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## **The need to reconcile Security and Human Rights**



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## INTRODUCTION

Setting the parameters of the relationship between security and human rights has prompted unprecedented debate across the world. Post 9/11, the spotlight is largely directed on the challenges of fighting terrorism while protecting human rights, reflected in reports by human rights organisations, public debates, major concerns expressed by UN bodies, and even the appointment of a UN Special Rapporteur on human rights and terrorism. The debate on terrorism - or perhaps counter terrorism more aptly - has sharpened the focus on how to negotiate the balance between security and human rights.

In the context of India, there is an urgent need to reconcile national security concerns and respect for human rights. Admittedly, spiralling violence, growing criminality, a proliferation of small arms, vigilantism, terrorism, and increased militancy pose serious security concerns. In fact, the scale and scope of contemporary security challenges are unprecedented and require a strong response from the state. Unfortunately, surveying past and present state responses to security situations reveals that repressive, rather than democratic, strategies are adopted. Rather than address root causes where possible, militaristic solutions are usually the chosen path. This involves enacting draconian security laws that allow for unregulated use of force and impunity for security agents. This has often led to serious human rights violations of ordinary people, imperilling security rather than securing it.

Focused specifically on reconciling security and human rights, this paper argues that protection of national security will only be further secured with protection of human rights. The paper begins by framing the notion of people-centric security in the context of constitutional values and protections. It then briefly explores constitutional debates and international legal frameworks that address the security - rights balance. Finally, the paper highlights and briefly analyses past and present state responses to security situations that have favoured an authoritarian impulse.

## Part I – Security and Human Rights: A Constitutional framework

In de-limiting or debating national security, it is imperative to place the values and principles upon which a state is founded at the centre of the discourse. The Preamble of the Constitution of India lays down that the foundations of the Indian state rest upon the promises of justice, liberty, equality and fraternity. The cherished ideals of the independence movement – secularism, democracy, equality and freedom – infuse its entire breadth. In practical terms, the framers of the Constitution were committed to preserving democratic values, guaranteeing the protection of fundamental rights, and providing a forward-looking, practicable blueprint for governance. Throughout their deliberations, the members of the Constituent Assembly sought to balance their vision for a new India with the practicalities and challenges of practicing democratic governance. This dualism naturally extended into concerns around protecting state security while preserving individual liberty. Aspects of these debates mirror the contemporary concerns of the need to reconcile state responses to national security issues with the obligation to protect fundamental rights.

The renowned constitutional law scholar, Granville Austin, writes, “The Constitution was to foster the achievement of many goals. Transcendent among them was that of social revolution. Through this revolution would be fulfilled the basic needs of the common man [and woman], and it was hoped, this revolution would bring about fundamental changes in the structure of Indian society.”<sup>1</sup> The chapters on Fundamental Rights and Directive Principles of State Policy are said to form the “conscience of the Constitution”. In envisaging independent India and its future, the framers of the Constitution enshrined the rights to equality, freedom, life and personal liberty, freedom of religion, cultural and educational rights, constitutional remedies, and the right against exploitation as fundamental rights. These are the human rights that are assured and protected for the people of India, and meant to shield each person from intrusions by the state upon their dignity, security, equality and freedom. The directive principles were framed to guide all policies and law making, and indicate goals and directions for change to the state. The combined effect of the preamble, fundamental rights, and directive principles lay down a vision for India. The directive principles supplement the fundamental rights to secure a welfare state and just social order for all by bringing together enshrined civil and political rights with prescriptions for social and economic justice.

