

Routinization of the Extraordinary- A Mapping of Security Laws in India

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Introduction

"The relationship between violence, power and the law is especially evident to those committed to democratic values. There is an overwhelming play of violence as power and power as violence, sometimes in breach of the law and sometimes as a tool for its enforcement. If violence in society is perceived as a breach of the law, the law itself is equally violent and in fact has an even more debilitating effect because of its systematic and thorough ruthlessness backed by official sanction."

K.G. Kannabiran, "Saga of Impunity", 2004¹

It can be argued that a State's security laws and its corresponding discourses of national security and public order, aim in fact, to protect the State from real or perceived threats to its existence rather than to protect citizens from real or perceived threats to their safety. Indeed, an examination of security laws reveals a great deal about how a State works, the constitutive role of violence in this process and the profound links between law and violence, "unraveling in the process the legitimizing discourses of 'national security' and 'democracy' that shroud it, to show the ways in which law becomes an integral part of the organization of state violence".² In his insightful analysis of extraordinary laws, Ujjwal Kumar Singh demonstrates how such laws belie the "normal-exception dichotomy" on which they are based, such that the "state of exception" becomes a routine, perpetual and necessary condition for the existence of the State; a condition, moreover, that is defined by laws which are discursively and materially violent and serve selective interests of the State (and, importantly, governments). Extraordinary laws, it might be said, regard democracy as needing protection from itself for they quell existential challenges (to the State) that arise from the "openness and freedom which democracy allows".³ More often than not, they measure their success by the extent to which they demarcate "plural forms and sites of self-realization"⁴ – among the cornerstones of democracy – as extraordinary and delineate means for their suppression. In this troubling logic, to act in democracy's best interest necessitates undemocratic measures.

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¹K.G. Kannabiran; The Wages of Impunity: Power, Justice and Human Rights; Orient Longman; New Delhi; 2004

² UK Singh; The State, Democracy and Anti-terror Laws in India; Sage Publications; New Delhi 2007, P16

³ *Ibid*

⁴ *Id*

Violence perceived to threaten national security and public order may be broadly categorized into two. In the first category are armed struggles for secession in Punjab and Jammu and Kashmir and insurgency in the northeast. In the second category are terrorism, organized crime, violence based on communal and caste conflicts, and armed resistance emanating from the denial of basic rights and entitlements. In the latter category, terrorism features prominently.⁵ Although in many instances, such violence is predicated upon social, economic and political causes, the Indian state has rarely addressed these underlying causes and has, instead responded primarily with a series of special or extraordinary laws.

Before embarking on an analysis of these laws a preliminary and perhaps obvious point to be made is this - that the state has the power to enact laws to safeguard 'public order' and protect its denizens from violent attacks, is not in question. One cannot ignore the fact that group violence perpetrated by 'extremists' or 'terrorists' lead to mindless killing and destruction.⁶ However the question is whether the exercise of this power has been within reasonable limits and not to the "abandonment of governance and civilized conduct on part of the state".⁷ The question of reasonableness arises not only with regard to the power to enact laws but also vis-à-vis the manner in which such laws are enforced. The standard of reasonableness to which such laws should be held is laid down in constitutionally guaranteed human rights that act to limit state power and prevent unreasonable intrusion into personal liberty and fundamental freedoms.

The Indian State has invoked the notion of extraordinary times⁸ to enact and re-enact special laws to strengthen the hands of security and police forces. All these laws deviate from criminal procedures used in "non-extraordinary" times, such as powers of arrest, pre-trial detention, powers on the use of force vested particularly on armed forces, to name a few. The overarching justification provided is that conventional criminal laws approach crimes as an individual infraction and hence are not able to address movements that "collectively subvert and disrupt structures of governance and enforcement". To illustrate - the National Human Rights Commission has noted that anti-terrorism laws are justified as it is difficult to secure convictions under the criminal justice system and that trials are delayed under regular courts. Hence it is acceptable to take certain offences out of the ambit of general criminal law.⁹ This justification itself is a damning critique of the workability of the criminal justice system. However,

⁵ N Manohar; *Trojan Horses: Counter-Terror Laws and Security in India*; Economic and Political Weekly Vol XLIV No. 46; November 2009

⁶ Kannabiran *supra* N 1 at p-12

⁷ *Ibid*

⁸ Usha Ramanathan; *Extraordinary Laws and Human Rights Insecurities*; Asiarights; Issue One; July 2004

⁹ See *supra* N 2.

instead of addressing the issues that plague the system, recourse has been taken to enacting special or extraordinary laws to deal with particular forms of offences that are considered to threaten the Indian State.

The enactment of these laws mark a “tendency towards ‘the routinizing of the extraordinary’ through the institutionalization of emergency powers during non-emergency times and without a formal derogation from human rights obligations”.¹⁰ Enacted or re-enacted without adequate public discussion and an assessment of the impact of existing or similar laws/provisions, these laws have rarely met the objectives with which they are enacted -- to secure national security, ensure the safety and prevent harassment of innocent civilians. Instead, despite supposedly inbuilt safeguards in such laws, as well as safeguards prescribed in several court decisions, practice reveals that there has been flagrant misuse. This has resulted- to varying degrees- in the hardening of stands and alienation, further targeting and harassment of already marginalized groups and silencing of democratic dissent. It is disconcerting to note that although the constitutional underpinnings of such laws have been challenged on numerous occasions, none of them have been struck down, as the apex court, in most cases, has either resorted to reading down the provisions or prescribing guidelines for its application.

Security laws can be broadly categorized into three:

First, special national laws that apply in non-emergency situations such as preventive detention laws of the past aimed towards preventing an individual from acting in a manner prejudicial to the defense or security of the country to the current Unlawful Activities (Prevention) Act, which was amended in 2008 to curb, *inter alia*, terrorist activities.

Second, area specific central laws- enacted by the Central Government, these laws are applied to select areas to deal with insurgencies and militancy. The earliest enactment is the Armed Forces Special Powers Act, 1958 that covers the northeast and was later extended to the state of Jammu and Kashmir- this law continues to be in force.

Third, special laws enacted by State Governments to deal with public order and organized crime. Examples being the Chhattisgarh Special Public Security Act, 2005, the Jammu and Kashmir Public Safety Act, 1978, the Maharashtra Control of Organized Crimes Act, 1999.

This paper seeks to map the application of extraordinary laws in the context of constitutional mandates. The paper is divided into three parts. The first part sets

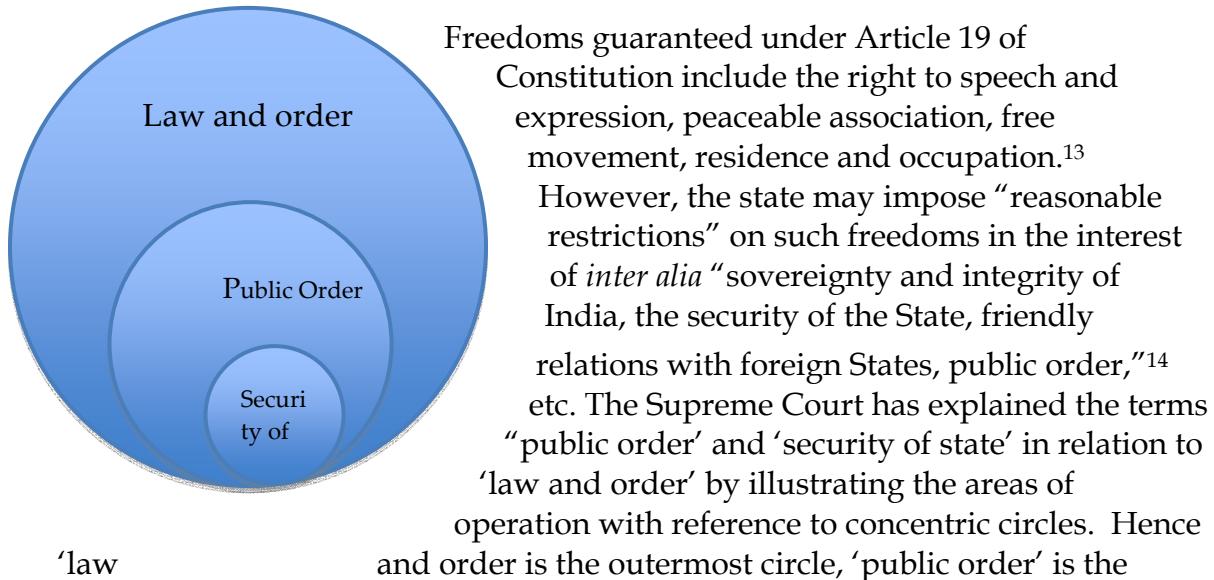
¹⁰ See *supra* n-4

out the constitutional and international law framework. The second part provides a brief overview of the laws. The final part examines the issues that arise in the enforcement of such laws.

