Preliminary Report:
Arrest of Indian Attorneys and Activists
in Apparent Retaliation for Human Rights Work
(October 2019)

Introduction

In the wake of violent attacks on marginalized communities in India, the Maharashtra police arrested several activists and lawyers last year who have historically advocated for the rights of these communities. A preliminary review of the judicial records in this case raises serious concerns of procedural irregularities, abuse of process, and violations of fundamental human rights. Several United Nations’ (UN) experts on human rights have expressed concern that the arrests and charges were brought in retaliation for the defendants’ legitimate human rights work.¹

The American Bar Association (ABA) is an independent, non-governmental organization, representing approximately 400,000 members of the legal profession worldwide.² It is committed to protecting the rule of law in the United States and abroad. The American Bar Association Center for Human Rights (Center) observes trials around the world to help promote compliance with international fair trial standards.

² The statements and analysis contained in this memorandum are the work of the American Bar Association Center for Human Rights, which is solely responsible for its content. The Board of Governors and House of Delegates of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA. It is not intended as legal advice on particular cases.
The Center is monitoring the legal proceedings against the accused to determine whether they are in line with India’s international treaty obligations, including its obligations to preserve the rights of freedom of expression, freedom of association, respect for fair trial rights, freedom from arbitrary detention. This preliminary report outlines irregularities in the pre-trial proceedings and potential violations of the right to freedom of expression and association.

**Background**

On January 1, 2018, violence broke out between members of Hindu Nationalist groups and the Dalit community (persons belonging to the oppressed castes, a majority of whom are subjected to “untouchability”), who had gathered outside Pune for the 200th anniversary of the commemoration of a battle at Bhima-Koregaon, an important cultural event for the Dalit community. Some have claimed that the attacks were planned and incited by Hindu Nationalist leaders, while others claim that incendiary speeches were made during the event due to which violence broke out.

Two sets of First Information Reports (F.I.R.s) were filed with the police in January 2018 based on these competing narratives. While two popular Hindutva leaders were arrested on a complaint filed by a Dalit woman, for planning inciting and leading the mobs that attacked the Dalit community, they were released soon after. The other set of F.I.Rs alleged that the violence was instigated by individuals with links to Maoist/Naxalite groups at the Elgaar Parishad, a connected event organized on 31.12.2017.

The Elgaar Parishad was in fact organized by two retired judges - former Supreme Court Judge, Hon’ble Justice PB Sawant and Hon’ble Justice Kolse Patil, a retired Bombay High Court Judge. They have repeatedly made public statements in this regard and have clarified that neither the event nor the organizers or funders had any links with a banned group.
The Elgaar Parishad ended with a pledge: “Today, on the occasion of Shaurya Divas (Victory Day) in Bhima Koregaon on the 200th anniversary, we pledge that we will protect the Constitution and democracy. . . . We will not support those (organizations) who speak against the Constitution or oppose the Constitution. We will never vote for opponents of the Constitution, the RSS and BJP.”

In June 2018, four activists and one lawyer, Surendra Gadling, were arrested from Delhi and Maharashtra in connection with this case. Subsequently, in August 2018, five more activists and lawyers were arrested in connection with the case despite none of them having been named in the first information report (F.I.R.) or being present at Bhima Koregaon event. They were arrested under provisions of the Unlawful Activities Prevention Act (UAPA), and the Indian Penal Code sections 153A, 505, 117, and 120(b).

It was reported that the police told the trial court that that those arrested are “urban Naxalites”—left-wing extremists—but that they present themselves in public as human rights activists and lawyers. The police claimed that one of them has held photo exhibitions on mob lynching to “influence young people against the government” and that together, they form “an anti-fascist front.” Their aim, the police read out from one of the letters, is to engineer “frequent protests and chaos [which] will gradually lead to a breakdown of law and order, and this will have significant political ramification in the coming months.”

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6 Id.
7 Johari, supra note 5.
A writ petition challenging the arrests was filed in the Supreme Court of India by 5 eminent citizens, including historian Romila Thapar, economists Devaki Jain and Prabhat Patnaik, Maja Daruwala, board member and advisor of the Commonwealth Human Rights Initiative and sociologist Satish Deshpande. The petition sought release of the 5 activists arrested in August 2018 arguing that their arrest stifled honest dissent. Their petition described the arrests as a “gross abuse of police power in the country which is intended to stifle if not kill independent voices and a differing ideology from the party in power.”

