law. Indeed, this initially appears to be a reasonable expectation. After all, preventive detention laws were seemingly justified as necessary derogations from procedural due process and fair trial rights. That is, the social, political, and economic situation in India arguably necessitated an institutionalized "state of emergency" legitimating otherwise arbitrary detentions in the name of the public good. The logic of the amendment, on the other hand, suggests that all preventive detention legislation must, at a minimum, protect the rights enumerated in Articles 20 and 21 of the Constitution because these rights are, according to the amendment, not amenable to limitation in times of national crisis. No legislator, court, or, commentator has suggested that the non-derogable rights amendment would have any discernable effect on preventive detention legislation or jurisprudence.[188]

B. *Fundamental Rights Provisions in the Indian Constitution*

The fundamental rights provisions of the Indian Constitution provide further evidence against the derogation thesis. Specifically, the Constitution's framers defined the contours of personal liberty in light of the necessity of preventive detention. That is, the framers thought that preventive detention necessitated a certain sort of procedural rights regime.

As previously discussed,[189] India's Constitution empowers the government to enact preventive detention laws[190] and specifies the only rights applicable in cases involving these laws.[191] Moreover, the drafting and subsequent development of Article 21 demonstrates that support for preventive detention shaped the scope of personal liberty in general, including areas *not involving preventive detention.* Specifically, the Constituent Assembly voted against including a "due process" clause in the personal liberty provision of Article 21 primarily because such a provision might authorize the judiciary to invalidate preventive

187. *Id.*, Art. 21.

188. *See A.K. Roy v. India*, A.I.R. 1982 S.C. 710; AGRAWAL, *supra* note 68.

189. *See supra* Section II.A.

190. *See* INDIA CONST., Sched. 7, List I, Entry 9 (Central government powers); *id.* List III (Concurrent Powers), Entry 3.

191. *See* INDIA CONST., Art. 22, cls. 3-7.

detention legislation.[192] Challenged by the Assembly to draft the fundamental rights provisions of the Constitution, the Advisory Committee on Fundamental Rights substituted the phrase "except according to procedure established by law."[193] The deletion of "due process" from the personal liberty provision generated considerable controversy.[194] This controversy also gave rise to Article 22, including the restrictive clauses for preventive detention cases.[195]

Therefore, it was thought that the support for preventive detention necessitated eliminating "due process of law" from Article 21.[196] Fearful

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192. *See* AUSTIN, *supra* note 53, at 102. *See also* 9 CONSTITUENT ASSEMBLY DEBATES, 1535 (statement of Alladi Krishnaswami Ayyar) ("[T]he main reason why 'due process' has been omitted was that if that expression remained there, it will prevent the State from having any detention laws . . . .").

193. *See* AUSTIN, *supra* note 53, at 84–86. *See also* IX CONSTITUENT ASSEMBLY DEBATES 1525–35 (1946).

194. For example, Syed Karimuddin argued that, under the amendment, judges would be reduced to mere "spectator[s]," and that "it would not be open to him to examine whether the law is capricious or unjust." IX CONSTITUENT ASSEMBLY DEBATES (1946). Thakurdas Bhargava contended that the "procedure established by law" clause was a " 'black law' which would permit thousands to be jailed despite which court shall be helpless." *Id.* at 1504; *see also id.* at 1542 (Statement of M. Anathasayanam Ayyangar) ("[T]he procedure 'as enacted by law' would throw open the floodgates and Government will be able to curtail the liberty of the citizen and put him in jail even recklessly. If there is a political rival capable of fighting you at the elections the possibility is that you will clap him in jail."). *See generally* AUSTIN, *supra* note 53, at 105–08 (providing details of the contentious exchange).

195. Dr. B.R. Ambedkar, Chairman of the Drafting Committee and the most prominent proponent of the draft article on procedural protections, stated: "We are therefore, now, by introducing [Article 22], making, if I may say so, compensation for what was done then in passing [Article 21]. In other words, we are providing for the substance of the law of "due process" by the introduction of [Article 22]." 9 CONSTITUENT ASSEMBLY DEBATES at 1497. He also suggested that Article 22 effectively incorporated the fundamental guarantees of "due process":

> Ever since [Article 21] was adopted, I and my friends had been trying in some way to restore the content of due procedure with its fundamentals without using the words "due process." I should have thought that the members who are interested in the liberty of the individual would be more than satisfied for being able to have the prospect before them of the provisions contained in [Article 22].

Id.

196. This fear was perhaps overblown. Indeed, eventually the Supreme Court held that the phrase "procedure established by law" necessarily implied something similar to "due process of law." *See Maneka Gandhi v. Union of India*, A.I.R. 1978 S.C. 597. The Court held that a section of the Passports Act violated Article 21 because it "d[id] not prescribe a 'procedure' within the meaning of that article and if it is held that procedures have been prescribed, it is arbitrary and unreasonable; . . . ." *Id.* at 597.

The Court concluded that the procedure established in law "must be 'right and just and fair', and not arbitrary, fanciful or oppressive, otherwise, it should be no procedure at all and the requirements of Article 21 would not be satisfied." *Id.* at 598. Interestingly, the nature of the judicial inquiry envisioned by the Court mirrored the sort feared in the Constituent Assembly. The Court reasoned that:

that this omission gave the legislature unrestrained power to deprive individuals of their personal liberty, the Committee felt obligated to insert a separate provision specifying the minimum procedural rights that must accompany deprivations of personal liberty.[197] To avoid circumscribing the legislature's power to enact preventive detention laws, however, this new provision included a proviso specifically indicating that the rights recognized therein did not extend to preventive detention cases.[198] Fear that this proviso would enable the legislature to enact draconian preventive detention legislation, in turn, necessitated that Article 22 also include a specific list of procedural rights applicable in preventive detention cases.[199] The Drafting Committee Chairman, Dr. Ambedkar, suggested that, on the whole, the proposed article sufficiently protected individual personal liberty.[200] In anticipation of opposition to the preventive detention proviso, he specifically mentioned that the safeguards enumerated in the provision adequately protected personal liberty in these cases as well.[201]

> There are inherent or natural human rights of the individual recognized by and embodied in our Constitution. Their actual exercise, however, is regulated and conditioned largely by statutory law. Persons upon whom these basic rights are conferred can exercise them so long as there is no justifiable reason under the law enabling deprivations or restrictions of such rights. But, once the valid reason is found to be there and the deprivation or restriction takes place for that valid reason in a procedurally valid manner, the action which results in a deprivation or restriction becomes unassailable. If either the reason sanctioned by the law is absent, or the procedure followed in arriving at the conclusion that such a reason exists is unreasonable, the order having the effect of deprivation or restriction must be quashed.

Id. at 610–11. Justice Krishna Iyer would later state flatly that the "due process" standard had been incorporated into India's law. *See Sunil Batra v. Delhi Administration*, A.I.R. 1978 S.C. 1675 ("True, our Constitution has no 'due process' clause . . . but after . . . *Maneka Gandhi* . . . the consequence is the same."). The Court made clear, however, that the rights recognized did not apply to procedures established by punitive or preventive detention laws. *See Maneka Gandhi*, A.I.R. 1978 S.C. 659. (" 'Procedure' in Article 21 means fair, not formal procedure. 'Law' is reasonable law, not any enacted piece. As Article 22 specifically spells out the procedural safeguards for preventive and punitive detention, a law providing for such detentions should conform to Article 22.").

197. *See, e.g.*, 9 Constituent Assembly Debates 1497 (statement of Dr. Ambedkar) (noting the widespread belief that Article 21 "g[ave] a carte blanche to Parliament to make and provide for the arrest of any person under any circumstances as Parliament may think fit.").

198. *See* India Const., Art. 22, cl. 3.

199. *Id.* at Art. 22, cl. 4–7.

200. *See* 9 Constituent Assembly Debates 1497 (statement of Dr. Ambedkar) ("[W]hile . . . this article might have been expanded to include some further safeguards. I am quite satisfied that the provisions contained are sufficient against illegal or arbitrary arrests.").