The constitutional framework

While declaring India a sovereign, socialist, secular, democratic republic, the Constitution of India, in its preamble, identifies justice, liberty, equality and fraternity as the foundational principles of the Indian state. To give effect to these goals, the Constitution incorporates a bill of rights – entitled “fundamental rights” - in Part III and Directive Principles of State Policy in Part IV (“Directive Principles”). Fundamental rights guaranteed under the Constitution include the right to equality, freedom and personal liberty, the right to religion, the right to constitutional remedies and the right against exploitation. The Directive Principles include non-enforceable socio-economic rights to supplement enforceable civil and political rights contained in the fundamental rights chapter. Also termed fundamental obligations,¹¹ Directive Principles are to be used as yardsticks to measure the Government’s performance. The chapters on fundamental rights and Directive Principles are said to form the “conscience of the Constitution”.¹²

Fundamental Freedoms and Scope of “Reasonable Restriction”



¹¹ Kannabiran *op cit*

¹² Commonwealth Human Rights Initiative; “The need to reconcile Security and Human Rights”; New Delhi; October 2006
http://www.humanrightsinitiative.org/publications/chogm/chogm_2007/docs/the_need_to_reconcile_security_and_human_rights.pdf

¹³ Article 19

¹⁴ Article 19(2)

middle circle within ‘law and order’ and ‘security of state’ is the small circle within the middle circle of ‘public order’. Therefore, “*an act may affect law and order but not public order just as an act may affect public order but not security of the state.*”¹⁵ Despite this explanation, the terms ‘public order’ and ‘security of state’ remain undefined thereby leaving expansive scope for state discretion.¹⁶ Further, the Constitution also provides that rights under Article 19 may be suspended during times when an emergency is declared.¹⁷

Constitutional provisions on emergency

Article 352 of the Constitution empowers the President – the head of the executive branch of state- to declare a state of emergency, through a proclamation, either nationally or in a particular territory, if there is a threat to security, by war or external aggression or armed rebellion. As mentioned earlier fundamental rights under Article 19 may be suspended during these times.¹⁸ However, Article 359 clarifies that fundamental rights under Articles 20 and 21 containing guarantees of fair trial and the right to life and liberty respectively, cannot be suspended even if other rights are suspended in the area in which the Proclamation of Emergency is in operation.

Safeguards under Articles 20 and 21

Articles 20 and 21 are crucial safeguards against arbitrary State action. Article 21 recognizes the right to life and prohibits the deprivation of life or personal liberty of any person except in accordance with the ‘procedure established by law’. The Supreme Court has provided a broad interpretation of this phrase to include “substantive due process” guarantees- meaning thereby that ‘procedures’ mentioned in Article 21 must be ‘just, fair and reasonable’.¹⁹ The Supreme Court, in *DK Basu v State of West Bengal*²⁰ further extended these procedural guarantees by stipulating guidelines to be followed by the police during arrest and interrogation. The right to life has also been interpreted to include the right to

¹⁵ *Ram Manohar Lohia v State of Bihar* (1966) 1 SCR 709. The Court explained this concept by providing example- when there is a violent dispute between two individuals then it is a “law and order” situation. If the individuals belong to religious communities and the dispute is based on an issue related to the communities and therefore has an impact the communities is a “public order” issue. Acts grave enough to threaten national security are relatively rare and thus constitute a smaller circle within the issue of public order.

¹⁶ The late K.G. Kannabiran, doyen of the human rights movement in India argued “...expressions like ‘law and order’, ‘public order’ and ‘state security’ enable the state to employ violence against the people without a corresponding obligation to exercise discretion”. See *supra* n1

¹⁷ Article 358

¹⁸ Article 358

¹⁹ *Menaka Gandhi v Union of India* (1978) 1SCC248

²⁰ 1997 (1) SCC 416

privacy²¹ and the freedom from cruel, inhuman or degrading treatment²² within its ambit. Article 20 guards against the application of retroactive criminal laws²³, double jeopardy²⁴ and compelled self-incrimination²⁵. Under the jurisprudence developed by the Supreme Court, rights under these provisions have been broadly interpreted to include various aspects of the right to a fair trial.²⁶

National emergencies have been declared thrice in India after its independence in 1947 -- in 1962 and 1971 due to armed conflicts with China and Pakistan respectively and in 1975 on alleged grounds of internal disturbance.²⁷ During these times, sweeping powers were conferred on the executive and rules promulgated that authorized deviations from criminal procedural law including the imposition of preventive detention extending well beyond the length of time permitted under ordinary preventive detention laws. On all these occasions, states of emergency were retained long after the actual threat to national security had ceased.²⁸

Although salutary amendments to the Constitution post the 1975 Emergency restricted the governments' authority to derogate from Articles 20 and 21 and reined in the government's power to declare emergency, the authority to impose preventive detention is permitted under Article 22.

Article 22 and Preventive Detention

Crucial to aspects of criminal justice, Article 22 provides for protection against arrest and detention in certain cases. Hence this provision stipulates that an arrested person has to be informed of the reason for his arrest "as soon as may be" and be produced before a magistrate within 24 hours. It also guarantees the right to counsel of the defendant's choice. The Supreme Court has held that the State is constitutionally obligated to provide a lawyer to the accused when required to meet the ends of justice and that the State must provide free legal aid to all indigent persons. The right to legal aid accrues to the accused from the time

²¹ *Kharak Singh v State of Uttar Pradesh* AIR1963 SC 898

²² *Francis Coralie Mullin v Union Territory of Delhi* AIR 1981 SC 746

²³ Article 20 (1)- "No person shall be convicted of any offence *except for the violation of the law in force at the time of the commission of the act charged ...*" (Emphasis supplied)

²⁴ Article 20 (2) – "No person shall be prosecuted and punished for the same offence more than once."

²⁵ Article 20(3) – "No person accused of any offence shall be compelled to be a witness against himself".

²⁶ Kalhan *et al*; "Colonial Continuities: Human Rights, Terrorism, and Security Laws in India; 2006 http://www.abcny.org/pdf/ABCNY_India_Report.pdf

²⁷ A slew of constitutional amendments were effected in the aftermath of the 1975 emergency. Significantly, the term "internal disturbance" used in Article 352 was replaced by the term "armed rebellion" in Article 352. Also Article 359 was amended to the effect that fundamental rights under Articles 20 and 21 could not be suspended during times of proclaimed emergencies. (44th Amendment to the Constitution)

²⁸ See *supra* N 20

s/he is first produced in court.²⁹ However, these safeguards are not available to persons arrested or detained under any law that allows for preventive detention.³⁰

The practice of preventive detention is a continuation of a much-reviled colonial practice.³¹ Preventive detention laws and provisions authorize administrative detention to prevent *apprehended* breaches of State security. In a significant departure from criminal procedural law, there is no requirement of a charge, investigation, trial, conviction and sentence³² for the detention of a person under such laws. Traditionally, preventive detention was used against enemy aliens when the evidence in possession of the detaining authority was not sufficient to secure the immediate conviction of the detenu by the ordinary legal process.³³ India is one of the few countries in the world that gives constitutional protection to preventive detention laws during peace or non-emergency times under Article 22. This provision recognizes both the Central and State Governments' authority to enact preventive detention laws while mandating that preventive detention may not exceed three months except with the sanction of an Advisory Board-constituted by current or former High Court judges. The person under preventive detention laws must be informed of grounds for the detention "as soon as may be" and accorded the opportunity to make a representation against the order for detention. However, even these minimal safeguards may be qualified by the Parliament that has the power to specify circumstances for extended detention without the Advisory Board review or prevent the detaining authority from communicating the grounds of detention, if such communication is deemed to be contrary to public interest.

The first national law on preventive detention was the draconian Preventive Detention Act, 1950, (PDA) which was brought into force within weeks of adopting the Constitution.³⁴ Although this law lapsed in 1969, the Maintenance of Security Act (MISA), enacted in 1971, brought back many of its provisions on preventive detention. The MISA was subsequently repealed in 1977.

The National Security Act, 1980, which continues to be in force today, retains some of the PDA and MISA provisions and allows preventive detention for a

²⁹ *Khatri v State of Bihar* 1981 SCR (2) 408. The court further held that the magistrate or the judicial authority before whom such person is first produced has a duty to inform the person of his/her right to legal aid.