The defendants in the case were: Sudha Bhardwaj, a prominent trade unionist and human rights lawyer who has represented workers, Adivasis, and marginal farmers in Chhattisgarh and is Vice-President of the People’s Union for Civil Liberties (PUCL); Vernon Gonsalves, an academic, columnist, and social activist; Varavara Rao, a poet and a literary critic; Gautam Navlakha, a journalist, human rights activist, and former Secretary of the People’s Union for Democratic Rights; and Arun Ferreira, a lawyer and human rights defender.

The petition said that the charges against them on the face of it appear indiscriminate, unwarranted, and part of a malicious campaign to threaten human rights defenders, independent journalists, writers, and thinkers in the country from critiquing the government and its policies in an attempt to muzzle dissent. The arrested activists are pro-democracy workers who have been leading peaceful rights-based movements especially among the poor and marginalized communities—Dalits and Adivasis—for several years in different parts of the country. The petition called for an urgent intervention by the Court for release from custody of all activists and prevent the use of the UAPA (originally meant for exceptional and violent activity), in the absence of evidence of any acts of violence by defendants.

8 Id.
The writ petition also sought that the case be investigated by a Special Investigation Team and not by the police. During arguments it was shown how evidence claimed to have been recovered by the police was prima facie fabricated and the allegations against them were baseless. The accused allege that the proceedings have been characterized by a number of procedural irregularities, including: the unjustified pre-trial detention of Mr. Gonsalves, Mr. Ferreira, and Ms. Bhardwaj; the failure to translate the first information report into a language understood by the accused; lack of independent public witnesses to the arrest and seizure of memos; prejudicial public statements by police; statements by the police challenging the courts’ authority over these cases; and a consistent pattern of filing charges against some of the defendants without meaningful evidence of wrongdoing. The police held two press conferences, the first proclaiming that they had sufficient evidence against the activists and the second where they selectively read letters that had not yet been authenticated implicating the activists in supporting and being a part of the conspiracy.

Furthermore, UN human rights experts issued a joint statement expressing their deep concern about the use of anti-terrorism charges against ten human rights defenders (including those discussed above). Their statement expressly states: “We are concerned that terrorism charges brought in connection with the commemoration of Bhima-Koregaon are being used to silence human rights defenders who promote and protect

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10 Thapar v. Union of India, supra note 9, at ¶ 15.
12 See infra, Freedom of Expression section.
13 Times of India, supra note 11, See also Thapar v. Union of India, supra note 9.
14 The statement was signed by: Mr. Michel Forst, Special Rapporteur on the situation of human rights defenders; Ms. Fionnuala D. Ni Aoláin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; Mr. Fernand de Varennes, Special Rapporteur on minority issues; Mr. David Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; Ms. Ivana Radacic (Chair), Ms. Meskerem Geset Techane (Vice Chair), Ms. Elisabeth Broderick, Ms. Alda Facio, Ms. Melissa Upreti, Working Group on the issue of discrimination against women in law and in practice; Ms. E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Mr. Seong-Phil Hong (Chair), Ms. Leigh Toomy (Vice-Chair), Ms. Elina Steinerte (Vice-Chair), Mr. José Guevara, Mr. Setondji Adjovi, Working group on arbitrary detention.
the rights of India’s Dalit, indigenous, and tribal communities.” The experts believe that these individuals have been charged and detained in retaliation for their human rights work, in violation of India’s international law obligations.

The Supreme Court through an interim protection, directed that the five activists not be taken into police or judicial custody and only be kept under house arrest during the pendency of the petition. On September 28, 2018, the Supreme Court rejected the writ petition; the majority judgment rejected the contention that the arrests were motivated and intended to curb dissent, while the minority judgment acknowledged that the evidence appeared to be fabricated. The Supreme Court, however, extended the house arrest for another four weeks in order to give the five activists time to take recourse to appropriate remedy.

It has also been reported that several lawyers associated with the legal defense of the Bhima Koregaon case have been subject to surveillance through the Pegasus spyware hack of WhatsApp accounts. Ankit Grewal, Nihalsing Rathod, and Shalini Gera have all been targeted by the spyware and are all involved in the defense of Bhima Koregaon activists including Surendra Gadling and Sudha Bhardwaj. Mr. Rathod stated that he believed that he was targeted by the spyware due to his defense of Mr. Gadling: “[w]e are a handful of human rights lawyers who are… in the process of exposing the different strategies used to arrest human rights activists in the country.”