Following from this vision, any understanding of national security must be guided by the need to protect not just the physical boundaries, symbols and infrastructure of the state, but also the idea of India. In reality, over the years since independence, restriction of democratic spaces by the government – for instance by breaking up peaceful public protests or labelling legitimate resistance movements as “anti-national” – has shaped a state-driven understanding of national security which threatens to block all democratic forms of dissent. A police firing in the state of Orissa in January 2006 is a case in point. On January 2<sup>nd</sup>, tribal communities from nearby villages gathered at the Kalinganagar industrial complex upon hearing that construction was to begin that morning at the site of a Tata Steel plant project. The communities had been protesting for a long time against the plant construction, demanding in particular adequate compensation for being displaced from their lands by the state government. That morning, nine platoons of the state police force fired into the crowd with no warnings and little attempt at pacifying the protestors through negotiations, resulting in the deaths of 12 people including a schoolboy and three women.<sup>2</sup> The Report of a series of workshops held by Amnesty International India on “security” legislation and human rights<sup>3</sup> points to a similar point: “At every workshop it was highlighted that people and organisations in the forefront of the struggle for social and economic justice are facing the brunt of harsh new criminal

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<sup>1</sup> Austin, G. (1966), *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, New Delhi, p. xvii.

<sup>2</sup> Human Rights Features (2006), *Displacement: Time for India to force the issue and excessive force is not the answer*, South Asian Human Rights Documentation Centre, HRF/134/06

<sup>3</sup> In 2002, Amnesty International India held a series of four regional workshops and a national conference on ‘security’ legislation and human rights, which were attended by representatives of mass movements, trade unions, civil liberties groups, women’s groups, journalists, lawyers, and political and social activists from all over the country.

legislation or the increasingly repressive abuse of existing laws”.<sup>4</sup> Drawing from their experiences, participants to the workshops identified prevalent patterns, including large-scale abuse of preventive detention and arrest provisions against activists and supporters of peoples’ organisations, and using the law to brand peoples’ organisations as “terrorist” or anti-national and subsequently banning them.<sup>5</sup> These real-life stories signal that entirely legitimate democratic aspirations, which contest the *status quo*, are often twisted to constitute security threats. This routine illegality on the part of the state, in the guise of a “security” response, reflects that the constitutional vision of a just and free India is often forgotten in practice.

## HUMAN SECURITY / PEOPLE-CENTRIC SECURITY

These experiences and struggles reflect that the current understanding of national security in India may not encompass the “security concerns” of the people. A new concept is needed to take these concerns into account. In the global debate on the changing meaning of security, “human security” has been established as a distinctive new concept, which broadens the idea of security in unprecedented ways. The first real articulation of the concept of human security was put forth by Mahbub ul Haq, a development economist, in the United Nations Development Programme report of 1994.

In introducing the concept, ul Haq ushered in a new understanding of security by broadening the parameters away from traditional state security. Simply put, human security is not about states and nations, but about individuals and people. While traditional state security focuses mainly on protecting the state – its territory, boundaries, values – human security concerns itself with the security of *people*. More broadly, the concept seeks to protect people from acts of violence and foster a greater sense of security for the individual. For instance, in addition to traditional forms of threats such as transnational crime and terrorism, the human security framework encompasses “threats” such as “the dangers of environmental pollution, the spread of infectious diseases such as HIV/AIDS, and massive population movements”.<sup>6</sup> In the same way, proponents of human security will recognise that violent acts of state agents against ordinary people would also constitute security threats. While there are competing definitions of the concept, Lloyd Axworthy, a former Foreign Affairs Minister of Canada<sup>7</sup>, eloquently defined human security:

“(Human security) is, in essence, an effort to construct a global society where the safety of the individual is at the centre of the international priorities and a motivating force for international action; where international human rights standards and the rule of law are advanced and woven into a coherent web protecting the individual; where those who violate these standards are held fully accountable; and where our global, regional and bilateral institutions – present and future – are built to enhance and enforce these standards”.<sup>8</sup>

Human rights are an intrinsic part of human security – “human rights have been described as the core of human security and as a normative framework for human security”.<sup>9</sup> The tenets of human security can provide insights to shape a new, more holistic, and relevant understanding of security in India. A new understanding of national security requires a paradigm shift from the traditional state-centric model to a people-centric model. In line with the constitutional vision, comprehensive “people-centric” security is inextricably linked to the guarantee of human rights protection enshrined in the Constitution. A people-centric model would recognise that any actions by state and non-

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<sup>4</sup> Amnesty International India (2002), *Special ‘Security’ Legislation and Human Rights: A Report of Four Regional Workshops and a National Conference on ‘Security’ Legislation and Human Rights*, p. 9.