³⁰ Article 22 (3)

³¹ Ramanathan *supra* N 23

³² *Ibid*

³³ A Faizur Rahman; "*Preventive detention an Anachronism*"; The Hindu; September 02, 2004

³⁴ The Preventive Detention Act authorized detention for upto 12 months to prevent a person from acting in a manner prejudicial to the defense or security of India, India's relation with foreign powers, state security or maintenance of public order, or maintenance of essential supplies and services.

maximum period of 1 year.³⁵ Similar to the PDA, this law empowers the central or the state government to detain a person to prevent him from acting in any manner that is prejudicial *inter alia* to the defence of India or its relation with foreign powers, or to the security of the state, or maintenance of public order or the maintenance of supplies and services essential to the community.³⁶ At the time of its enactment it was stated that “these powers were needed to deal with blackmarketeers and smugglers, and that the question of its use to curb political action did not arise”, however, practice revealed otherwise. In its very first year of implementation, the list of prominent detainees under this law read like the “who’s who of political activists and trade unionists”, while not a single big smuggler or black marketer was caught.³⁷ Provisions contained in subsequent counter terrorism laws appear to mirror provisions of the NSA.³⁸

Other than national laws, state governments too, have enacted state laws with provisions on preventive detention. State governments have the power to enact such laws under Entry 3 of List III, i.e. the “Concurrent List”, that allows Parliament and state legislatures to pass preventive detention laws in times of peace for “the maintenance of public order or maintenance of supply and services essential to the community”.³⁹

International Law

³⁵ Section 13 of the National Security Act, 1980— although this provision also provides that the appropriate government may modify this period.

³⁶ Section 3 of the National Security Act, 1980

³⁷ PUCL; “NSA, A Weapon of Repression” PUCL Bulletin, May 1980.

³⁸ See discussion *infra*

³⁹ The Indian Constitution puts in place a quasi-federal structure with Legislatures for each state and a Parliament for the country. The Supreme Court in *Ganga Ram Moolchandani v. State of Rajasthan* opined that the Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely supremacy of the Constitution, division of power between the Union and States and existence independent judiciary.

Legislative powers of the center and the states are divided as per the list of entries in the Seventh Schedule, which are-

- Union List (List I)— which lists subjects of national importance over which the Parliament has exclusive jurisdiction.
- State List (List II)- which contains subjects of local importance over which State legislatures have exclusive jurisdiction
- Concurrent List (List III) - contains subjects that both the Parliament and State Legislatures may legislate upon.

In the event of dispute between Parliament and State laws, parliament enacted laws take precedence.

While public order is a state subject under Entry 1 List II, the Constitution grants the central and state governments concurrent jurisdiction to enact substantive procedural and criminal laws (Entry 1 and 2 of List III). The Central government is also provided exclusive jurisdiction over matters involving national security and the use of military or central police forces to aid state civilian authorities maintain public order (Entry 2A of List I).

India is a signatory to several international human rights treaties including the International Covenant on Civil and Political Rights. Although provisions contained in human rights treaties are not directly enforceable in the absence of an enabling domestic law, Article 51 of the Directive Principles provides that "*The State shall endeavor to foster respect for international law and treaty obligations.*" Hence, the Supreme Court has used international conventions that India is a party to, as a tool to interpret the ambit of fundamental rights by holding that "*any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into [domestic] provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee*".⁴⁰

Relevant to the subject at hand are Articles 6 and 9 of the ICCPR that protect the right to life, liberty and security of persons and guarantee freedom from arbitrary detention. Article 3 recognizes a person's right to an effective remedy in case of violation of any of the ICCPR rights.

The ICCPR allows states to derogate from some of the rights enshrined in the Convention in times of public emergencies "*that threaten the life of the nation and the existence of which is officially proclaimed*".⁴¹ Derogation from rights is allowed only to the extent required to meet the exigencies of the situation and hence must be proportional. Measures taken to derogate from ICCPR rights must be in accordance with other international obligations of the State and non-discriminatory in application. Such measures are also meant of an "exceptional and temporary nature" meaning thereby that they must be limited in duration.⁴² However, even in times of emergency, certain ICCPR rights are considered to be non-derogable. These are – the right to life, the right not to be subjected to cruel or inhuman or degrading punishment or treatment, the right not to be held in slavery or servitude, the prohibition of retroactive criminal law and the freedom of thought, conscience and religion. Through its interpretation, the UN Human Rights Committee has added to the list of non-derogable rights by including the right of all detained people to be treated in a manner that respects their dignity, certain aspects of the right to fair trial and the right against arbitrary deprivation of liberty.⁴³ India has never professed to derogate from any of ICCPR's provisions. However, extraordinary laws, which derogate from rights recognized under the ICCPR, have been enacted, re-enacted and implemented without adhering to any of the conditions stipulated for such derogations during times of emergency.

⁴⁰ *Visakha v State of Rajasthan*, (AIR 1997SC 3011)

⁴¹ Article 4 of the ICCPR

⁴² The UN Human Rights Committee has observed that "*the restoration of a state of normalcy where full respect for the Covenant can again be secured must be the predominant objective of a State party derogating from the Covenant.*"

⁴³ General Comment 29 on Article 4 ICCPR

Other than the ICCPR provisions on emergency and particularly relevant to terrorism laws, is UN Security Council Resolution 1373, which was adopted shortly after the September 11 attacks in the United States. This resolution mandates all states to take measures to combat international terrorism, although it does not define “terrorism”, thus leaving each State to evolve its own definition. Nor does this resolution obligate States to respect and protect human rights while combating terror.⁴⁴ However, subsequent UN Security Council resolutions, particularly UN Security Council Resolution 1456, has clarified that “*States must ensure that any measure taken to combat terrorism comply with all their obligations under international law and should adopt such measures in accordance with international law in particular international human rights, refugee and humanitarian law*”. Post 2001 India has invoked Resolution 1373⁴⁵ while enacting counter-terrorism laws that deviate from ordinary criminal law. The alacrity with which the Indian State has adhered to international mandates in enacting counter terrorism laws is unfortunately missing from its commitment to implementing core human rights guarantees under the ICCPR.

Overview of the laws

In addition to constitutional provisions on emergency and laws authorizing preventive detention, the Indian State also exercises its extraordinary powers through the enactment of substantive criminal laws that apply outside formally declared periods of emergency. The issues raised in two national laws- the Armed Forces Special Powers Act and the Unlawful Activities Prevention Act, shall be analyzed in this paper along with some examples of state laws, namely the Chhattisgarh Special Public Security Act, 2005, (CSPSA) the Jammu and Kashmir Public Safety Act, 1978, (JKPSA) the Maharashtra Control of Organized Crimes Act, 1999 (MCOCA). This section provides a brief introduction to these laws.

Armed Forces Special Powers Act (AFSPA)

Armed Forces (Special Powers) Act (AFSPA) was first passed by the Parliament of India in 1958 to apply to the North East of the country, and later extended to Punjab (1983)⁴⁶ and Jammu & Kashmir (1990). AFSPA is based on a British ordinance of 1942 aimed at containing the Indian

⁴⁴ The Counter-Terrorism Committee monitors implementation of the mandates set out in Resolution 1373. India has been appointed to chair this committee this year (2011).

⁴⁵ UN Security Council Resolution 1373 is quoted the “Statement of Object and Reasons” in both the POTA and the 2008 Amendments to the UAPA.

⁴⁶ The Act no longer applies to Punjab

independence movement during the Second World War.⁴⁷ The Act was originally intended as a short-term measure to allow Army deployment to counter an armed separatist movement in the Naga hills. However, it has remained in force for over five decades.

The AFSPA allows the Government to define, at its discretion (the Act's language is deliberately vague) and without judicial review, an area as "disturbed" and empowers the armed forces to shoot to kill, conduct warrantless searches and arrests, arbitrarily detain people and demolish structures in order to "maintain...public order". The Act provides *de jure* impunity to the armed forces: no legal proceeding can be brought against any member of the armed forces acting under AFSPA, without prior sanction from the Central Government - a clause that has allowed most to escape any legal accountability.

