Lawfare and the Indian Legal System

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Gautam Bhatia*

Lawfare is commonly understood to refer to the use (or abuse)—that is, the instrumentalization—of law in order to achieve distinctly political goals. The term is perhaps most famous in the context of Latin American legal politics, where "lawfare" has been deployed to incarcerate or otherwise delegitimize political leaders, often on charges of corruption.[1] The flexibility of the term "lawfare" means that it can take different forms in different jurisdictions, with questions often arising about the blurred lines that determine where legitimate law enforcement action ends, and lawfare begins.

Administrative Detention

Without getting into specific controversies, there are two distinct ways in which the Indian legal system *structurally* facilitates—or at least, does not create enough safeguards to withstand—the practice of lawfare. The first is the law's tolerance of lengthy pre-trial detention. The Indian Constitution is unique in that it explicitly authorizes administrative detention, in so many words.[2] The use of administrative detention provisions for the purpose of lawfare goes back to the founding of the Indian republic: the very first case before the Supreme Court of India involved the administrative detention of a popular communist leader, who had been detained both by the colonial regime, and—upon Independence—under the administrative detention law of the new government.[3] The Supreme Court upheld the detention, and adopted a light-touch judicial review standard; this has been the Court's position since then, which—in turn—has enabled governments at the level of both the center and the several Indian states, to deploy administrative detention in order to *bypass* the "normal" criminal justice system: administrative detention is thus used to incarcerate individuals (which often include political opponents or dissenters) when it is clear that under "normal" criminal law proceedings, they would be granted bail.

"Twin Test" for Bail

Administrative detention is not the only structural feature of the criminal law that enables lawfare. One of the colonial legacies that has survived

into a multitude of modern-day Indian laws is something known as the "twin test" for bail. With some variations, the "twin test" is a statutory proscription that prohibits a judge from granting bail to an accused individual if, among other things, the accusations against them appear to be *prima facie* true. As bail applications are argued before the commencement of the trial, at the stage of consideration, the judge has access only to the prosecution's version of the case to make this determination. Judgments by the Supreme Court have further restricted the scope of the materials that the judge can consider at this stage, at the instance of the defense.[4] Attempts to challenge the "twin test" on the basis that it violates the presumption of innocence—and thereby, the right to life and liberty under the Indian Constitution—have been rebuffed.[5]

Two prominent statutes that encode the "twin test" are the Unlawful Activities (Prevention) Act ["the UAPA"] and the Prevention of Money Laundering Act [PMLA]. The first is India's umbrella anti-terror legislation, and the second—as the name suggests—is a statute for the purpose of prosecuting and punishing money-laundering. These two statutes are particularly ripe instruments for lawfare: as experiences in multiple jurisdictions have shown, invocations of national security in the anti-terrorism context, and allegations of corruption in money-laundering cases, often result in judicial deference. When this judicial deference is coupled with something like the "twin test," and that—in turn—is understood in light of the fact that criminal trials in India take decades to complete, these laws constitute powerful weapons for incarcerating individuals—whether dissidents or political opponents—for years on end without any trial or affirmative finding of guilt. This kind of lawfare differs slightly from the standard model, in that it is not a situation of a compromised trial, or a false conviction: but simply, lengthy imprisonment *without* trial (similar in nature to administrative detention).

Public Interest Litigation and *Locus Standi*

The Indian legal landscape offers one other unique avenue for lawfare. In the 1980s, the Indian Supreme Court initiated the era of "public interest litigation," which is still perceived to be amongst its most significant contributions to global jurisprudence. One of the key features of public interest litigation, Indian-style, is the relaxation of *locus standi* requirements: that is, *anyone* can bring a case, claiming that it is in the "public interest." In its initial years, the Supreme Court attempted to contain this by insisting on certain requirements (such as a demonstrable violation of enforceable rights), but in more recent times, the admission of such cases has been purely up to the discretion of the Court.[6]

The result of this is that litigation that would otherwise be dismissed at the threshold on grounds of *locus* and maintainability is frequently admitted by Indian courts. This, in turn, creates a structure where people—including

political forces—are incentivized to use the Court to achieve outcomes that cannot be achieved through the political process—and which would, in ordinary circumstances, be considered outside the court's remit. Particularly spectacular recent examples of this include, for example, using public interest litigation to secure a judicial order directing the playing of the national anthem in all cinema halls, and—rather more seriously—a set of judicial orders where the Court directly supervised—and pushed—the creation of a citizenship register in an Indian border state—a long-standing political demand of ethno-nationalist groups, but which had nonetheless become stalled *through* the political process. These, thus, are some of the ways in which lawfare works in and *through* Indian legal institutions, in ways that are familiar to scholars of lawfare worldwide, but which also have a specific, *local* color, that must be understood on its own terms.

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* Gautam Bhatia is a constitutional lawyer and scholar of comparative constitutional law. He lives and works in New Delhi, India.

[1] See, e.g., Valeria Vegh Weis, Indicators of Lawfare: Assessing the Criminalization of Progressive Politics in Latin America, MCLR+ (crimlrev.net) (Oct. 28, 2024).

[2] Article 22, Constitution of India.

[3] A.K. Gopalan vs State of Madras, 1950 SCR 88.

[4] National Investigation Agency vs Zahoor Ahmed Shah Watali, (2019) 5 SCC 1.

[5] Kartar Singh vs State of Punjab, (1994) 4 SCC 569.

[6] See Anuj Bhuwania, *Courting the People* (CUP 2019).

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