<sup>5</sup> Ibid

<sup>6</sup> Ogata, S (2003) *Empowering People for Human Security*, Payne Lecture (Stanford University).

<sup>7</sup> The Canadian government has adopted the human security concept as a priority in its official foreign policy.

<sup>8</sup> Oberleitner, G. (2003), *Human rights and security – The Two Towers?*, Centre for the Study of Human Rights (London School of Economics and Political Science), p. 5.

<sup>9</sup> Ibid

state actors impacting the freedoms and livelihood of the people of India constitute grave threats to security.

While it is encouraging that a holistic conceptual understanding of security is evolving, the age-old practical dilemma of balancing national security with human rights – on the ground, in the face of more traditional security threats – remains as challenging as ever. Interestingly, the framers of the Constitution wrestled with these issues in very similar ways, as revealed by the Constituent Assembly debates on preventive detention. Moreover, international human rights treaties specifically address the question by providing legal frameworks where rights protection can be adapted to national security situations, without diminishing the essence of the rights themselves.

## Part II – Balancing Human Rights & Security: An age-old dilemma

### CONSTITUTIONAL DEBATES AND HIGHLIGHTS

Striking an acceptable balance between security concerns and rights protection – due process rights specifically – was an area of immense debate for the Constituent Assembly. In a nutshell, the debate pitted due process against preventive detention, in the light of public security. For India in the years 1946-1949, public order problems and security concerns loomed large. Just after achieving independence, India was in a state of flux due to large-scale migrations and communal violence stemming from the Partition. In this context, the Assembly members generally agreed that preventive detention provisions were necessary as a tool to fight and prevent crime, and only a minority challenged the *principle* of preventive detention in the debates. Tellingly, “what members did fear was that governments, in exercising their powers of preventive detention, would infringe other fundamental rights”.<sup>10</sup> In this way, the supporters of omitting preventive detention sought due process rights for their procedural safeguards against excesses by the police and the executive when attending to public security. Interestingly, it has been written that the public reaction to the Assembly’s decision to include preventive detention was wholly negative, reflecting the fear of executive excesses, stemming from the experience of living under colonial India’s preventive detention laws.<sup>11</sup>

Finally though, provisions for preventive detention were included in Article 22 of the Constitution.<sup>12</sup> Paradoxically, it is also Article 22 which, in its first part, lays down rights on arrest and provides safeguards against arbitrary detention<sup>13</sup>, except in cases where a person is detained under a preventive detention law<sup>14</sup>. Much of the constitutional debates revolved around the types of safeguards that needed to be put in place to prevent arbitrary, indefinite detention. Article 22 provides procedural safeguards in preventive detention cases.<sup>15</sup> Notably, it sets up an Advisory Board (made up of persons who are, have been, or are qualified to be appointed as judges of a High Court) which must evaluate whether a person detained under any preventive detention law can

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<sup>10</sup> Austin, G. (1966), *The Indian Constitution: Cornerstone of a Nation*, Oxford University Press, New Delhi, p. 108.

<sup>11</sup> *Ibid*, p. 106-107

<sup>12</sup> Article 22, clauses (4) to (7), Constitution

<sup>13</sup> Article 22 (1) states: “No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice. Article 22 (2) states: “Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate”.