In 2006, in an attempt to respond to the "legitimate" grievances of the people, Prime Minister Manmohan Singh declared that the Act would be amended on the basis of the Jeevan Reddy Committee Report and "made more humane, giving due regard to the protection of basic human rights". This Report is yet to be publicly discussed by the government. Some legal analysts have criticized the Reddy Committee Report for expanding rather than restricting State powers under the guise of recommending a repeal of the Act after incorporating the most pernicious provisions into the Unlawful Activities (Prevention) Act.⁴⁸

Unlawful Activities Prevention Act, 1967 (UAPA)

Pursuant to the constitutional powers vested on the state to place reasonable restrictions on freedoms enumerated under Article 19⁴⁹, the Unlawful Activities (Prevention) Act (UAPA) was enacted in 1967. This law accords the Central Government the power to declare "any association that engages in activities that support any secession claims" or "disclaims, questions, disrupts" the sovereignty and territorial integrity of India or causes disaffection against India. Once an association is declared unlawful, the Central Government has broad powers to restrict its activities and criminalize individual involvement with such associations. This law was amended twice - in 2004 and 2008- to include counter-terrorism provisions- some of which were contained in previous anti-terror laws, namely the Terrorist and Disruptive Activities Act, 1987 (TADA) and the Prevention of Terrorism Act, 2002 (POTA).

⁴⁷ Armed Forces (Special Powers) Ordinance, 1942

⁴⁸ Combat Law; *Justice Jeevan Reddy Report on AFSPA; Evil is Intact*; February 21, 2010
<http://www.combatlaw.org/?p=74>

⁴⁹ See discussion on fundamental freedoms above

Terrorist and Disruptive Activities, 1987 (TADA)

Enacted shortly after the then Prime Minister Indira Gandhi's assassination in 1985, the TADA was specifically aimed at penalizing "terrorist acts". This law granted broad ranging powers to law enforcement agencies that went well beyond those prescribed under the Code of Criminal Procedure (CrPC) and the Indian Evidence Act (IEA). To illustrate, in a marked departure from established notions of fair trial, confessions of detainees in police custody was made admissible as evidence in legal proceedings- a practice that is expressly prohibited under the IEA.

By the end of 1992, 67,000 had been arrested under the TADA, of which 8000 were put on trial and only 275 convicted. Also, religious minorities were selectively targeted under the TADA. For instance in Rajasthan of the 115 TADA detainees, 112 were Muslim and three were Sikhs.⁵⁰ The misuse of TADA was reported from states that did not have a history of terrorism, for instance 19,000 persons were arrested in Gujarat by 1993- a state that had no history of terrorism.⁵¹ These figures demonstrate that TADA was used more as a preventive detention law and tool of misuse by the police rather than an effective counter-terrorism strategy. Although the Supreme Court upheld the validity of TADA⁵², it was allowed to lapse in 1995 pursuant to political pressure.

Prevention of Terrorism Act, 2002 (POTA)

Following an attack on the Indian Parliament in December 2001; the Prevention of Terrorism Act (POTA) was brought into force in 2002.⁵³ Critiqued by some as being more draconian than the TADA, the POTA included provisions on criminal liability for mere association with suspected terrorists without possession of criminal intent.⁵⁴ Similar to the TADA, the POTA allowed for pre-trial police detention (for up to 180 days), setting up of special courts for trials, drawing adverse inference etc. The enforcement outcomes of this law were also strikingly (and inevitably) similar to that of TADA, hence many of the arrests under the POTA were conducted in states that had had no prior history of terrorism, it was applied discriminatorily against religious minorities, *dalit* and

⁵⁰ Bidwai P; "New Anti-terror Laws Draconian Say Activists"; Dec 2008

<http://ipsnews.net/news.asp?idnews=45179>

⁵¹ *Id*

⁵² *Kartar Singh v State of Punjab* [1994] 3 SCC 569. In this case the Supreme Court upheld all TADA provisions even while noting the law's potential for misuse. However, it set down procedural guidelines to minimize misuse and mandated the setting up of review committees

⁵³ Prior to the POTA being enacted the Prevention of Terrorism Ordinance (POTO) was already in force. The Parliament attack was used as trigger for transforming this ordinance into law.

⁵⁴ "People's Tribunal on the POTA and Other Security Legislation"; New Delhi 2004

| tribal groups,⁵⁵ and used as a tool to harass political opponents.⁵⁵ Again, as with the TADA, although the Supreme Court upheld its constitutionality in *People's Union for Civil Liberties v Union of India*⁵⁶, it was repealed in 2004 following public and political pressure.

Notwithstanding its formal repeal, both the TADA and POTA continue to apply to individuals.⁵⁷ Cases already instituted under the TADA continue despite its repeal and the State and the Central Governments retain the power to institute new cases under the TADA on allegations based in periods the law was still in effect. To illustrate TADA's continuing legacy- a 2001 news report from Kashmir mentions a 1987 TADA case against 52 people including former Chief Minister (who passed away in 2009), in which - even after the lapse of 23 years in 2000- charges had not been framed.⁵⁸ Although, certain safeguards were included in the Ordinance that repealed POTA,⁵⁹ such as requiring cases to be reviewed by a review committee before permitting any POTA investigation or prosecution to proceed, its repeal remains largely ceremonial in already instituted cases.

Amendments to the UAPA

Closely following the repeal of the POTA, the UAPA was amended in 2004 to bring back a number of provisions from the POTA. The UAPA was further amended in 2008 in the aftermath of the 26/11 terror attacks in Mumbai. Although the amended UAPA deleted provisions allowing confessions in police custody to be used as evidence, it brought back many of the provisions of the POTA.⁶⁰ Some of the salient features of the UAPA post 2008 are as follows:

- Retains the Central Government's power to designate "terrorist organizations"⁶¹ and criminalize membership or any form of association with such organization.⁶²

⁵⁵ Human Rights Watch; Back to the Future; India's 2008 Counterterrorism Laws; New York; July 2009

⁵⁶ AIR 2004 SC 456

⁵⁷ Section 1 (4) of the TADA and Section 1(6) of the POTA provides that even after "its expiry under the operation (...) shall not affect—(a) the previous operation of, or anything duly done or suffered under this Act, or (b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act, or (c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act, or (d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and, any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired."

⁵⁸ Kashmir Media Service,:*TADA and POTA continue to hound hundreds of Kashmiris*" July, 2001;
<http://www.kmsnews.org/news/tada-and-pota-continue-hound-hundreds-kashmiris>

⁵⁹ Section 2(3) Prevention of Terrorism (Repeal) Ordinance, 2004

⁶⁰ Dhawan R; *India's Unlawful Activities Prevention Act (UAPA): The Return of the TADA and POTA*; December, 2008 http://www.worldproutassembly.org/archives/2008/12/indias_unlawful.htm

⁶¹ Section 2 (m)

⁶² Section 20, 23

- Provides a broad definition of “terrorist act” to include any act done to overawe or kidnap constitutional authorities and public functionaries.⁶³
- Addition of new offences for organizing terrorist training camps or recruiting terrorists⁶⁴ and stricter provisions on raising funds or financially aiding terrorists and terrorist organizations.⁶⁵
- Presumption of guilt if arms are recovered from the accused or if his/her fingerprints are found on or any other evidence connects him/her to weapons used in committing terrorist acts.⁶⁶
- Provisions allowing for a pre-trial detention period upto 180 days,⁶⁷ denial of bail to foreigners and in cases where a *prima facie* case exists. Also, the inclusion of other provisions allowing for warrantless arrests, search and seizure authorizations by authorities designated by either the Central or State Governments.⁶⁸
- Provisions making the obligation to disclose information- considered relevant by the investigating officer- mandatory.⁶⁹
- Provision admitting “*evidence collected through the interception of wire, electronic or oral communication under the provisions provision of the Indian Telegraph Act, 1885 or the Information Technology Act, 2000*”.