201. Dr. Ambedkar concluded that:

The scope of personal liberty protections in the Indian Constitution reflects a carefully (and laboriously) negotiated settlement between those who favored a more robust role for the judiciary and those who favored something close to unbridled parliamentary discretion. The driving force in this progression of events was the widely shared commitment to preventive detention in the Constituent Assembly.[202] As historian Granville Austin put it, "the story of due process and liberty in the Constituent Assembly was the story of preventive detention."[203] In short, preventive detention is too deeply implicated in the Constitution's very definition of personal freedom to conceive of the practice as simply a "derogation" or "exception" to otherwise well-established rights.

C. *India's Defense of Preventive Detention in International Human Rights Fora*

Furthermore, India does not invoke "emergency conditions" to justify preventive detention laws before international human rights institutions. Consider two salient examples: (1) India's reservation to the International Covenant on Civil and Political Rights, and (2) India's statements before the U.N. Human Rights Committee in the face of forceful criticism. Both examples illustrate that India vigorously defends the legality of preventive detention, and, contrary to the conventional view, does not base its authority to do so on appeals to emergency powers.

> There again, those who believe in the absolute personal liberty of the individual will recognise that this power of preventive detention has been helged in by two limitations: one is that the Government shall have power to detain a person in custody under the provisions of clause (3) only for three months. If they want to detain him beyond three months they must be in possession of a report made by an advisory board which will examine the papers submitted by the executive and will probably also give an opportunity to the accused to represent his case and come to the conclusion that the detention is justifiable. It is only under that that the executive will be able to detain him for more than three months. Secondly, detention may be extended beyond three months if Parliament makes a general law laying down in what class of cases the detention may exceed three months and state the period of such detention.
>
> I think, on the whole, those who are fighting for the protection of individual ought to congratulate themselves that it has been found possible to introduce this clause which, although it may not satisfy those who hold absolute views in this matter, certainly saves a great deal which had been lost by the non-introduction of the words "due process of law."

Id. at 1498.

202. Even the most ardent advocates of personal liberty supported preventive detention. *See* AUSTIN, *supra* note 53, at 100.

203. *Id.* at 102.

1. India's Reservation to Article 9 of the ICCPR

First, the government of India has formally sought to clarify its human rights treaty obligations to insulate preventive detention from international scrutiny. Specifically, India entered a package of reservations upon accession to the ICCPR including the following:

> With reference to article 9 [the right to personal liberty] . . . the Government of the Republic of India takes the position that the provisions of the article shall be so applied as to be in consonance with the provisions of clauses (3) to (7) of Article 22 of the Constitution of India.[204]

This "interpretive reservation" does not assert the right to derogate from the right to personal liberty. Rather, India's reservation seeks only to put the other States' Parties on notice that India's interpretation of Article 9 is consistent with and reflected in its Constitution.[205] That is, the Indian government made clear that the preventive detention laws, as envisioned in Article 22 of the Constitution, do not involve "arbitrary" or "unlawful" deprivations of liberty.

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204. Reprinted in MANFRED NOWAK, *CCPR: A Commentary*, 784 (1993) (Appendix).

205. The actual legal effect of the reservation is, however, less clear. First, the effect of the declaration is to remove the autonomous meaning of the Covenant obligations under Article 9. The Human Rights Committee has suggested that such reservations are incompatible with the ICCPR. *See* General Comment No. 24 (52) 1, E/1995/49, 13 April 1995, ¶ 19 ("Nor should interpretive declarations or reservations seek to remove an autonomous meaning to covenant obligations, by pronouncing them to be identical, or to be accepted only in so far as they are identical, with existing provisions of domestic law.").

Second, the HRC maintained that the reservation does not alter India's obligations under the ICCPR. When examining India's periodic report in July 1997, the Human Rights Committee also said with respect to the declaration in relation to Article 9:

> The Committee regrets that the use of special powers of detention remains widespread. While noting the State party's reservation to article 9 of the covenant, the Committee considers that this reservation does not exclude, inter alia, the obligation to comply with the requirements to inform promptly the person concerned of the reason for his or her arrest, the Committee is also of the view that preventive detention is a restriction on the liberty imposed as a response to the conduct of the individual concerned, that the decision as to continued detention must be considered as a determination falling within the meaning of article 14, paragraph 1, of the covenant, and that proceedings to decide the continuation of detention must, therefore, comply with that provision. Therefore: the Committee recommends that the requirements of article 9, paragraph 2, of the covenant be complied with in respect of all detainees. The question of continued detention should be determined by an independent and impartial tribunal constituted and operating in accordance with article 14, paragraph 1 of the Covenant.

Human Rights Committee, *Concluding Observations on State Part Reports: India*, UN Doc. CCPR/C/79/Add.81, ¶ 24.

2. India's Statements before the U.N. Human Rights Committee

India's formal defense of preventive detention in other international fora further substantiates this point. In its most recent submission to the Human Rights Committee,[206] the government of India made clear that preventive detention legislation is not understood as a derogation from international human rights protections:

> At the time India's second periodic report was considered, reference was made to legislation, such as . . . the NSA (National Security Act) . . . as being inconsistent with some of the rights recognized in the Covenant and therefore constituting derogations from India's commitment under the Covenant. While there was appreciation of the special circumstances that had necessitated such legislation, the Committee had sought clarification on why India had not sought to notify the Committee of these derogations, as stipulated in article 4 of the Covenant. . . . [Terrorism, insurgency, and other public order problems] necessitated special statutes to combat terrorism and protect the life

206. The ICCPR established the United Nations Human Rights Committee (HRC or Committee) to monitor States parties' compliance with the treaty. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9, 14, & 15, 999 U.N.T.S. 171 [hereinafter ICCPR]. This monitoring function involves three complementary procedures. First, the ICCPR establishes a periodic reporting process. *See id.* art. 40(1). Under the reporting process, the Committee receives periodic written reports from State parties explaining the measures that they have taken to protect the rights recognized in the treaties. *See id.* Government representatives present the reports to the Committee in public sessions, while Committee members question the representatives about issues raised in the reports. The Committee then publishes comments and recommendations on how to improve the protection of human rights in the State in question. Second, the Committee drafts "general comments" typically concerning the interpretation of the substantive rights and freedoms contained in the treaty each Committee oversees. *See, e.g.*, DOMINIC MCGOLDRICK, THE HUMAN RIGHTS COMMITTEE 95 (1991) ("The general comments serve rapidly to develop the jurisprudence of the HRC under the Covenant."). Third, and most important, the Committee receives written "communications" or "petitions" from individuals alleging that a State party has violated one or more rights protected by the ICCPR. *See* Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 301 (hereinafter First Optional Protocol); Torkel Opsahl, *The Human Rights Committee, in* THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston, ed. 1992). This procedure is optional, however, and many States party to the ICCPR do not recognize the competence of the Committee to receive individual petitions. *See* Human Rights Committee (visited Aug. 31, 2000) <http:// www1.umn.edu/humanrts/hrcommittee/hrc-page.html> [hereinafter Optional Protocol] (stating that 95 of the 144 parties to the ICCPR have ratified the First Optional Protocol). Under the First Optional Protocol to the ICCPR, the Committee performs a quasi-judicial function when reviewing individual petitions. If numerous admissibility requirements are satisfied, the Committee determines the merits of the complaint. *See* TOM ZWART, THE ADMISSIBILITY OF HUMAN RIGHTS PETITIONS (1994). Note that the Committee's decisions are not legally binding, although many commentators view them as persuasive authority and several States have implemented the Committee's interpretation of the treaty. *See* Helfer & Slaughter, *supra* note 5, at 344–45.