Mr. Gonsalves, Mr. Ferreira, and Ms. Bhardwaj filed bail applications before the Pune Sessions Court, which were rejected. Subsequently, the appeals/bail petitions were also

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16 *Id.*
17 *Johari, supra* note 5.
rejected by the Bombay High Court on October 15. Meanwhile, Mr. Gonsalves, Mr. Ferreira, and Ms. Bhardwaj have been held in Yerawada Jail (Pune, Maharashtra). Mr. Navlakha filed a writ before the Delhi High Court challenging the procedural illegalities of his arrest and transit remand. The Delhi High Court set the transit remand aside which prevented him from being taken into police custody. This order has been challenged by the State of Maharashtra before the Supreme Court and is presently pending. Gautam Navlakha filed another application before the Bombay High Court seeking withdrawal of the F.I.R. against him, which the court has rejected. However, the Supreme Court has issued an interim order protecting him from arrest for a month, so he can apply for bail.

Mr. Rao was arrested by the Pune police after the Hyderabad High Court refused to set aside the transit remand order. On January 30, 2019, Mr. Rao and Mr. Gadling were taken into custody by the Gadchiroli police in connection with another UAPA case related to a 2016 Maoist attack at Surajgadh. He has been taken from the Yerawada jail and moved to Aheri for the hearing.

In December the Pune police made efforts to arrest Dalit scholar Mr. Anand Teltumbde in connection with the same F.I.R. Though Mr. Teltumbde has been granted protection

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from arrest, his plea for withdrawal of the F.I.R. against him was rejected by the Supreme Court.26

**Preliminary Fair Trial Rights Concerns**

The Center is concerned with reports of procedural irregularities and possible fair trial rights violations. According to publicly available information and the arguments made to the Supreme Court, there are concerns that the police did not follow proper procedure with regard to arresting and charging these individuals under the UAPA.

a) Efforts by the police to prejudice the accused: The Maharashtra police has repeatedly resorted to press conferences where baseless allegations that are not substantiated by the F.I.R. or evidence and are prejudicial to the accused, have been made. The police have claimed that the arrested persons were part of a conspiracy to assassinate the Prime Minister. The police further released to the press several documents which they claimed were letters written by and to the arrested persons. Independent security experts observed that the letters appear to be fabricated: “Anyone familiar with the patterns of communication adopted by the Maoists would immediately reject this letter as an obvious fabrication. Moreover, in trying to implicate a number of unrelated and prominent critics of the current regime in a plot to murder the Prime Minister, prosecuting agencies appear to be constructing a straw man in order to sensationalize the case, said one expert.”27 It was admitted by the Police themselves that the letters were not forensically verified.

b) The Supreme Court in a dissenting opinion expressed the view that the press conferences were highly irregular and a violation of the procedural rights of the accused.28 The Indian Constitution guarantees the right to be presumed

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28 Thapar vs. Union of India, supra note 9, dissenting opinion of J. Chandrachud.
innocent. 29 Article 14 of the International Covenant on Civil and Political Rights (ICCPR) guarantees the right of criminal defendants to be presumed innocent. 30 The UN Committee on Human Rights (UNHRC), the body charged with authoritative interpretation of the ICCPR, has found that widely publicized statements by high-level law enforcement officials portraying criminal suspects as guilty violates the right to the presumption of innocence. 31

c) Material that was purportedly recovered from the arrested persons was not seized in accordance with law: Reports indicate that no integrity of process has been maintained during the seizure of electronic equipment such as computers and cell phones during the raids and arrests from which these documents have supposedly been extracted. 32 While the Criminal Procedure Code prescribes that a seizure memo of articles recovered from an accused must be attested by two independent witnesses who are respected members of the locality, the seizure memos in the case of all the arrested persons were signed by witnesses from Maharashtra, who travelled to the places of arrest with the Maharashtra police, and some of the witnesses were even found to be employees of the Pune local government and stock witnesses, thereby undermining their capacity to act independent of police control. 33 This raises serious concerns of planted evidence and/or tampering/fabricating evidence that may be used to implicate the arrested persons.

29 India Const. art. 14.
Similarly with regard to the arrest, the arrested persons were not informed about the grounds of their arrest. The arrest warrants were in the language Marathi, and were not translated for those arrested from Delhi, Faridabad or Hyderabad.

Pre-Trial Detention

There are serious grounds for concern that Mr. Rao, Mr. Gonsalves, Mr. Ferreira, and Ms. Bhardwaj are being held in pre-trial detention without adequate legal justification. The ICCPR states, that “it should not be the general rule that persons awaiting trial shall be detained in custody.” The UNHRC has clarified that “detention pending trial must be based on an individual determination that it is reasonable and necessary taking into account all the circumstance, for such purposes as to prevent flight, interference with evidence, or the recurrence of the crime.” It has further clarified that “pretrial detention should not be mandatory for all defendants charged with a particular crime without regard for individual circumstances” Finally, the UN Working Group on Arbitrary Detention has also interpreted the ICCPR to find that “any detention must be exceptional and of short duration and a release may be accompanied by measures intended only to ensure representation of the defendant in judicial proceedings.”