National Investigation Agency Act, 2008

Along with the amendments to the UAPA, the government also enacted the National Investigation Agency Act in 2008 instituting a National Investigation Agency (NIA) akin to the FBI in the United States. This agency is authorized to investigate certain crimes, including offences under the UAPA. Significantly, this law authorizes the establishment of special courts to try “terrorism offenses”. While such special courts are yet to be instituted, international bodies such as the Human Rights Watch caution that “*the record of national security courts in many countries over many years shows that such courts, while highly sensitive to the need to protect national security, typically lack the respect for the rights of dependents intrinsic to criminal courts of broader practice.*”⁷⁰

State laws

⁶³ Section 53

⁶⁴ Section 18A and 18B

⁶⁵ Section 17, 51A

⁶⁶ Section 43E

⁶⁷ Section 43D

⁶⁸ Section 43A

⁶⁹ Section 43F

⁷⁰ See *supra* N-48

In addition to central laws, several states have laws with provisions that mirror central anti terror laws both repealed and current. Of the different kinds of state laws that are used to address terrorism, some are aimed at addressing organized crimes and while others are aimed at maintaining public order and protecting public safety. Some illustrations are:

Maharashtra Control of Organized Crimes Act, 1999 (MCOCA)

Purported to punish and prevent “organized crime” and pecuniary benefits arising therefrom, the Maharashtra Control of Organized Crimes Act, 1999 (MCOCA), is applicable in the state of Maharashtra and Delhi.⁷¹ This law retains several provisions found in the erstwhile TADA. Significant among them are provisions that allow confessions made in police custody to be used as evidence. Due to purported high conviction rates⁷² the MCOCA has been used as a template to enact similar legislation in other states such as Andhra Pradesh and Karnataka.⁷³ The MCOCA was also held up as an example of a model criminal law in the debates preceding the enactment of the POTA.⁷⁴ However, it has been observed that the very provisions that make MCOCA “desirable for its efficiency are precisely the ones that [] make it draconian and extraordinary.”⁷⁵ This is demonstrated in investigative reports and practice that has shown rampant misuse of the MCOCA with confessions made in police custody being eventually retracted and no proper investigations in cases filed. Hence there is a strong possibility that convictions under the MCOCA are based on forced confessions.⁷⁶

In its definition of “organized crime”, the MCOCA includes unlawful activities and violent acts to gain pecuniary benefits or to “promote insurgency”. Due to the presence of the latter phrase, this law has been used to prosecute terrorist suspects. For instance, this law is currently being used to prosecute those accused in the Malegaon Masjid bomb blast case that killed 31 persons in 2006. This law too, allows detention without charge upto 180 days, of which 30 days may be in police custody. It also provides for the institution of special courts to try cases under this law.

Jammu and Kashmir Public Safety Act, 1978 (JKPSA) / Chhattisgarh Special Public Safety Act, 2006 (CSPSA)

⁷¹ Another similar law is the Karnataka Control of Organized Crimes Act, which was enacted in 2001

⁷² 56% according to the Mumbai Police Commissioner D Sivanandan. Tehelka Magazine; *MCOCA has Never Been Misused by Anyone*; January 16, 2010

⁷³ Karnataka Control of Organized Crime Act, 2000, Andhra Pradesh Control of Organized Crime Act, 2001.

⁷⁴ UK Singh; *Supra* N 2

⁷⁵ *Id*

⁷⁶ Tehelka; “One flew over the cuckoo’s nest”; Jan 16, 2009;

4http://www.tehelka.com/channels/mcoca/page.asp

Some states have exercised their power to legislate on matters of public order by enacting legislations to protect public safety and deal with unlawful activities.

Tracing its origins from the Defence of India Act promulgated under colonial rule⁷⁷, the Jammu and Kashmir Public Safety Act, 1978 (JKSPA) empowers the state to restrict movement to certain areas by declaring it to be a “prohibited place” or a “protected area”, and to maintain communal and regional harmony by prohibiting the circulation of documents considered prejudicial and detaining persons to prevent them from acting in a manner that is prejudicial to the “security of the state” or “the maintenance of public order”. Under these broad powers, a person may be detained without trial for upto two years. Other than this glaring inconsistency with fair trial norms, this law also protects actions done in “good faith” by state officials.

A recent Amnesty International report has found that State officials often implement this law in an arbitrary and abusive manner and even if detainees approach the High Court to quash detention orders “J&K authorities consistently thwart the High Court’s orders for release by re-detaining individuals under criminal charges and/or issuing further detention orders, thereby securing their continued incarceration”.⁷⁸ As a result the scale of detentions remain indisputably high estimated at 8000 to 20,000 over the past two decades.⁷⁹

Chhattisgarh Special Public Safety Act, 2005 (CSPSA)

The Chhattisgarh Special Public Safety Act, 200 (CSPSA) was enacted to counter Naxal violence in the state. It is modeled on the Madhya Pradesh Special Areas Security Act, 2001. This law defines “unlawful activities” to include acts that pose or have a tendency to pose danger to public order, peace or to the administration of law. Encouragement to disobedience of established law is also included in the definition of “unlawful activities”. Any organization or person who commits or abets or tries to commit or even plans to commit an “unlawful activity” may be imprisoned for upto seven years. This definition goes well beyond the definition of “unlawful activity” and “terrorist act” provided for in the UAPA.⁸⁰ This law also empowers the state government to declare an organization as being unlawful, criminalize membership thereof and notify a place as being used for the purpose of unlawful activities. Once notified, the District Magistrate has the power to take occupation of the place, seize moveable

⁷⁷ Hashmi S.J; *Jammu and Kashmir Public Safety Act, 1978*, May 2007; www.countercurrents.org;

⁷⁸ Amnesty International; “A Lawless Law; Detentions under the Jammu and Kashmir Public Safety Act; London; April 2011

⁷⁹ *Id*

⁸⁰ Peoples Union for Democratic Rights; *PUDR Memo on the Chattisgarh Bill 2005; A Memorandum to the President of India*;

properties and evict residents. There is limited scope for review and appeal against notification of places under this law.

Issues

This section outlines some significant challenges posed to democratic rights/principles under the laws mapped in the previous section

1. Emergency Safeguards Bypassed

All the laws that invoke the extraordinary powers of the state are enacted without a formal declaration of emergency. Hence safeguards applicable in times of emergency are given a go-by even when it comes to enacting laws that some critics have termed “martial law”⁸¹. As mentioned earlier Article 352 of the Constitution provides for a declaration of emergency on grounds of “armed rebellion”. By the 44th Constitutional amendment, that was brought in to rein in the powers of state in declaring emergencies, the term “internal disturbance” used earlier was replaced by the term “armed rebellion”. In the *Naga People's Movement for Human Rights*⁸² case (*NPMHR case*), the constitutional validity of the AFSPA was challenged on the ground that the reason for declaring areas in the northeastern states as being “disturbed” was due to armed rebellion, hence there was a need to declare emergency and adhere to safeguards applicable in situations of emergency. However, the Supreme Court, while upholding the AFSPA, rejected this argument by stating that

“[t]he disturbance may not be of such a magnitude as to pose a threat to the Security of the country or part thereof so as to call for invocation of the emergency powers under Article 352. If the disturbance caused by armed rebellion does not pose a threat to the security of the country and the situation can be handled by deployment of armed forces of the Union in the disturbed area, there appears to be no reason why the drastic power under Article 352 should be invoked.” (Emphasis supplied)

Through this reasoning the apex court made a distinction between security threats by armed rebellion – a term apparently not applicable to armed insurgency in the northeast, and use of security forces in internally disturbed areas. In the latter instance, there is no need to declare an emergency. It is relevant to note here that all the armed groups operating in the northeast have been banned under the newly amended UAPA as “terrorist organizations” engaging in terrorist acts. The broad definition of “terrorist acts” provided in the UAPA includes acts undertaken with the intent of threatening the “unity, integrity, security or sovereignty” of the country. The judgment of the court in the NPMHR case in declaring the areas in the northeast to be “internally

⁸¹ See KG Kannabiran *Supra* N-1

⁸² *Naga People's Movement of Human Rights v Union of India* 1998(2) SCC 109

disturbed" but not posing a threat to national security and the subsequent inclusion of northeastern armed groups as terrorist organizations committing acts of violence that threaten the security of the state,⁸² create an obvious anomaly.

States of emergency can only be declared for specific time periods and must be reviewed by the Parliament. Since there is no declaration of emergency, emergency laws such as the AFSPA, have been allowed to continue indefinitely. This is ironical given the fact that the AFSPA was brought in as an emergency measure and was initially meant to have remained in operation for only a year.⁸³ On the other hand, in the absence of a declaration of emergency, the state cannot derogate from fundamental rights guarantees. However, extraordinary laws are replete with provisions that denude constitutionally guaranteed rights particularly freedoms guaranteed under Article 19 and fair trial guarantees under Articles 20 and 21. In view of the latter provisions it must be recalled that Article 359 of the Constitution mandates that rights under Articles 20 and 21 cannot be derogated from even in times of emergency. Additionally, the implementation of extraordinary laws result in the violation of the guarantee of equality as the application of these laws have been directed specifically against particular communities and marginalized groups.