> and property of ordinary citizens. It may be emphasized that such statutes were enacted by a democratically elected Parliament, their duration was subject to periodic review, and not only could their validity be tested by judicial review, but also any action taken thereunder could be challenged before the High Courts and the Supreme Court. It may also be mentioned that safeguards had been built into such legislation to ensure that fundamental human rights were not violated. These safeguards have been further strengthened as a result of judicial review. It may be emphasized that liberty cannot be suspended even during emergency. Moreover, if individual and isolated aberrations have occurred, there are judicial remedies available, including procedures for apprehension and punishment for such perpetrators of human rights violations.[207]

In response to the Human Rights Committee's concerns about preventive detention laws, the Indian government maintained that such laws are not inconsistent with the ICCPR because they include sufficient safeguards to protect fundamental human rights.[208] In addition, the government emphasized that no "state of emergency" within the meaning of Article 4 of the ICCPR exists in India and that the scope of personal liberty protections recognized in the Constitution could not be restricted even if such an emergency were declared. In short, the Indian government asserted that preventive detention laws, as administered in India, fully comply with the procedural dictates of international human rights law:

> Liberty is one of the pillars on which the Indian democracy rests, as enshrined in the preamble to the Indian Constitution itself. As has been reported earlier, all the prescriptions of article 9 of the Covenant are enshrined in the Indian Constitution and are observed in India in accordance with the Constitution."[209]

Interestingly, India's written submission did not reference the government's reservation to the ICCPR, despite the Committee's emphasis on preventive detention laws and other security legislation in its evaluation of India's previous periodic report.[210]

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207. U.N. Human Rights Committee, *Third Periodic Reports of States' Parties due in 1992: India*, ¶¶ 49–50, CCPR/C/76/Add. 6 (1996).

208. The government outlined in great detail the procedural safeguards applicable in preventive detention cases. *See id.* at ¶ 55.

209. *Id.* at ¶ 74. The government's submission made clear that the NSA, specifically, complied with human rights standards. *Id.* at ¶ 55.

210. *See id.* However, in its oral presentation to the HRC in Geneva, after two days of vigorous questioning from Committee members, the Indian delegation flatly suggested that

The Indian case demonstrates that preventive detention is not defended only as a justifiable derogation from international human rights standards. Moreover, many governments attempt to legitimate preventive detention legislation on similar grounds.[211] As previously discussed, these legitimation strategies coupled with the constitutive features of preventive detention regimes resist simplistic classification and evaluation under international human rights law.

IV. PREVENTIVE DETENTION, PUBLIC ORDER, AND PERSONAL LIBERTY: LESSONS OF THE INDIAN CASE

Central to the idea of the rule of law is the principle that governments cannot arbitrarily deprive individuals of their personal liberty. First recognized in the *Magna Carta Libertatum* in 1215,[212] this basic human right has in no small measure defined the proper juridical relationship between citizens and their governments.[213] Indeed, this principle is now explicitly recognized in most national constitutions[214] and several

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the government's reservation to Article 9 placed preventive detention legislation beyond the competence of the Committee. *See* Author's Personal Notes, Human Rights Committee, India's Third Periodic Report to the Human Rights Committee, August 1997 at 3 (on file with author).

211. *See, e.g., Third Periodic Reports of State Parties due in 1991: Sri Lanka*, Human Rights Committee, U.N. Doc. CCPR/C/70/Add.6 (1994) (State Party Report); *Second Periodic Reports of State Parties due in 1996: Republic of Korea*, Human Rights Committee, U.N. Doc. CCPR/C/114/Add.1 (1998) (State Party Report); *Initial Periodic Reports pf State Parties due in 1992: Nepal*, Human Rights Committee, U.N. Doc. CCPR/C/74/Add.2 (1994) (State Party Report).

212. Chapter 39 of the Magna Carta sets forth that "[no] free man shall be taken, imprisoned, dismissed, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964). An early U.S. Supreme Court opinion traced the Due Process Clause of the Fifth Amendment to the U.S. Constitution to this passage. *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855).

213. *See, e.g.*, David Harris, *The Right to a Fair Trial in Criminal Proceedings as a Human Right*, 16 INT'L & COMP. L.Q. 352 (1967) ("The right to a fair trial has figured prominently in the efforts made in recent years to guarantee human rights at an international level.").

214. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections In National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235 (1993) (collecting provisions). In many countries, rules now considered part of constitutional criminal procedure may be found neither in constitutions nor judicial decisions, but in statutes. *See, e.g.*, Manfred Pieck, *The Accused's Privilege Against Self-Incrimination in the Civil Law*, 11 AM. J. COMP. L. 585, 585–86 (1962) (noting that in France, Germany, and the Netherlands, the right of an accused to remain silent is guaranteed in criminal procedure statutes).

international human rights treaties,[215] declarations,[216] and resolutions.[217] Despite this apparent consensus denouncing the arbitrary deprivation of liberty, patterns of actual state practice suggest widespread disagreement as to the meaning of "arbitrary."[218] Unlike the absolute rights

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215. *See* ICCPR, *supra* note 215, at 171; The African Charter on Human and Peoples' Rights, Arts. 3, 6, & 7, (1981), 21 I.L.M. 59 [hereinafter Banjul Charter]; American Convention on Human Rights, Arts. 7, 8, & 9, (1969), 9 I.L.M. 673 [hereinafter ACHR]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Arts. 5, 6, & 7, (1950), 312 U.N.T.S. 221, E.T.S. 5, *amended by* Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55, Protocol No. 8, E.T.S. 118 [hereinafter ECHR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984).

216. *See, e.g.*, Universal Declaration of Human Rights, Arts. 9–11, G.A. Res. 217, U.N. GAOR, 3d Sess., at 72, U.N. Doc. A/810 (1948) [hereinafter UDHR].

217. *See, e.g., Basic Principles on the Role of Lawyers, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990); *Guidelines on the Role of Prosecutors, Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, G.A. Res. 43/173, Annex, 43 U.N. GAOR 43d Sess., *revised by* Supp. No. 49, at 298, U.N. Doc. A/43/49 (1988); *Basic Principles on the Independence of the Judiciary, Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/ CONF.121/22/Rev.1 at 59 (1985); *Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF/611 (1957), Annex 1, E.S.C. Res. 663C, 24 U.N. ESCOR Supp. No. 1, at 11, U.N. Doc. E/3048, *amended by* E.S.C. Res. 2076, 62 U.N. ESCOR Supp. No. 1 at 35, U.N. Doc. E/5988 (1977).

218. The degree of convergence has been remarkable. *See, e.g.*, Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171 (1993); Craig M. Bradley, *The Convergence of the Continental and the Common Law Model of Criminal Procedure*, 7 CRIM. L.F. 471 (1996). Several important developments bolster Professor Bradley's position, including the International Criminal Court statute and China's decision to sign the ICCPR. *See* Rome Statute of the International Criminal Court, *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex II, U.N. Doc. A/ CONF.183/9 (1998); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000). On China's decision to sign the ICCPR, *see* United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Status at http://www.unhchr.ch (visited September 21, 2000) (China signed the ICCPR on May 10, 1998, but has not ratified the treaty). Moreover, national courts have begun to define explicitly domestic constitutional protection in light of international standards. *See* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 240 (1993) (observing that rise in both international and transnational crime has "broken through national sovereignty barriers," resulting in increased application of international standards of criminal justice in national courts). Complete transnational convergence in this area of law is, however, unlikely. *See, e.g.*, Diane Amman, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 INDIANA L.J. 809 (2000); Li-Ann Thio, *Implementing Human Rights in ASEAN Countries: "Promises to Keep and Miles to Go Before I Sleep"*, 2 YALE HUM. RTS. & DEV. L.J. 1 (1999). Interestingly, some circumstantial evidence suggests that there may be important areas of disagreement even within Europe. *See* Olivier Jacot-Guillarmod, Rights Related to Good Administration of Justice (Article 6) *in* The European System for the Protection of Human

recognized in various human rights regimes,[219] the right to personal liberty is not, of course, an unqualified right.[220] Personal liberty thus gives way to compelling community interests in certain circumstances, prompting international human rights treaties to recognize that such public policy considerations will define and delimit the scope of personal liberty in emergency situations. In this Part, I first summarize the notion of "states of exception" in international human rights law. I then analyze the utility of these concepts in evaluating preventive detention legislation.

A. *"States of Exception" in International Human Rights Law*

Because human rights treaties attempt to create a balance between the rights of the individual and the rights of a state, it is necessary "for improved human rights to be matched by accommodations in favor of the reasonable needs of the State to perform its public duties for the common good."[221] International human rights treaties, therefore, explicitly authorize states to restrict or suspend some rights, subject to several requirements, for an identified set of important public policy objec-

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Rights 381, 381 (R. St. J. MacDonald, et al., eds. 1993)(observing that more claims have been brought under the fair trial provisions of the European Convention than any other provision).