In February the Supreme Court set aside an order of the Bombay High Court that directed the release of the activists arrested in June 2018 on the grounds that 90 days had elapsed from the date of arrest without the police having filed a charge sheet. In order to safeguard against indefinite pre trial detention, the Criminal Procedure Code in India provides that if no charge sheet is filed within 60 days of arrest, the accused has a right to “default bail”. Under the UAPA this period may be extended up to 180 days with sufficient cause. While the Bombay High Court held that an extension of this 90 day period sought by the Maharashtra police was illegal, the Supreme Court reversed

34 ICCPR, supra note 30, at art. 9(3).
36 Id.
this order, and the 5 activists arrested in June 2018 continue to be incarcerated, even a year later.

**Freedom of Expression**

The Center is concerned that the vague provisions of the UAPA render it susceptible to arbitrary and capricious misuse to silence human rights activists. UN experts have already publicly expressed their view and are urging “the Government to refrain from engaging in the criminalization of human rights defenders in general, including through the use of overly broad national security legislation.”³⁸ They have already found that “[t]he UAPA’s vague definition of ‘unlawful activities’ and ‘membership of terrorist organisations’ confers discretionary powers upon State agencies, which weakens judicial oversight and diminishes civil liberties in the process,” in contravention of India’s international obligations under the ICCPR.³⁹

The ICCPR protects the right to freedom of expression.⁴⁰ Although the right is not absolute, and can in certain specific and limited circumstances be restricted, those restrictions must be provided by law and necessary to protect the rights or reputations of others or for the protection of national security, public order, public health, or morals.⁴¹

The UNHRC has emphasized that restrictions on the freedom of speech “cannot be invoked as a justification for the muzzling of any advocacy of multiparty democracy, democratic tenants and human rights.”⁴² While it is legitimate to restrict speech for the protection of public order,⁴³ the Committee has stated that “all public figures, including

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³⁹ *Id.*

⁴⁰ ICCPR, *supra* note 30, at art. 19 (requiring that “everyone shall have the right to hold opinions without interference.” The right includes that everyone has the “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art or through any other media of their choice.”)

⁴¹ *Id.* at art. 19(3).

⁴² U.N. Human Rights Comm. General Comment No. 34 on its 102nd Session, U.N. Doc. CCPR/C/GC/34 (2011), at ¶ 23 (commenting on article 19 freedoms of opinion and expression) [herein after “General Comment 34”].

those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition,” because the value placed by the ICCPR upon uninhibited expression is particularly high.”44 Moreover, as a general matter, the government may not prohibit expression of opinions, even if they are erroneous or found to be insulting.45

The UNHRC provides further guidance to analyze whether a particular restriction violates the right to freedom of expression. When analyzing whether a restriction is ‘necessary’ under the ICCPR, it must also be analyzed as to whether it is a proportionate response to the perceived need that justifies the restriction being used.46 It requires that the restriction must not be overbroad – the law must be specific enough to enable individuals to regulate their conduct accordingly.47 These sorts of restrictions “may not put in jeopardy the right itself.”48 A restriction on freedom of expression to protect national security requires a serious and imminent threat to the nation and should not be used to prosecute human rights defenders or journalists for disseminating information.49

An in-depth analysis of the UAPA will be included in the final report issued by the Center, but a preliminary analysis of the UAPA finds that it violates Article 19 of the ICCPR and possibly India’s own constitutional protections. The UAPA broadly defines “unlawful activity” to mean “any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),—which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial

44 General Comment 34, supra note 42, at ¶ 38.
45 Id. at ¶ 49.
46 Id.
47 Id. at ¶ 25
48 Id.
49 Id. at ¶ 30.
This definition is impermissibly broad because, *inter alia*, there is no clear and direct link between the vague term “disaffection” and concrete threats to national security.

The UNHRC has expressly stated that when a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat. In the present case there seems to be overwhelming evidence to show that the arrested persons have been targeted on account of their consistent challenging of the State and State actors for violations of human rights.

In response to these arrests, Meenakshi Ganguly, South Asia director of Human Rights Watch, alleged that Indian police often use counter-terrorism laws to target “critics of the government and social activists, particularly those acting on behalf of marginalized communities. . . . The authorities should follow Supreme Court directives not to punish ideological support for a movement and to protect freedom of expression,” she said.