2. Challenge to Article 21

The most glaring challenge to the right to life is present in Section 4 of the AFSPA. This section empowers army officers, except *jawans*, to use force "even to the extent of causing death" for violating orders prohibiting the assembly of more than five people, or carrying weapons or carrying any object that is capable of being used as ammunition, in disturbed areas. Excessive power is thus vested on officers of the armed forces to deal with offences that do not attract more than two and half years of imprisonment⁸⁴, let alone the death penalty. To justify the use of such force, the officer need only be "*of the opinion that it is necessary to do so for the maintenance of public order*". Hence there is no need to justify the use of excessive force on grounds of self-defense or minimum levels of proportionality.⁸⁵ As succinctly put by a senior lawyer/journalist- Section 4 "*ignores the officer's duty to respect the life of a citizen, omits this vital injunction and contains instead a carte blanche unheard of in any other democracy- 'even to the extent of*

⁸³ Asian Center for Human Rights, *An Analysis of Armed Forces Special Powers Act, 1958*, PUCL Bulletin, March 2005

⁸⁴ Under Section 143 of the Indian Penal Code being a member of an unlawful assembly attracts a prison term of six months and/or a fine. If a person brings weapons to the unlawful assembly the sentence prescribed is two and a half years and a fine.

⁸⁵ South Asia Human Rights Documentation Center, *Armed Forces Special Powers Act: A Study in National Security tyranny*; http://www.hrdc.net/sahrdc/resources/armed_forces.htm

*causing death'.*⁸⁶ There have been numerous instances of excessive use of force by the army in disturbed areas in the northeast and in Jammu and Kashmir. The South Asia Human Rights Documentation Center documents an instance where indiscriminate firing by the Central armed forces in Kohima⁸⁷ led to the killing of seven and causing grievous injury to 22 people. The shooting was in response to a tire burst mistakenly perceived to be a bomb explosion by the personnel.⁸⁸

3. Broad definitions that lead to procedural advantage

A law typically contains both substantive and procedural provisions. Extraordinary laws usually contain broad definitions of the unlawful acts—examples being the broad definition of “terrorist act”⁸⁹ under the UAPA and “unlawful activities”⁹⁰ under the CSPSA. In its definition of ‘terrorist act’ the UAPA includes “any act with the intent to threaten or likely to threaten the unity, integrity, security or sovereignty of India or likely to strike terror in the people or in India or any foreign country”. The definition then enumerates the means that may be used in perpetrating the terrorist act such as bomb making, using firearms or biological weapons or “any other means of whatever nature.” The latter is a catchall phrase that may be expansively interpreted. For instance, in 2010, a number of civil society members were arrested in Gujarat under the UAPA. The Gujarat police recorded omnibus vague FIRs that did not accurately describe the commission of any offence.⁹¹ The possibility of indiscriminate use of special laws is compounded by the fact that these laws allow departures from regular criminal procedural laws, which afford the police significant procedural advantage.⁹²

a. Provisions of arrest search and seizure

Under the UAPA, officers of designated authorities may search any person or property, seize any property or arrest any person if there is a “reason to believe” that an offence has been committed.⁹³ This is a deviation from the standard of arrest on “reasonable suspicion” and searches on “reasonable grounds” laid down in the Code of Criminal Procedure.⁹⁴ Another deviation from the Code of

⁸⁶ Noorani A.G. *Armed Forces (Special Powers) Act: Urgency of Review*; Economic and Political Weekly Vol XLIV No 34, August 22, 2009

⁸⁷ Capital of the state of Nagaland in the Northeast

⁸⁸ *Ibid*

⁸⁹ Section 15 UAPA

⁹⁰ See *Supra* overview section on the CSPSA

⁹¹ Coordination of Democratic Rights Organizations; *Resolution of the All India Convention against the Unlawful Activities (Prevention) Act, 2967*

⁹² Bhuwania A, *UAPA: Legalizing the police state*; Kafila, January 6, 2009 (First published in Indian Express)

⁹³ Section 43A UAPA

⁹⁴ Section 418 ad 165 of the Code of Criminal Procedure. Also See Back to the Future Supra N 49

Criminal Procedure is that the UAPA requires the police to inform an individual of the grounds of arrest "as soon as may be" instead of "forthwith" of the "full particulars of the offence for which he is arrested".⁹⁵ In the absence of a clear time stipulation there is a high chance of the detenu being kept in the dark regarding the grounds of his/her arrest for considerable periods, which, in turn, undermines his/her ability to take appropriate remedial action.⁹⁶ This is clearly violative of fair trial norms.

Under the AFSPA, the army may use force to make arrests and the arrested person has to be handed over to the nearest police station "with the least possible delay". In this regard, the Supreme Court in the NPMHR case while laying down basic procedural guidelines, interpreted the phrase "least possible delay" to mean a period not exceeding 3-4 hours. However, the Supreme Court itself gave a go-by to even this limited safeguard in a 2007 case seeking compensation for a custodial death in Kashmir.⁹⁷ In this case the apex court chose to ignore the evidence that the deceased had been in illegal army custody for at least 30 hours before his death. Instead, it carved out an exception to the safeguard, which it had earlier mandated, on grounds that the army needs to move promptly on evidence received in custody, failing which there could be information leakage that might frustrate the very purpose of the army action.

A common trend observed in cases where the Supreme Court has upheld the validity of extraordinary legislation (other than upholding the validity of such laws) is the issuance of guidelines to mitigate misuse and reduce arbitrary action-for instance - guidelines on recording confessions by the police in *Kartar Singh*. In the NMPHR case the court adopted army instructions to subordinates as adequate safeguards against the violation of fundamental rights. K.G. Kannabiran had observed, "*While judgments rendered by the court have the force of law, they suffer from the absence of publicity and so by and large remain ineffective. In fact, there is no way of communicating to the public the laws laid down by the court. The length of these judgments and the difficulty in unraveling the ratio of the case are daunting obstacles, which discourage any attempt at effective communication. If these guidelines are to be effective, they should be made known to the accused before he is charge-sheeted, and also to the public so that they know what their rights are if arrested as suspected terrorists.*"⁹⁸

b. Preventive detention through the backdoor

⁹⁵ *Ibid*

⁹⁶ *Ibid*

⁹⁷ *Massoda Parveen v Union of India* Writ Petition (Civil 275 of 1999); Supreme Court 02.05.2007

⁹⁸ See *Supra* N-1

The most insidious aspect of deviations from ordinary criminal procedural laws is the difficulty, nigh impossibility, of obtaining bail upon arrest. Under ordinary criminal procedure an accused has to be produced before the magistrate within 24 hours. The magistrate must then release the accused on bail unless it appears that the investigation cannot be completed within 24 hours. At this stage, although bail is not available as of right in non-bailable offences⁹⁹, it is meant to be the rule and not the exception. Bail is available as of right if no chargesheet is filed within 90 days.¹⁰⁰ The UAPA extends this period to 180 days of which 30 days may be in police custody. If investigation is not completed within this period, then the court may extend it by another 90 days if satisfied by a report filed by the public prosecutor “*indicating the progress of investigation*” or if a *prima facie* case is made out. The UAPA also explicitly bars bail for foreigners illegally present in the country who are accused of offences under this law. Experiences from the implementation of the TADA and POTA, which had similar clauses show that detainees under such laws can be held in pre-trial detention for indefinite periods.¹⁰¹ It is important to note that safeguards prescribed under Article 22 apply to all persons and are not limited to citizens. Hence the UAPA’s blanket ban on bail for foreigners may be challenged as being unconstitutional.

Other than central laws on terrorism, state laws on maintaining public safety also contain lengthy pre-trial detention periods, for example the JKPSA not only allows detention for up to two years, but also allows for repeat detention orders on the same facts if an earlier order “is not legal on account of any technical defect”.¹⁰² Not only are detention orders repeated under this clause, in a number of other cases, even if the High Court quashes a detention order, the authorities continue holding the detainees by issuing fresh detention orders on ‘new grounds’, which are “often made up of extremely vague allegations”, leading to successive or serial detention depriving persons of their liberty.¹⁰³

The MCOCA, on the other hand, provides that bail shall be granted if the court “*is satisfied that there are reasonable grounds for believing he is not guilty of such offence..*” This means that an assumption of guilt must be dispelled in order to obtain bail- a clear subversion of the principle of assuming innocence until

⁹⁹ Non-bailable offences are those of a serious nature that attract more than three years imprisonment.

¹⁰⁰ Section 167 CrPC

¹⁰¹ See *Supra* N- 49

¹⁰² Section 19 (2) of the JKPSA provides that there “shall be no bar to making a fresh order of detention against a person on the same facts as an earlier order of detention” when the earlier order of detention “is not legal on account of any technical defect” or when the order “has been revoked by reason of any apprehension, for avoiding any challenge that such order or its continuance is not legal on account of any technical defect”

¹⁰³ *Supra* N-73

proven guilty, which is the bedrock of fair trial guarantees. This onerous burden leads to lengthy pre-trial detention periods.