219. Many rights are designated as "non-derogable," and, as such, these rights may not be suspended even in times of grave national emergency. Article 4 of the ICCPR provides that in situations threatening the life of the nation, a Government may issue a formal declaration suspending most human rights as long as (1) the exigencies of the situation strictly require such a suspension, (2) the suspension does not conflict with the nation's other international obligations, and (3) the Government informs the United Nations Secretary-General immediately. *See* ICCPR, *supra* note 206, Art. 4(1). The only rights that are not subject to suspension in these circumstances are those specified as protected from derogation. *Id.* Art. 4(2). These rights include freedom from: discrimination based on race, color, sex, language, religion, or social origin; arbitrary killing; torture or other cruel, inhuman or degrading treatment or punishment; slavery; imprisonment for debt; and retroactive penalties. *Id.* In addition, emergencies cannot excuse the failure to recognize a person before the law. *Id.*

220. It is, of course, well understood that states may deprive individuals of their personal liberty in some circumstances. International human rights law, therefore, protects personal liberty through rules regulating the procedures and grounds upon which arrests are justified. In addition, the rights to personal liberty and fair trial are derogable in times of public emergency. *See* ICCPR, *supra* note 206, art. 4(2).

"Prolonged arbitrary detention," has, however, been classified as a jus cogens norm by several US-based sources. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987); *Ma v. Reno*, 208 F.3d. 815 (9th Cir. 2000); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Fernandez v. Wilkinson*, 505 F.Supp. 787, 795–98 (D.Kan. 1980), *aff'd* 654 F.2d 1382 (10th Cir. 1981).

221. Rosalyn Higgins, *Derogations Under Human Rights Treaties*, 48 BRIT. Y.B. INT'L L. 281, 281 (1976–77).

tives.[222] These "states of exception" strike a balance between universal human rights norms and national interests by specifying the circumstances in which derogations may be enacted lawfully.[223] This legal concept is central because states often justify rights restrictions by appeal to emergency conditions.[224] International human rights treaties recognize two sorts of exceptional regimes: "states of emergency" and general public policy "limitations." Derogation clauses permit the suspension of certain rights in times of war or public emergency. In contrast, limitation clauses permit rights restrictions for a number of important public policy reasons.

1. States of Emergency

International human rights treaties allow the suspension of some rights in public emergencies.[225] Article 4 of the ICCPR, for example, is representative in that it provides that in situations threatening the life of the nation, a government may issue a formal declaration suspending certain human rights guarantees as long as: (1) a state of emergency that threatens the life of the nation exists,[226] (2) the exigencies of the

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222. For useful surveys of this area of law, *see* SVENSSON-MCCARTHY, *supra* note 27; JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY (1994); JAIME ORAÁ, HUMAN RIGHTS IN STATES OF EMERGENCY IN INTERNATIONAL LAW (1992).

223. *See generally* SVENSSON-MCCARTHY, *supra* note 27 (providing an exhaustive examination of the relevant treaty provisions and case-law).

224. For example, several governments point to emergency conditions to justify practices otherwise inconsistent with the ICCPR. *See, e.g., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Human Rights Committee, 3d Sess., U.N. Doc. CCPR/C/1/Add.17 (1977) (discussing report filed by United Kingdom under Article 40 of Covenant); *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, U.N. Human Rights Committee, 4th Sess., U.N. Doc. CCPR/C/1/Add.25 (1978) (discussing report filed by Chile Under Article 40 of Covenant); *Summary Record of the 221st Meeting*, U.N. Human Rights Committee, 10th Sess., U.N. Doc. CCPR/C/1/SR.221 (1980) (discussing report filed by Columbia under Article 40 of Covenant); *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 58, U.N. Doc A/37/40 (1982) (discussing report filed by Uruguay under Article 40 of Covenant).

225. *See, e.g.*, ECHR, *supra* note 215, Art. 15(1); ICCPR, *supra* note 206, Art. 4(1); ACHR, *supra* note 215, Art. 27(1). The African Charter does not contain a provision allowing States to derogate from their obligations under the treaty in times of public emergency. *See* Banjul Charter, *supra* note 215.

226. *See* SVENSSON-MCCARTHY, *supra* note 27, at 195–281; FITZPATRICK, *supra* note 222, at 1–28; Fionnuala Ni Aolain, *The Emergence of Diversity: Differences in Human Rights Jurisprudence*, 19 FORDHAM INT'L L. J. 101, 103 (1995) (arguing that a "state of emergency refers to those exceptional circumstances resulting from temporary factors of a political nature, which, to varying degrees, involve extreme and imminent danger that threaten the organized existence of the state"); Fionnuala Ni Aolain, *The Fortification of an Emergency Regime*, 59 ALB. L. REV. 1353, 1367 (1996) (concluding that a state of emergency may be declared "only if an exceptional situation of crisis or emergency [exists]

situation "strictly require" such a suspension,[227] (3) the suspension does not conflict with the nation's other international obligations,[228] (4) the emergency measures are applied in a non-discriminatory fashion,[229] and (5) the government notifies the United Nations Secretary-General immediately.[230] Certain rights are not subject to suspension even in such situations; these are specified in Article 4 as protected from derogation.[231] The ICCPR specifically identifies several non-derogable obligations including the rights to be free from arbitrary killing;[232] torture or other cruel, inhuman or degrading treatment or punishment;[233] and slavery.[234] Although the rights to fair trial and personal liberty are

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which affects the whole population and constitutes a threat to the organized life of the community of which the state is composed . . .") [hereinafter Ni Aolain, *Fortification of an Emergency Regime*]; Lawless Case (Ireland), 1961 Y.B. EUR. CONV. ON H.R. (Eur. Comm'n on H.R.) 438, 472, 474 (holding that the ECHR's derogation clauses may be invoked only in "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed"). The concept of emergency does include circumstances other than armed conflict. For example, national disasters and extreme economic crises may constitute "public emergencies." *See* Higgins, *supra* note 221, at 287; R. St. J. Macdonald, *Derogations under Article 15 of the European Convention on Human Rights*, 36 COLUM. J. TRANSNAT'L L. 225, 225 (1997). Furthermore, the emergency must be temporary, imminent, and of such a character that it threatens the nation as a whole. *See* SVENSSON-MCCARTHY, *supra* note 27; ORAÁ, *supra* note 222, at 11–33.

227. This requirement incorporates the principle of proportionality into derogation regimes. This principle requires that the restrictive measures must be proportional in duration, severity, and scope. Implicit in this requirement is that ordinary measures must be inadequate; and the emergency measures must assist in the management of the crisis. *See, e.g.*, ORAÁ, *supra* note 222, at 143; Macdonald, *supra* note 226, at 233–35.

228. *See* SVENSSON-MCCARTHY, *supra* note 27, at 624–39.

229. *See id.* at 640–682.

230. *See id.* at 683–718; ICCPR, *supra* note 206, art. 4(3); ECHR, *supra* note 215, art. 15(3); ACHR, *supra* note 215, art. 27(3). The Human Rights Committee has emphasized the importance of notification for effective international supervision of derogations in states of emergency. *See Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, Annex VII, at 110, U.N. Doc A/36/40 (1981).

231. Each convention containing a derogation clause provides an explicit list of non-derogable provisions. *See* ICCPR, *supra* note 206, Art. 4(2) (prohibiting derogation from Articles 6 (right to life), 7 (prohibition on torture), 8 (prohibition of slavery and servitude), 11 (imprisonment for failure to fulfill contractual obligation), 15 (prohibition on retrospective criminal offence), 16 (protection and guarantee of legal personality), and 18 (freedom of thought, conscience and religion); ECHR, *supra* note 215, Art. 15(2), (prohibiting derogation from Articles 2 (right to life), 3 (freedom from torture), 4 (freedom from slavery), and 7 (retrospective effect of penal legislation)); ACHR, *supra* note 215, Art. 27, O.A.S.T.S. No. 36, at 9, 9 I.L.M. at 683 (prohibiting suspension of Articles 3 (right to juridical personality), 4 (right to life), 5 (right to humane treatment), 6 (freedom from slavery), 9 (freedom from ex-post facto laws), 12 (freedom of conscience and religion), 17 (right of the family), 18 (right to name), 19 (right of child), 20 (right to nationality), and 23 (right to participate in government).