<sup>14</sup> Article 22, clause (3), Constitution

<sup>15</sup> Article 22(5) states: “When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order”.

continue to be detained beyond three months<sup>16</sup>. Article 22 also provides for parliamentary oversight over maximum detention periods and the procedures to be followed by the Advisory Boards<sup>17</sup>. Article 21, which enshrines the right to life and personal liberty “except according to procedure established by law”, gained value in terms of safeguarding rights only through subsequent judicial interpretations. In the landmark case, *Maneka Gandhi vs. Union of India* (1978)<sup>18</sup>, the word “procedure” contained in Article 21 was interpreted in the light of the spirit of the entire chapter on fundamental rights. Moving away from its colourless standing in the Constitution, the Supreme Court took a decidedly principled stand and laid down that “procedure” must be read against a test – that all actions of the state must be right, just and fair, not arbitrary, fanciful or oppressive. Interestingly, the same judgment pointed to the inherent contradictions of the Constitution arising from the allowance for preventive detention, as “Preventive detention, which is dealt with in Article 22, also amounts to deprivation of personal liberty which is referred to in Article 21, and is a violation of the right of freedom of movement dealt with in Article 19(1)(d)”<sup>19</sup>.

Fundamental rights are so overarching that the Constitution forbids the Parliament or state legislatures from making any law, or the central or state governments from passing any order or taking any action, that interferes with their enjoyment. As in many other democracies, it is only in the exceptional circumstance of a state of emergency that the Constitution allows for the suspension of fundamental rights, though Article 359 states that Articles 20 and 21 cannot be suspended even during a proclamation of emergency.<sup>20</sup>

## INTERNATIONAL LAW

Article 51 of the Constitution of India, which forms part of the directive principles of state policy, specifically provides that: “The State shall endeavour to foster respect for international law and treaty obligations”. This becomes particularly important as the relationship between human rights and security has been addressed in most international and regional human rights treaties. India ratified the International Covenant on Civil and Political Rights (ICCPR)<sup>21</sup>, the bedrock of international civil and political rights, in 1979. In the *Vishaka case*<sup>22</sup>, the Supreme Court laid down 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”. Therefore, it becomes very relevant to analyse the provisions of the ICCPR which relate to national security.

Similar in spirit to the Constitution of India, the Preamble to the ICCPR states:

“Considering that [...] recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world [...]

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.”

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<sup>16</sup> Article 22(4), Constitution

<sup>17</sup> Article 22(7), Constitution

<sup>18</sup> *Maneka Gandhi vs. Union of India* (1978) SCC 248

<sup>19</sup> *Ibid*

<sup>20</sup> Article 20 provides: “(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. (2) No person shall be prosecuted and punished for the same offence more than once. (3) No person accused of any offence shall be compelled to be a witness against himself”.

<sup>21</sup> Adopted and opened for signature, ratification and accession by the General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on 23 March 1976.

<sup>22</sup> *Vishaka v. State of Rajasthan* (1997) 6 SCC 241

The ICCPR recognises that the most serious security situations might require states to *derogate* (i.e. suspend temporarily) from some of the rights enshrined in the Covenant under very strict conditions. It also provides that a few specific rights might be *limited* on the grounds of national security.

In time of public emergency threatening the life of a nation, the ICCPR<sup>23</sup> allows states that have officially proclaimed such emergency the power to derogate from certain provisions of the Covenant if “such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin”. Thereby, derogation from certain human rights in the name of national security is permissible only if four conditions are met: (i) a public emergency threatening the life of the nation<sup>24</sup>; (ii) a proportionate response by the state; (iii) a response in accordance with the international obligations of the state; and (iv) a non discriminatory response.

### ***The Sacrosanct: “Non-derogable” rights***

Even in cases where a state of emergency threatens the life of a nation, the ICCPR provides that certain civil and political rights are “non-derogable”, which means that under no condition can a State infringe upon these individual rights, no matter how serious the threat to national security is. These rights are “so inherent to the respect for the life and liberty of the person that no derogation can be granted”.<sup>25</sup> Enshrined in the ICCPR, these non-derogable rights include<sup>26</sup>: the right to life, the right not to be subject to cruel, 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.