The use of these laws, therefore, brings preventive detention in through the backdoor without adherence to constitutional safeguards under Article 22.

c. Use of evidence obtained through interception and compulsory disclosure

Central laws on terrorism have been enacted and re-enacted in a cyclical manner. In some instances, procedural safeguards present in previous versions get omitted. An example of this is Section 46 of the UAPA that makes admissible as evidence, "evidence collected through the interception of wire, electronic or oral communication regulated under the Telegraph Act and the Information Technology Act."¹⁰⁴ Under ordinary legal procedure, electronic interception may not be produced as primary evidence against the accused.¹⁰⁵ Under the UAPA the accused may be given a copy of the order authorizing the interception but not the transcripts and even this requirement may be waived at the judge's discretion. Detailed safeguards that were earlier present in the POTA and are retained in state laws like the MCOCA have therefore, been dispensed with.¹⁰⁶

The UAPA also provides for compulsory disclosure of information considered relevant by the investigating officer. Failure to disclose attracts an imprisonment term of upto 3 years. In the absence of guidelines to determine relevancy, the individual officers' power is greatly enhanced.¹⁰⁷ However, while increasing the officer's power, the UAPA contains no corresponding provisions to ensure witness protection. If the purpose of terrorism laws is to protect denizens from terror, then clauses like this may have the opposite effect, as citizens will be victimized by the terrorists and State authorities alike.

4. Impact on the right to form associations and political speech

Under the UAPA, the Central Government has the power to declare an organization a "terrorist organization" by including the name of such organization in the Schedule to the Act.¹⁰⁸ There is limited scope for a judicial review of a decision so taken, as applications for the revocation of such

¹⁰⁴ Under ordinary criminal procedural law, telephone interceptions cannot be used as primary evidence against the accused.

¹⁰⁵ UK Singh *op cit*

¹⁰⁶ Under the POTA the police had to get official permission for the interception, a copy of the order had to be presented to a review committee for its approval and the government had to present an annual report to the parliament on the interceptions

¹⁰⁷ Ramanathan, see *supra* N 5

¹⁰⁸ Section 35 UAPA

declarations lie to a Review Committee constituted by the Central Government.¹⁰⁹

Membership in a terrorist organization or terrorist gang is criminalized even if such a member is not involved with the commission of a “terrorist act”. The term “terrorist gang” alludes to “any association” indulging in terrorist acts.¹¹⁰ This is a vague and broad definition that has serious implications on the freedom of association and political speech. Further, state laws on public safety, such as provisions in the CSPSA, that criminalize all forms of association with unlawful organizations¹¹¹ allow the state to use such laws against any person who challenges state policy/action -- witness the use of both these laws in Dr. Binayak Sen’s case. In this case a renowned medical doctor and human rights defender was sentenced under provisions of the CSPSA and UAPA for his association with a banned Maoist outfit- a finding that was based primarily on the fact that Dr Sen had visited an imprisoned Maoist ideologue 33 times in jail.¹¹² However, documentary evidence shows that Dr Sen visited the imprisoned Maoist in his capacity as the head of a prominent human rights organization in India (People’s Union for Civil Liberties) with prior police permission. It is also widely known that Dr Sen had consistently raised his voice against human rights violations committed by the state. The Supreme Court granted him bail in April 2011, however, there are many reports of grassroots civil rights organizations engaged in collectivizing and protesting against state action that have been targeted for alleged associations with banned outfits.¹¹³

Recently, in February 2011, in an appeal against a conviction under TADA, the Supreme Court held that *“mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence.”*¹¹⁴ This is a clear rejection of the doctrine of “guilty by association” by the apex court, which is supported by substantial precedents in national and international law, both from the perspective of national security and human rights.¹¹⁵ This progressive judgment serves as a landmark in future cases, which hopefully will prevent the politically motivated harassment of bona fide human rights defenders.

5. Lack of accountability and review

¹⁰⁹ Sections 36 and 37

¹¹⁰ Section 2(l)

¹¹¹ Section 8 (2) and (3) of the CSPSA

¹¹² Dr Sen has been sentenced for committing sedition under Section 124B of the Indian Penal Code as well.

¹¹³ See *Supra* N-78

¹¹⁴ *Arup Bhuyan v State of Assam*; Supreme Court February 3, 2011

¹¹⁵ South Asia Human Rights Documentation Center; *Guilty by Association?*; Economic and Political Weekly; Vol XLVI No 13 March 26, 2011

Under Section 197 of the Code of Criminal Procedure, prosecution against a public servant can be initiated only with the prior sanction of the government, if the offence alleged was committed by the person while acting or purporting to act in the discharge of his official duties. This provision is applicable to the police and members of the armed force. In addition, extraordinary laws like the AFSPA contain similar provisions barring the prosecution of the members of the armed forces without prior Central Government sanction.¹¹⁶ In practice this amounts to *de facto* impunity with the army refusing to submit to the jurisdiction of courts. Given the broad range of powers granted to the armed personnel under the AFSPA, the lack of accountability of armed personnel poses a serious challenge to human rights norms.

Recently, this issue came up for adjudication before the Guahati High Court. The case arose from the rape and killing of 32-year-old Manorama Devi by members of the armed forces in Manipur. Widespread public outrage expressed against this incident led the State Government to appoint a single member commission of inquiry- the Upendra Commission- under the Commission of Inquiries Act to enquire into the facts and circumstances of the case. The Central Government filed a case to prevent the State Government from taking action on the recommendations made in the report submitted by the Upendra Commission, on the ground that it was beyond the State Government's ambit of jurisdiction as proceedings against armed personnel can be initiated only after obtaining Central Government sanction and that inquiries had already been instituted by the armed forces. The State Government argued that the Upendra Commission had been constituted to avert a public order situation and that the armed personnel did not share information with the State Government. The court accepted the State Government's argument and allowed for action to be taken on the Upendra Commission Report.¹¹⁷ This case indicates the issues that are raised when central forces operate in a state even if it marks a step forward in ensuring accountability of armed personnel.

Section 58 of the POTA had allowed for the penalization of police officers exercising "*their powers corruptly or maliciously knowing that there are no reasonable grounds for proceeding under this Act*". This provision has been dropped from the UAPA. Instead Section 49 provides protection for actions taken in good faith. This makes holding police officers accountable for misusing UAPA provisions nearly impossible.

Although extraordinary laws allow for deviations from normal criminal procedural laws, to enhance powers of state officials, there is no corresponding

¹¹⁶ Section 6 AFSPA

¹¹⁷ *Jagmohan Singh v State of Manipur*; Guahati High Court at Guwahati; Case No. WA 560/2005; September 2, 2010

deviation from ordinary criminal law provisions granting immunity to hold State authorities accountable for misusing their expansive powers.

Further, although security laws are enacted to deal with emergencies none of the laws provide for adequate review of implementation or contain sunset clauses to limit the time period of their application to cover the emergency and not continue interminably. The Supreme Court in its judgment NPMHR case directed the government to review the AFSPA on a periodic basis, but this has not been effective in preventing its misuse. There is limited scope for review in other security laws. Unlike the TADA and POTA, the UAPA has no sunset clause. The absence of sunset clauses is a clear indication of “routinizing the extraordinary.”

6. Challenges to federalism

A common argument raised in cases that have challenged the validity of TADA, POTA and the AFSPA is of union (central) overreach and the denudation of the federal structure – an aspect of the basic structure of the Constitution. However, the Supreme Court has not allowed this argument in any of the cases.