232. *See* ICCPR, *supra* note 206, art. 6.

233. *Id.* at Art. 7.

234. *Id.* at Art. 8.

derogable provisions,[235] the Human Rights Committee has suggested that many restrictions of these rights are inappropriate even in times of emergency.[236] The Committee, following the lead of the Inter-American Court of Human Rights,[237] strongly suggested that the right to habeas corpus (or *amparo*) is non-derogable.[238]

2. General Limitations

International human rights treaties also authorize states to restrict certain rights even in the absence of a formal state of emergency. Many provisions in these instruments incorporate language that permits governments to limit, on a permanent basis, the scope of rights protection to further certain specified public values.[239] These "limitations clauses" developed out of Article 29(2) of the Universal Declaration of Human Rights, which provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order, and the general welfare in a democratic society.[240]

Although this provision is clearly the inspiration for the limitations clauses in subsequent human rights treaties, the Universal Declaration remains the only instrument that concentrates the permissible limitations on rights in a single provision. Again the ICCPR serves as a useful

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235. *See supra* note 223 (describing various attempts to categorize the right to trial and the right to habeas corpus as non-derogable rights).

236. Although the Human Rights Committee recommended against adopting an Optional Protocol to the ICCPR re-categorizing Articles 9 and 14 as non-derogable, the Committee noted that states should not derogate from several of the protections included in these articles. *See Annual Report of the Human Rights Committee*, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, ¶ 2 (1994).

237. *See* I/A Court H.R., *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-13/87 of 1987, Series A No.8 at 33. *See also* I/A Court H.R., *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A No. 9 at 40. The Court unanimously held that " 'essential' judicial guarantees which are not subject to derogation, according to Article 27(2) of the Convention, include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1))." *Id.* at 40.

238. Annual Report of the Human Rights Committee, U.N. G.A.O.R., 49th Sess., Supp. No. 40, at 120, U.N. Doc. A/49/40, ¶ 2 (1994).

239. *See* Alexander Charles Kiss, *Permissible Limitations on Rights in the International Bill of Rights: The Covenant on Civil and Political Rights*, *in* THE INTERNATIONAL BILL OF RIGHTS 290 (Louis Henkin ed., 1981).

240. UDHR, *supra* note 216, Art. 29(2).

model.[241] In the ICCPR limitations clauses are "scattered" and pertain only to select rights.[242] These clauses specify the permissible grounds for limitations including: national security,[243] public safety,[244] public order (ordre public),[245] public health,[246] and public morals.[247] These provisions also typically require that limitations be "provided by law"[248] and be "necessary" or "necessary in a democratic society."[249]

Derogation regimes and limitations clauses do *accommodate*, to some extent, the interests of states within a general rights framework. The concepts delimiting the scope of permissible limitations, for example, are "difficult to define and imply a measure of relativity in that they may be understood differently in different countries, in different circumstances, at different times. All of them relate to a particular conception of the interests of society."[250] The concepts may also offer a *principled* means of accommodating national interests in that interna-

241. The limitations clauses of the various human rights treaties are remarkably similar. For a comprehensive legal analysis of the differences, *see* Bert B. Lockwood, et al., *Working Paper for the Committee on Limitation Provisions*, 5 HUM. RTS. Q. 35 (1985) (surveying the limitations clauses in the ICCPR, ECHR, and ACHR).

242. *See* Kiss, *supra* note 239, at 291 ("The fact that there is no general limitation clause in the International Covenant on Civil and Political Rights has an important consequence: limitations are permitted only where a specific limitation clause is provided and only to the extent it permits.").

243. *See* ICCPR, *supra* note 206, Art. 12(3); *id.* Art. 14(1); *id.* Art. 19(3); *id.* Art. 21; *id.* Art. 22(2).

244. *See* ICCPR, *supra* note 206, Art. 18(3); *id.* Art. 21; *id.* Art. 22(2).

245. *See* ICCPR, *supra* note 206, Art. 12(3); *id.* Art. 14(1); *id.* Art. 18(3); *id.* Art. 19(3); *id.* Art. 21; *id.* Art. 22(2).

246. *See* ICCPR, *supra* note 206, Art. 12(3); *id.* Art. 18(3); *id.* Art. 19(3); *id.* Art. 21; *id.* Art. 22(2).

247. *See* ICCPR, *supra* note 206, Art. 12(3); *id.* Art. 14(1); *id.* Art. 18(3); *id.* Art. 19(3); *id.* Art. 21; *id.* Art. 22(2).

248. In the ICCPR, the limitations clauses provide that restrictions must be "provided by law," "prescribed by law," "in accordance with law," or "in conformity with law." *See* ICCPR, *supra* note 206, Art. 12(3); *id.* Art. 18(3); *id.* Art. 19(3); *id.* Art. 21; *id.* Art. 22(2). *See also* Kiss, *supra* note 239, at 304 ("In every case the objective is to avoid arbitrary restrictions on rights by requiring that the limitation be established by general rule."); Oliver Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 HARV. J. INT'L L. 503, 556–57 (1976).

249. One of these formulations appears in the ICCPR as a limitation on the following rights: the right to liberty of movement and freedom to choose residence, *see* ICCPR, *supra* note 206, Art. 12; the right to freedom of thought, conscience, and religion, *see id.* Art. 18; the freedom to hold opinions without interference, *see id.* Art. 19; the right of peaceable assembly, *see id.* Art. 21; and the right of freedom of association, *see id.* art. 22. *See, e.g., id.* Art. 18(3), ("Freedom to manifest one's religion or beliefs may be subject to only such limitations as are ... *necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others.*" (emphasis added)); *id.* Art. 21.

250. Kiss, *supra* note 239, at 295.

tional human rights tribunals have not condoned unreasonable invocations of these "states of exception."[251]

These accommodation principles, however, do not offer any meaningful contribution to debates over the substance of international human rights norms. The case of preventive detention in India illustrates that the disagreements at issue are often more fundamental. Both "states of exception" permit national governments to restrict or suspend, in certain specified circumstances, *otherwise valid rights protections*.[252] In other words, interpreting and defining these "states of exception" become relevant only if there is agreement on the invalidity of the underlying contested practice absent some legally recognized excuse.

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251. Several early decisions of the Human Rights Committee suggest that it shared the view that States enjoy great latitude in balancing competing interests in domestic society. *See, e.g., Hertzberg v. Finland*, No. 14/61, U.N. GAOR, Hum. Rts. Comm., 37th Sess., Supp. No. 40, Annex XIV, at 161, 165, U.N. Doc. A/37/40 (1982) ("The Committee finds that it cannot question the decision of the responsible organs of the Finnish Broadcasting Corporation that radio and TV are not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behavior."). As its case law has developed, however, the Committee has become increasingly willing to scrutinize closely the decisions of states' parties. *See, e.g., Sohn v. Republic of Korea*, No. 518/1992, Hum. Rts. Comm., 54th Sess., at 7, U.N. Doc. CCPR/C/54/D/518/1992 (1995) ("While the State party has stated that the restrictions were justified in order to protect national security and public order... the Committee must still determine whether the measures taken against the author were necessary for the purpose stated."); *Mukong v. Cameroon*, No. 458/1991, U.N. GAOR, Hum. Rts. Comm., 49th Sess., Supp. No. 40, Annex IX, at 171, 181, U.N. Doc. A/49/40 (1994) (stating that the arrest and detention of a political opponent of the ruling party was not "necessary for the safeguard of national security and/or public order" and thus violated the right to free expression); *Ballantyne v. Canada*, No. 359/1989, U.N. GAOR, Hum. Rts. Comm., 48th Sess., Supp. No. 40, Annex XII, at 91, 103, U.N. Doc. A/48/40 (1993) ("The Committee believes that it is not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English. This protection may be achieved in other ways that do not preclude the freedom of expression...."). Nevertheless the Committee has not produced a robust jurisprudence interpreting the limitations clauses. *See* Svennson-McCarthy, *supra* note 27, at 63 ("The work of the Human Rights Committee is disappointing in so far as it concerns the interpretation of the limitation provisions of the Covenant . . . ").