The United Nations Human Rights Committee has indicated that the list of non-derogable rights contained in the ICCPR is not exhaustive<sup>27</sup>. Other non-derogable rights include: (i) the prohibition on taking hostages, (ii) the prohibition on forced displacement of persons, (iii) the rights of minorities, (iv) the right of all detained people to be treated in a way which respects their dignity, (v) the fundamental aspects of the right to a fair trial, including the presumption of innocence, (vi) the right against arbitrary deprivation of liberty.

### ***Limitation of certain rights on grounds of “national security”***

Besides the exceptional case of states of emergency, the ICCPR allows state parties to limit the scope of few specific rights in the name of national security and again, only under strict conditions. Such limitations might be imposed in cases that “require balancing the rights of the individual with the public interest or the proper functioning of the society, or balancing competing individual rights”.<sup>28</sup>

Within the framework of the ICCPR, the only rights which may be limited on the grounds of “national security” are: (i) the right to liberty of movement, freedom to choose residence and freedom to leave any country, including one’s own<sup>29</sup>, (ii) the right to freedom of expression<sup>30</sup>, (iii) the right of peaceful assembly<sup>31</sup>, and (iv) the right of freedom of association<sup>32</sup>. In addition,

<sup>23</sup> Article 4(1), ICCPR

<sup>24</sup> In 1985, distinguished experts in international law drew the Siracusa Principles defining more precisely the international law approach to derogations and limitations. According to principle 39, a threat to the life of a nation as one which: “(a) affects the whole of the population an either the whole or part of the territory of the State and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic functioning if institutions indispensable to ensure and protect the rights recognised in the Covenant.”

<sup>25</sup> International Federation for Human Rights (2005) *Analysis Report: Counter-Terrorism versus Human Rights: The Key to Compatibility*, p. 17.

<sup>26</sup> For a comprehensive list of “non-derogable” rights see Article 4(2), ICCPR.

<sup>27</sup> United Nations Human Rights Committee (2001), *General Comment 29 on Article 4 of the ICCPR*.

<sup>28</sup> International Federation for Human Rights (2005), *Analysis Report: Counter-Terrorism versus Human Rights: The Key to Compatibility*, p. 19.

<sup>29</sup> Article 12(3), ICCPR

<sup>30</sup> Article 19(3), ICCPR

<sup>31</sup> Article 21, ICCPR

the press and the public may be excluded from all or part of a trial on the same grounds.<sup>33</sup> Limitations must be specifically provided for by law and limitations on the rights to a public trial and freedom of peaceful assembly are permissible only if “necessary in a democratic society”.

Any attempt by a state party to the ICCPR to derogate or limit any human right enshrined in the Covenant on the grounds of national security outside the strict parameters mentioned above is not only illegitimate but also illegal. Apart from the curtailment allowed by international law itself, there can be no justification whatsoever for any other curtailment of civil liberties in the name of security.

### **Part III – The Authoritarian Impulse: Violations of Human Rights in the name of Security**

Past and present state responses to security situations have favoured an “authoritarian impulse” leading to serious human rights violations. India – like many other countries in the world – has tended to address security problems solely by enacting a wide range of special laws that give more powers to security forces and neglect accountability. On the ground, this has meant repressive and often violent practices by security forces. This section of the paper will provide a brief legal analysis of specific special security laws currently in force; profile prominent cases of grave human rights violations by state agents in the high security contexts of Manipur, Kashmir and Punjab; and highlight the impunity of security forces as one of the root causes of abuses.

#### **SPECIAL LAWS: DRACONIAN PROVISIONS IN THE NAME OF SECURITY**

Rather than attempting to resolve security challenges politically where possible, or addressing the socio-economic roots of internal struggles, the knee-jerk response of the state has been to enact repressive legislation. Some of these laws plainly violate fundamental rights by (for example) arming security forces with unhindered use of force; while others, through imprecise and loosely worded provisions, have created an environment favourable to human rights abuses. Violation of rights in the name of security is all the more widespread as perpetrators are covered by *de jure* or *de facto* impunity.