Apropos AFSPA, the Court in the NPMHR case upheld the powers of the Parliament to enact the AFSPA on the ground that -- by virtue of Article 355 the Union (Center) owes a duty to protect states against internal disturbances and hence can sanction the deployment of armed forces in aid of the civil power of the state. As per the court's interpretation, the power to provide armed forces “in aid of civil authority” does not supplant ordinary machinery for maintaining law and order or act as a substitute for the civil power of the state. The Court went on to clarify that the objective is for the armed forces to operate in cooperation with the civil administration so that the situation is effectively dealt with and normality restored. However, it has been observed that once the AFSPA is brought into operation the state civil administration is relegated to a second position– hence instead of coming to its aid central forces actually replace state civil administration. In certain areas the army has also taken over many of the civil government’s functions such as traffic control, running schools, health centers, road building, etc. There have been incidents where the army has taken decisions that are contrary to state government positions¹¹⁸. This leads to further alienation in areas where the AFSPA has been implemented, as locals in these areas view central armed forces as an occupying power. Widespread disenchantment with the presence of central armed forces in these regions, their practices and lack of accountability have manifested in continuing protests- a poignant example being Irom Sharmila of Manipur who entered her 12th year of

¹¹⁸ Navlakha G; “*Principled versus Piecemeal Approach: Repeal of AFSPA, Troops Pullout or Ending War against Our People*”; Sanhati; November 2, 2010.

hunger strike in 2011. It is a matter of irony that the State Government used the argument of maintaining public order in defending its decision to institute the Upendra Commission - it appears that the armed forces themselves give cause for internal disturbance even though its restoration is *raison d'être* for their deployment.

Conclusion

The paradigm of extraordinary laws presumes that the interests of democracy can be folded into those of State security. As the introduction argues this is not so easily the case, which is why the formulation of security laws must be accompanied by a hyper-vigilance about human rights and the potential for their violation. As this paper hopes to have demonstrated- extraordinary laws are frequently ineffective vis-à-vis their stated goals; moreover their implementation results in enormous documented violation of human rights while at the same time scuttling the right of citizens¹¹⁹ to hold the State and its agencies accountable for such violations. Even when citizens engage with the State using democratic means, State agencies tend to undermine legitimate grievances.

To illustrate in January 2011, Yaseen Malik, Chairman of the Jammu & Kashmir Liberation Front filed a public interest petition before the High Court of Jammu and Kashmir in respect of killings/ deaths of 117 persons caused by police action during public protests between January, 2010 to December, 2010.¹²⁰ The petition sought the directions for the registration of cases and effective investigations into the deaths in order to hold State functionaries accountable in accordance with the law. The Government's response to this petition is revealing of the State's attitude towards enforcing accountability of its own agents. Instead of addressing any of the legal points raised, the Government sought the petition's dismissal solely on personal grounds-- by bringing the petitioner's motives and credibility¹²¹ to question and stating that: "*The present PIL petition has been filed for oblique motives and for gaining political mileage/publicity, as such the same deserves to be dismissed. The petitioner who is bent upon advocating the slogan of freedom (Azadi) may use the PIL against the Union of India and the State in international fora, like he did in the past through a signature campaign and submitting the same to Pakistan, USA and Britain in the year 2007.*"¹²²

¹¹⁹ It is important to note that certain rights as discussed in the paper also accrue upon non-citizens.

¹²⁰ *Yaseen Mallik v State of Jammu and Kashmir* <http://www.greaterkashmir.com/news/2011/Jan/15/text-of-the-petition-filed-by-yasin-malik-37.asp>

¹²¹ In the Government response it was averred that "*The petitioner is also facing trials/investigations in number of criminal cases because of his active participation in terrorist and anti national activities and therefore the credentials and antecedents of the petitioner overshadow his public spirit with which he has ostensibly approached this honorable court by filing the instant PIL petition..*"

¹²² "Local government seeks dismissal of PIL filed by separatist in Indian-controlled Kashmir"; May 2011 http://news.xinhuanet.com/english2010/world/2011-05/05/c_13859148.htm

Another illustration in this regard is the case of Jalil Andrabi that Amnesty International has described to be “*emblematic of the culture of impunity which has prevailed during the conflict in the Kashmir valley*”¹²³ The case involved the killing of Jalil Andrabi, a Kashmiri lawyer and activist, who had exposed a number of human rights violations by India’s armed forces in Kashmir in the early 1990s.¹²⁴ In 1996, he was last seen being taken away by Srinagar based armed forces led by Major Avtar Singh. After 19 days his dead body was found in the Jhelum river, bearing marks of torture. Major Avtar Singh was named an accused by a special investigation team set up on the orders of the High Court of Jammu and Kashmir. Even so, Major Singh was not put on trial and the Indian armed forces failed to take any action on grounds that he was untraceable. In 2011, Major Singh was arrested in a case of alleged domestic violence in California, thereby sparking off renewed demands by human rights groups to bring him to justice. If the demands of the human rights community are met then Major Singh’s trial will be purely due to happenstance rather than the State’s commitment to ensuring accountability of its own agents and upholding human rights.

It also bears mentioning that post colonial India reproduces a colonial mentality where punitive laws is seen as a necessary means to control an always potentially rebellious populace. A glaring example of this mentality is the continuance of the offence of ‘sedition’ in Section 124A of the Indian Penal Code. Used against freedom fighters like Bal Gangadhar Tilak and Gandhi in the colonial times, this provision stipulates that whoever excites or attempts to excite *disaffection* towards the government established by law in India shall be punished by imprisonment for life. The validity of this provision was upheld in the *Kedarnath* case¹²⁵ with the Supreme Court holding that “strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means would not come within the section”¹²⁶ and that prosecutions under sedition laws should be conducted only in cases where there is incitement to violence. Justice Rajinder Sachar, former Chief Justice of the Delhi High Court and eminent human rights advocate, notes with regret that

“...the Supreme Court refused to recognize the difference between the State and government. Disloyalty can only be to the Indian State. But to spread disloyalty peacefully to the government because it is considered to have anti-people policies is the

¹²³ Amnesty International; “*No more delay: 15 years after Jalil Andrabi’s murder, India must seek extradition of former Indian Army Officer*” 14 March 2011 <http://www.amnestyusa.org/news/press-releases/no-more-delay-15-years-after-jalil-andrabis-murder-india-must-seek-extradition-of-former-indian-army?id=ENGUSA20110314003&lang=e>

¹²⁴ *Ibid*

¹²⁵ *Kedarnath v. State of Bihar*, AIR 1962 SC 955

¹²⁶ *Ibid*

very foundation of a vibrant democracy. In a democracy anybody, who is dissatisfied with the government, has the right to create disaffection against it and seek its removal at the next election. In fact, it is the constitutional right of every citizen to expose the misdeeds of the government it disapproves of and create disaffection and disloyalty among the people and work for throwing it out of power – of course without resorting to violence. Disloyalty to a government is different from disloyalty to the State. But alas, because of the Kedar Nath Singh case the police confidently go on resorting to Section 124A against social activists and being non-bailable the courts as a routine deny bail and the activist remains in jail for years even without the trial starting. A greater degree of human right violation is hard to imagine.”¹²⁷

This provision has been used against a number of political dissenters, writer Arundhuti Roy and Dr Binayak Sen being notable examples. Dr Sen's conviction for sedition and conspiracy was not only under Section 124A of the Indian Penal Code but also under similar provisions in the CSPSA and UAPA. The UAPA definition is more “dangerous to democratic rights”¹²⁸ as the explanation to Section 124A, which distinguishes “disapprobation” (i.e. criticism) from “disaffection”, has been dropped.¹²⁹ The continuance of this provision in the Indian Penal Code and its adoption in other security legislation clearly represents an unfortunate adherence to colonial modes of governance.

It has been the long held view of academics and activists that the issue in a majority of cases is of socio-political and economic inequality and not a simplistic law and order problem. In a 2000 article critiquing the Law Commission's view on terrorism, the late K Balagopal, renowned human rights defender, argued that what distinguishes “terrorism” from other forms of organized crime is the politics behind the crime. He explained “*it is a politics, right or wrong, with a social base of people- well-guided or misguided, supporting it and its armed activity, which makes it difficult in the extreme to deal with it, if dealing with it means policing it.*” Merely policing such activities through stringent laws puts the preponderant burden of tackling this problem on the criminal justice system “*which must be made more harsh and illiberal to suit the task.*”¹³⁰ Hence the importance of political and other strategies are underplayed to deal with such politically motivated crimes.

Addressing underlying causes involve holistic long-term interventions, which are outside the scope of this paper. Even the reform of the criminal justice system, which could address several of the human rights concerns, particularly in terms of procedural efficacy, is a long-term project. At the same time however,

¹²⁷ Rajinder Sachar

¹²⁸ Sachar *Ibid*

¹²⁹ *Id*

¹³⁰ K Balagopal; “*Law Commission's View of Terrorism*”; Economic and Political Weekly. June 17, 2000

as per Kannabiran we must recognize the reality of mindless killing and destruction that requires a reasonable legal response. The challenge is to delineate the contours of this reasonableness. However, any deviations from ordinary procedure must be commensurate with substantive and enforceable mechanisms to ensure the accountability of the State and its agents and guard against the *routinization of the extraordinary*.