252. This is clearly true for derogation regimes that permit the suspension of rights in states of emergency. It is also true for general limitations clauses insofar as these clauses do not authorize the redefinition of the rights in question. That is, the limitations clauses do not alter the substantive scope of the rights in question. Anna-Lena Svensson-McCarthy points out that:

> The purpose of the ordinary limitations is to provide some boundaries to the exercise of individual rights and freedoms in favor of the rights and freedoms of others or some other specific public or general interest. Whilst limitations of this kind can be in force on a permanent basis, they are still not, in principle, allowed to encroach upon the *substance, per se*, of the rights to which they are linked: they are, in other words, merely aimed at regulating the exercise thereof so as to avoid excesses or abuses that would impede others effectively to enjoy the same rights.

Svensson-McCarthy, *supra* note 27, at 50.

The "states of exception" dimension of accommodation does not, therefore, provide a conceptual vocabulary for mediating substantive disagreements.

B. *Preventive Detention, Personal Liberty, and "States of Exception"*

International human rights treaties accord national governments broad powers to suspend rights protections in certain exceptional circumstances. Many governments arguably abuse this prerogative through the routine invocation of "special powers" or "national security" legislation providing for administrative detention with limited, if any, judicial review.[253] Throughout the world, the notion of a "permanent public order crisis" has justified the use of such special powers not only in states of emergency but as part of the ordinary criminal law.[254] In-

253. "Administrative detention" is a broad concept encompassing many specific practices including preventive detention. "Preventive detention" must be distinguished form "pre-trial detention." Pre-trial detention refers to the arrest and detention of a person alleged to have committed an offense, pending a proper criminal trial for that offense. *See generally* PREVENTIVE DETENTION: A COMPARATIVE AND INTERNATIONAL LAW PERSPECTIVE (Stanislaw Frankowski & Dinah Shelton eds. 1992) (providing a useful comparative study of pre-trial detention practices while illustrating the terminological confusion); Organization for Security and Co-operation in Europe, *Pre-Trial Detention in the OSCE* (1999) (Background Paper for ODIHR Review Conference), available at <www.osce.org/odihr> (last visited Sept. 19, 2000).

254. Many governments have formally enacted legislation providing for preventive detention including *India*, *see supra* Part II; *China*, State Security Law of the People's Republic of China (1993); *Syria*, Emergency Law; *Egypt*, Emergency Law (Law No. 162 of 1958); *Bangladesh*, BANGL. CONST., Pt. IXA, Art. 141A; *Kenya*, KENYA CONST. § 83, Preservation of Public Security Act, § 2; *Malaysia*, MALAYSIA CONST., Art. 150, Internal Security Act (Act No. 18 of 1960), Internal Security (Amendment) Act (No. A739 of 1989), Emergency (Public Order & Prevention of Crime) Ordinance 1969; *Singapore*, Internal Security Act of 1965; *Malawi*, Preservation of Public Security (Amendment) Act, No. 3 (1965); *Nepal*, Public Security Act of 1991; *Pakistan*, Security of Pakistan Act 1952, Maintenance of Public Order Ordinance 1960, Prevention of Anti-National Activities Act of 1974; *Sri Lanka*, Prevention of Terrorism (Temporary Provisions) Act 1979; *Israel*, Emergency Powers (Detention) Law of 1979; *Sudan*, National Security Act of 1995; Angola, National Security Law; *Tanzania*, Preventive Detention Act 1962, Deportation Ordinance 1921, Expulsion of Undesirable Persons Ordinance 1930, Area Commissioners Act 1962, Regions and Regional Commissioners Act 1962; *South Korea*: National Security Act (Law No. 4373 of 1991); *Trinidad & Tobago*, CONST. OF TRIN. & TOBAGO § 6; *Burma (Myanmar)*, State Protection Law (Law 11/91 of 1991) (providing for detention without charge or trial for up to five years of persons suspected of "wishing to molest [or] annoy the state"); *Swaziland*, Detention Order 1978; and *Zambia*, Preservation of Public Security Act and Preservation of Public Security (Amendment) Regulations 1964. In addition, both *South Africa*, Internal Security Act 1982, Public Safety Act 1953, and the *United Kingdom*, Prevention of Terrorism (Temporary Provisions) Act 1974, utilized forms of the practice into the 1980s. Of course, one of the most notorious events in 20th-century *United States* history was the preventive detention (or "internment") of Japanese Americans in World War II on "national security"

deed, many post-colonial constitutions specifically provided for "preventive detention"[255] despite the colonial legacy of draconian laws of this sort.[256] Preventive detention, although seemingly irreconcilable with international human rights law, is widely practiced as a formal component of many nations' order-maintenance strategies.

Critics of these laws often assert that "administrative detention" or "preventive detention," as defined in these laws, is inconsistent with well-settled international human rights standards. International human rights scholars and activists typically characterize these practices as "de facto states of emergency" that fail to comply with established international standards regulating the declaration and administration of emergency regimes.[257] In short, these critics analyze preventive detention as the product of illegitimate, undeclared states of emergency; the resultant rights limitations are therefore analyzed as impermissible derogations from established international human rights standards.

These critics are certainly right to point out that the international rules pertaining to "states of emergency" provide the exclusive basis for derogating from international legal obligations. Furthermore, very few, if any, of the states invoking emergency or exceptional conditions to justify preventive detention have satisfied the substantive and procedural rules regulating derogations.[258] On the surface, this analysis of preventive detention laws is obviously sound. As I have discussed in some detail, the actual legislative and justificatory practices utilized in India demonstrate, however, that the standard account is lacking.

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grounds. *See Korematsu v. United States*, 323 U.S. 214 (1944); PETER IRONS, JUSTICE AT WAR (1983).

255. *See supra* note 253 (distinguishing the concepts of "administrative detention" in general and "preventive detention" as analyzed in this Article).

256. *See infra* Section II.A (outlining this history).

257. *See, e.g.*, IMTIAZ OMAR, RIGHTS, EMERGENCIES, AND JUDICIAL REVIEW (1995); FITZPATRICK, *supra* note 222; INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY AND THEIR IMPACT ON HUMAN RIGHTS (1983); STEPHANOS STAVROS, RIGHTS OF THE ACCUSED UNDER ARTICLE 5 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (1995); Stephanos Stavros, *The Right to a Fair Trial in Emergency Situations*, 41 INT'L & COMP. L.Q. 343 (1992); Chris Maina Peter, *Incarcerating the Innocent: Preventive Detention in Tanzania*, 19 HUM RTS. Q. 113 (1997); Alan M. Dershowitz, *Preventive Detention of Citizens During a National Emergency: A Comparison between Israel and the United States*, 1 ISR. Y.B. ON HUM. RTS. 295 (1971); CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND THE SUPREME COURTS IN COMPARATIVE PERSPECTIVE 74–79 (1998); Amnesty International, *India's Submission to the U.N. Human Rights Committee Concerning the Application of the International Covenant on Civil and Political Rights* (1997), *available at* <www.amnestyinternational.org/library/india > (last visited Sept. 16, 2000).

258. *See supra* Section IV.A. (specifying these conditions). The relevant treaty provisions make clear the threshold requirements to derogate from rights protections. *See* ECHR, *supra* note 215, Art. 15(1); ICCPR, *supra* note 206, Art. 4(1); ACHR, *supra* note 215, Art. 27(1).