In March 2019, members of the European Union wrote to the Indian Government expressed concern over the “worrying signs of shrinking civil society space in India,” referring to these arrests amongst others.

**Conclusion**

In the present case, there are serious grounds for concern that the government has not demonstrated sufficient evidence of a direct and immediate connection between the actions taken by these individuals and any threat to security sufficient to justify the

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50 Unlawful Activities (Prevention) Amended Act 2012, No. 3 of 2013, § 2.
53 https://thewire.in/rights/members-of-european-parliament-ask-india-to-end-crackdown-on-rights-activists
charging of the defendants. Furthermore, there are grounds for the concern that the charges are not motivated by any concern for security but are in fact meant to prevent the defendants from supporting certain marginalized groups. The accused have all argued that they have been regular targets of criminal investigations and charges, in an attempt by the government to stop them from protecting, defending, and speaking out about issues faced by marginalized communities in India. According to the court documents, there have been multiple criminal charges filed against all of these individuals. As of September 28, 2018, Mr. Rao was implicated in 25 criminal cases that all ended in his acquittal. Mr. Ferreira has been acquitted in 11 cases brought against him. Mr. Gonsalves has been acquitted in 17 out of the 19 cases brought against him, with one pending appeal and another awaiting a discharge petition.

The charges that these individuals are facing, even if found to be unsubstantiated, can ruin their reputations, marking them as “anti-national.” Additionally, the time and resources required to continually defend against such allegations takes a significant toll and has chilling effect on their ability to exercise their profession as lawyers and to engage in legitimate human right work.

In light of the significant procedural irregularities to date, the Center is concerned that the proceedings against these individuals will not comport with India’s international treaty obligations. The Center will continue to monitor the case and update this report as the case progresses.

54 Thapar v. Union of India, supra note 9.
55 Id., dissenting opinion of J. Chandrachud.
PROFILE OF ARRESTED ACTIVISTS:

Sudha Bharadwaj has spent over 30 years working with social justice movements for the rights of workers, indigenous communities, and women. As a practicing Advocate of the High Court of Chhattisgarh, she has represented industrial workers, Adivasis, economically vulnerable communities facing land dispossession, rape victims, and other marginalized and vulnerable communities. She has also represented the Union Ministry of Tribal Affairs. At the time of her arrest, she was teaching in the National Law University of Delhi.

Vernon Gonsalves is a human rights activist. A gold medalist from Bombay University in commerce, he was an accounts officer at Siemens, then lecturer of accounts in Maharashtra College, Ruparel & HR colleges, as well as a writer and columnist. His translation of Annabhau Sathe's ‘Gold from the Grave’ from Marathi into English was published in David Davedhar's ‘A Clutch of Indian Masterpieces’.

Varavara Rao is a renowned poet, writer and activist. Founder of Veerasam-Revolutionary Writers Association, he is also considered an eminent Marxist critic of Telugu literature and has taught the subject to undergraduate and graduate students for decades. Rao was arrested during India’s Emergency in the 1970s, under the Maintenance and Internal Security Act.
Gautam Navlakha is a civil liberties and human rights activist, author, and a journalist. He is engaged in the longstanding activism of the People's Union for Democratic Rights, Delhi. He is also an editorial consultant at the Economic and Political Weekly. He has been a convener of the International People's Tribunal on Human Rights and Justice in Kashmir.

Arun Ferreira is a human rights activist and lawyer. He has previously been wrongly charged under the UAPA and in January 2014 was acquitted in 11 cases against him.

Surendra Gadling is a lawyer and is known in Nagpur and across Maharashtra as a champion of Dalit and Adivasi rights. He has anchored various fact-finding committees and petitioned courts seeking justice for the voiceless.\(^{57}\)

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Sudhir Dhawale, a Dalit rights activist, poet, singer, and artist, has been working for the rights of Dalits for decades. He has earlier faced charges under the UAPA. After a prolonged trial, the Gondia Court acquitted him, famously holding that “he was carrying books and not bombs”.

Rona Wilson, is an active participant in the civil rights movement, particularly in Delhi and a member of the Committee for Protection of Democratic Rights.

Mahesh Raut is a research scholar from the Tata Institute of Social Sciences who, through the prestigious Prime Minister Rural Development fellowship, has worked extensively with the local self-governance institutions of Adivasis in rural Maharashtra.

Shoma Sen is an assistant professor and head of the English literature department of the Nagpur University. She is a leading women’s rights activist and a member of the Committee for the Protection of Democratic Rights.