The "special connection between states of emergency and the practice of administrative detention"[259] gives rise to three kinds of problems. First, the invocation of emergency conditions is often little more than a rhetorical strategy aimed at insulating domestic practices from international scrutiny; that is, states abuse the international legal concepts of "emergency," "national security," and "public order" in an effort to legitimize widespread arbitrary detention.[260] Second, even in bona fide states of emergency, states often institute powers of administrative detention without establishing any reasonable connection between these extraordinary powers and the exigencies of the emergency. Third, the suspension of due process and fair trial rights often precludes individuals from enforcing non-derogable rights, while creating institutional conditions that contribute to violations of these non-derogable rights. These interconnected problems present both practical and conceptual difficulties for the regulation of states of emergency. Indeed, as one commentator noted, "one of the most serious defects in existing international standards governing states of emergency is the absence of precise and agreed limits on the derogability of the right to personal liberty."[261] In an effort to close these regulatory gaps, sustained reform efforts have focused on changing the rules regulating emergency regimes. For example, experts and activists advocate adding the right to a fair trial to the list of non-derogable rights in the ICCPR.[262] In addition, many suggest that international supervisory institutions should exercise independent review of the necessity and reasonableness of rights-restricting measures

259. FITZPATRICK, *supra* note 222, at 38.

260. *See id.*; Adamantia Pollis, *Cultural Relativism Revisited: Through a State Prism*, 18 HUM. RTS. Q. 316 (1996); John Quigley, *Israel's Forty-Five Year Emergency: Are There Time Limits to Derogation From Human Rights Obligations?*, 15 MICH. J. INT'L L. 491, 492–93 (1994).

261. FITZPATRICK, *supra* note 27, at 38.

262. *See* ICCPR, *supra* note 206, art. 4(2); *see also The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, reprinted in* 7 HUM. RTS. Q. 3, 12–13 (1985). Proposed drafts of Article 4 of the Covenant on Civil and Political Rights submitted by French and U.S. representatives would have made the prohibition on arbitrary arrest, the right to prompt notice of charges, and the right to fair and prompt trial non-derogable. Both proposals, however, would have made derogable the right to take prompt judicial proceedings to challenge the lawfulness of detention. U.N. Doc. E/CN.4/324 (1949) (French draft); U.N. Doc. E/CN.4/325 (1949) (U.S. Draft). The representative of the U.K. argued that the prohibition against arbitrary arrest and the right to a fair trial might be impossible to respect during wartime or other grave emergency. U.N. Doc. E/CN.4/SR.126, at 4–5 (1949). The U.K. view prevailed when the list of non-derogable rights was agreed to provisionally in 1950. *See* Joan Hartman, *Working Paper for the Committee of Experts on the Article 4 Derogation Provision*, 7 HUM. RTS. Q. 89, 115–18 (1985).

taken in states of emergency,[263] as well as the existence of conditions justifying the declaration of an emergency in the first place.[264]

Although such reforms would unquestionably advance the cause of human rights, this mode of analyzing preventive detention fails to address sufficiently the more fundamental legal question: Does such detention conform with prevailing international human rights standards? The standard critiques build upon the unexamined assumption that all such detention laws are inconsistent with international norms. On the surface, this seems a reasonable assumption in that detention without trial or charge would, by definition, abrogate fair trial guarantees.[265] All forms of extra-judicial detention would also seemingly constitute "arbitrary detention" in violation of the right to liberty of person.[266] Furthermore, governments often seemingly justify these laws not by asserting their legality but rather by emphasizing their necessity for public order or national security.[267]

The Indian case, therefore, suggests that these assessments require some qualification. First, the legal status of administrative detention in general and preventive detention in particular is unclear insofar as international norms do not explicitly prohibit the practice.[268] Second,

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263. *See* SVENSSON-MCCARTHY, *supra* note 27, at 445–49; FITZPATRICK, *supra* note 27, at 38–40.

264. *See* SVENSSON-MCCARTHY, *supra* note 27, at 445–49; FITZPATRICK, *supra* note 27, at 38–40.

265. *See, e.g.*, ICCPR, *supra* note 206, art. 14 (2)–(7) (guaranteeing right to fair trial with numerous specific procedural rights including the right to counsel; the right to confront adverse witnesses; and the right to be presumed innocent).

266. *See, e.g.*, ICCPR, *supra* note 206, art. 9 (1) (providing that no person shall be subject to arbitrary detention).

267. *See supra* Section III.D.3 (describing and analyzing India's statements to the U.N. Human Rights Committee); *see also supra* note 211 (collecting similar statements made on behalf of other governments).

268. *See* FITZPATRICK, *supra* note 27, at 38 ("International norms are . . . ambiguous on the question whether administrative detention is ever permissible in a non-emergency context."). This ambiguity results from the absence of clear legal prohibitions coupled with widespread state practice. United Nations Special Rapporteur Louis Joinet notes the underdevelopment of the law in this area:

> Contrary to what one might suppose, administrative detention is not banned on principle under international rules. . . . Virtually all countries, including those which regard themselves as the most democratic, provide in their legislation for detention where the power of decisions lies with the administrative authority alone. . . . Governments might at the very least be expected to use it only in truly exceptional cases, while judicial detention remained the rule. In all too many countries, on the contrary, the exception is tending to become the rule, not only when states of emergency are declared but also under 'internal security' or 'state security' laws which remain permanently in force.

Report on the Practice of Administrative Detention, Submitted by Special Rapporteur Louis Joinet to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Mi-

proponents of preventive detention laws may employ an equally plausible surface-level defense of the practice's legality. On this view, preventive detention laws do not require trials per se because these laws are not punitive in nature and do not require the determination of a criminal charge. Furthermore, preventive detention laws are not inherently arbitrary, according to this view, in that they provide for specific procedural safeguards including judicial or quasi-judicial confirmation of the detention order, a fixed maximum period of detention,[269] and dismissal of unlawful detention orders on habeas corpus review.[270] Finally, authoritative international institutions have repeatedly refused to condemn the practice in unequivocal terms.[271]

The unique structural features of preventive detention complicate evaluation under international human rights standards. The morass of procedural irregularities[272] and legitimation strategies[273] accompanying these laws reinforce the ambiguity that typifies current debates about the legality of the practice. Moreover, the defense of these laws enjoys a surface plausibility. Although it is beyond the scope of my argument to assess the validity of these claims, I do maintain that this surface plausibility makes preventive detention remarkably resistant to standard applications of human rights law; and that this institutional resilience reveals a structural weakness in international human rights law (and international law generally): the lack of coherent principles of accommodation.

Sound evaluation of preventive detention under international human rights law turns on the plausibility of three related claims. Proponents of preventive detention maintain that: (1) detainees are not entitled to full trials or hearings because the validity of preventive detention orders does not turn on the proper determination of a criminal charge; (2) the procedural safeguards in these laws ensure that the issuance and execution of preventive detention orders is not arbitrary within the meaning of international human rights standards; and (3) the nature of order main-

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norities, U.N. Doc. E/CN.4/Sub.2/1990/29, at ¶¶ 17, 19 (1990) [hereinafter Joinet Report]; *see also* FITZPATRICK, *supra* note 27, at 39 (arguing that the "lack of clarity in treaty standards has contributed to a laxness of practice.").

269. See INDIA CONST., Art. 22(7)(a) (requiring Parliament to specify the maximum period of detention); NSA § 13 (establishing one year as the maximum period of detention).

270. *See supra* Section II.C.2. (discussing the scope of judicial review).

271. *See, e.g.*, Human Rights Committee, General Comment 8, Article 9 (Sixteenth session, 1982), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994).

272. *See supra* Part II.C.

273. *See supra* Part III.

tenance problems in the developing world necessitates that individual liberties be defined in light of these socio-political realties.[274]

As previously discussed, international human rights law misunderstands claim (3); and virtually ignores claims (1) and (2). The first claim, if established, would insulate preventive detention from challenge under the "fair trial" rights recognized in international human rights law. The second would establish that preventive detention is a reasonable restriction in the right to personal liberty. Finally, the third claim, I argue, must be understood as a claim concerning the proper scope of these rights; and, if unchallenged, this claim represents a fundamental challenge to civil and political rights.

As discussed in Part I, the further legalization of international human rights institutions will substantially increase the salience of contradictory impulses in world society; that is, the tension between the universal and the particular. The question is how to pursue universal justice while maintaining domestic authority to solve concrete problems in ways that are sensitive to local conditions and priorities.[275] Interior to the pursuit of universal justice is the recognition, negotiation, and accommodation of national interests. The case of preventive detention in India illustrates the possibilities and limitations of three "modalities of accommodation": (1) normative imprecision; (2) "states of emergency"; and (3) general limitations. Moreover, the practice of preventive detention demonstrates the inability of these modalities to arbitrate substantive disagreements; and the tendency to analyze controversial practices in terms that implicitly presume the illegality of these practices.

The Indian case, therefore, suggests two important refinements to the prevailing modes of analysis. First, international institutions should directly engage the justificatory practices employed by states to legitimate controversial practices. I point out, for example, that preventive

274. These defenses of preventive detention would not, in my view, withstand sustained, serious scrutiny. Human rights lawyers must, however, assess preventive detention laws in light of the dynamic justificatory practices employed by proponents of the practice. These justifications do not acknowledge the illegality of preventive detention. Indeed, the case of India demonstrates that proponents of the practice assert that the procedural rights regimes established in these laws comport with international human rights standards. The Indian government does also emphasize the socio-political conditions that justify utilizing preventive detention, but these conditions are invoked to explain a sub-optimal, although permissible, policy choice. The central question is whether international human right law offers useful legal devices for evaluating this controversial practice.

275. I do not mean to suggest that the principles of "universal justice" and "national sovereignty" are necessarily in tension. Indeed, national interests are often defined in terms of international norms. For a thoughtful discussion of this theme, *see* Ryan Goodman, *Norms and National Security: The WTO as a Catalyst for Inquiry* CHICAGO J. INT'L L. (forthcoming 2001).

detention is not defended only as a justifiable derogation from human rights norms. Detailed exposition of the institutional and juridical matrix supporting preventive detention laws reveals a complex array of legitimation strategies that resists facile evaluation under international human rights standards. Because critics have not grappled with the dynamic justificatory practices employed to legitimize these "national security laws," they have failed to articulate meaningful limits on the legitimate exercise of special powers in exceptional circumstances. Second, international human rights law lacks effective "accommodation principles" which would generate a jurisprudence of bounded national discretion.

CONCLUSION

Preventive detention in general, and the Indian case in particular, reveals a fundamental weakness in international human rights law. Human rights regimes have not as yet articulated principles that can accommodate the structural tension between the ideal of an international legal order and the demands of effective domestic governance. This deficiency often means that evaluation of controversial practices devolves into either bare assertions of sovereignty by states or crude assertions of the primacy of international law by international institutions and lawyers. Finding a "third way" will require fine-grained comparative legal work that takes seriously both the proffered rationales for state practices and the deficiencies of international standards.

Ambiguity pervades the applicable primary and "interstitial" norms in this case study. Given the nature of the rights in question, some ambiguity may be inevitable; and indeed these norms must be understood in light of the socio-political context in which they are applied.[276] Nevertheless, "a human rights regime that is indeed working—and not a paper idea—will be normally and mainly concerned not so much with the outrageous, but with highly technical questions, e.g., concerning . . . police powers, the minutiae of due process of law, and the like."[277] Human rights institutions must, however, concretize these norms in light of the dynamic justificatory practices employed by proponents of contro-

276. *See, e.g.*, Sanford Levinson, *Transitions*, 108 YALE L.J. 2215, 2232 (1999) ("[D]ue process is indeed a highly flexible concept, as is 'arbitrariness.' Definitions are subject to all sorts of contextual considerations, and any analysis that ignores this flexibility will be profoundly misleading.").

277. Sir Robert Jennings, *Human Rights and Domestic Law and Courts*, *in* PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 295, 298 (Franz Matscher & Herbert Petzold eds., 1988).

versial practices as well as their specific institutional features. These justifications often do not acknowledge the illegality of these practices. Indeed, the case of India demonstrates that proponents of preventive detention assert that the procedural rights regimes established in these laws comport with international human rights standards. Such fundamental disagreements cannot be dismissed as appeals to "emergency conditions" or some conception of cultural or material relativism.[278] To the contrary, the practice of preventive detention should be understood as a challenge to the substance of international human rights law.[279]

The successful articulation of a truly global human rights regime will require that such challenges be met directly, so that competing conceptions can be compared and assessed. Indeed, the very process of exchange might well serve to construct more durable conceptions of internationalism.[280] Philosopher Jeremy Waldron summarizes the deficiencies of the prevailing approach:

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278. Jeremy Waldron makes a similar point in a recent commentary:

> If we are going to strut around the world announcing, and where possible enforcing, universal human rights claims, the only thing that can possibly entitle us to do that is that we have carefully considered everything that might be relevant to the moral and political assessment of such claims. . . . The price of legitimizing our universalist moral posturing is that we make a good faith attempt to address whatever reservations, doubts, and objections there are about our positions out there, in the world, no matter what society or culture or religious tradition they come from. Apart from that discipline and that responsibility, we have no more right to be confident in the universal validity of our intuitions than our opponents in another culture have to be confident in theirs. And that is a difficult assignment, because such doubts and reservations and objections will often challenge not just the content of our conclusions, but our whole way of thinking about the issues that we address in our human rights concerns.

Jeremy Waldron, *How to Argue for a Universal Claim*, 30 COLUM. HUM. RTS. L. REV. 305, 313 (1999). *See also* JEREMY WALDRON, LAW AND DISAGREEMENT (1999); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT at viii (1996) ("When legal reasoning operates at its best, participants in law are attuned to the fact that people legitimately disagree on basic principles. They try to resolve cases without taking sides on large-scale social controversies. They produce *incompletely theorized agreements on particular outcomes*, a central feature of legal reasoning . . ."); Cass R. Sunstein, *Problems with Rules*, 83 U.C.L.A. L. REV. 953 (1995); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

279. Waldron, *supra* note 278, at 313 ("Precisely because relativism is for the most part silly and misconceived as a philosophical position, any resistance to our universalization of human rights doctrine should be read charitably as a direct challenge to the substance of the doctrine. . ., it should not be taken as a resistance to universalization as such. It has to be addressed as substance.").

280. Thomas Risse, *"Let's Argue!": Communicative Action in World Politics*, 54 INT'L. ORG. 1 (2000); Jeffrey T. Checkel, *Building New Identities? Debating Fundamental Rights in European Institutions*, ARENA Working Paper No. 00/12 (2000), *available at*

> [H]uman rights standards can be arrived at and ought to be upheld everywhere in the world. But precisely because relativism in general is false, we are not entitled to assume the right to enforce whatever tentative conclusions happen to have emerged from our particular inbred set of debates about free speech, the division of church and state, or individual autonomy. Until those debates are enriched, in a cosmopolitan way, with an awareness of what is to be said about them and around them and against them, from all the variety of cultural and religious and ethical perspectives that there are in the world, they remain parochial; and we should stand accused of the stupidest, most arrogant form of moral imperialism if we were to swagger around trying to impose our way of life without sensitively confronting the basis of other people's and other cultures' resistance to it. Certainly if we try to dismiss all such resistance as relativism, we will end up consigning human rights discourse to a rather unpleasant, obtuse, and morally impervious relativism of its own.[281]

Unfortunately, the tendency is to characterize controversial practices as "exceptional measures" that could only be justified by appeals to necessity. This understanding of controversial practices obscures important cleavages in international society and, as a consequence, precludes the kind of constructive dialogue that is essential to fashioning sustainable, precise definitions of fundamental rights. Moreover, by masking fundamental disagreements, it precludes the fashioning of more effective principles of accommodation that might satisfactorily define the relationship between international and domestic law.[282]

What is needed instead is "a paradigm of understanding and appreciating the values inherent in particular traditions . . . while stretching our interpretive framework to more universal horizons. No intellectual task is more basic to the work of human rights."[283]

<www.sv.uio.no/arena/publications> (last visited September 27, 2000) (arguing that patterns of interaction and debate over the content of human rights in European institutions alters the identities of various actors).

281. Waldron, *supra* note 278, at 314.

282. *See* Alvarez, *supra* note 6, at 393.

283. Paolo G. Carozza, *Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights*, 73 NOTRE DAME L. REV. 1217, 1237 (1998).