The range of special security legislation in force today include: the Armed Forces (Special Powers) Act, 1958 (AFSPA)<sup>34</sup>; the National Security Act, 1980 (NSA); and the Unlawful Activities (Prevention) Act, 1967, amended by the Unlawful Activities (Prevention) Amendment Act, 2004 (UAPAA)<sup>35</sup>. States have also been adopting a number of special laws such as the Jammu and Kashmir Public Safety Act, 1978; the Jammu and Kashmir Disturbed Areas Act, 1992 (JKDAA); and the latest, the Chhattisgarh Special Public Security Act, 2005 (CSPSA)<sup>36</sup>. Repealed security laws include: the Maintenance of Internal Security Act, 1971 (MISA)<sup>37</sup>; the Punjab Disturbed Area Act, 1983; the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA); and the Prevention of Terrorism Act, 2002 (POTA).

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<sup>32</sup> Article 22, ICCPR

<sup>33</sup> Article 14(1), ICCPR

<sup>34</sup> The AFSPA was adopted in 1958 in the context of the armed conflict that arose in response to the demands for self-determination of the Naga people. Initially, the AFSPA was only applicable in Assam and Manipur and was supposed to remain in force for only one year. Today, nearly 50 years later and despite numerous and ceaseless demands by civil society to repeal the AFSPA, the law is still in force and has been extended to all the seven north-eastern states: Assam, Manipur, Tripura, Meghalaya, Arunachal Pradesh, Mizoram and Nagaland. In 1990, the Jammu and Kashmir government enacted a similar law named the Armed Forces (Jammu and Kashmir) Special Powers Act.

<sup>35</sup> The UAPAA currently in force is an amended version of the aged Unlawful Activities (Prevention) Act, 1967. It has been amended in 2004 to incorporate some provisions of POTA, which had just been repealed. Today, the UAPAA is India’s “anti-terror” legislation.

<sup>36</sup> The official name of the law is the “Chhattisgarh Vishesh Jan Suraksha Act”. It has come into force on 21 March 2006, date of its publication in the Official Gazette.

<sup>37</sup> This law was enacted during the 1971 war, extended and then widely used during the emergency.



Four laws, the AFSPA, the JKDA, the UAPAA and the CSPA will be analysed below briefly in light of two selected fundamental rights. These specific laws are being put forth as they adequately reflect the general trend towards the “authoritarian impulse”. Since none of these laws have been adopted during an “officially proclaimed time of public emergency”, article 4(1) of the ICCPR, which allows States to derogate to certain provisions of the Covenant under strict conditions, is not applicable. To reiterate, any limitation of rights in the name of national security is only permissible within the strict framework provided for by the ICCPR and the Constitution. However, the letter and spirit of the above-mentioned laws have gone far beyond permissible limitations, and have led to countless abuses by the armed forces and the police.

### ***Violation of the principle of legality***

The principle of legality is a universal principle in criminal and international human rights law.<sup>38</sup> It is a non-derogable right. While the immediate meaning of the principle of legality is that no one can be punished for an act which did not constitute a criminal offence at the time it was committed (prohibition of *ex post facto* laws), the scope of legality has been broadened to include the requirement of clarity and preciseness in all criminal provisions to prevent arbitrary enforcement.<sup>39</sup> Therefore, vague or imprecise legal definitions are prohibited.<sup>40</sup>

In blatant breach of the principle of legality, security laws in India tend to contain very broad and vague definitions. For example, the Unlawful Activities (Prevention) Amendment Act 2004 (UAPAA) which does “remedy many of the deficiencies that resulted in the gross misuse of POTA”,<sup>41</sup> has unfortunately also borrowed a number of problematic provisions from its predecessor. Most notably, the UAPAA has retained the vagueness and the broadness of the definition of terrorist acts provided for by POTA<sup>42</sup>, which was the “primary cause of [its] misapplication”.<sup>43</sup> For example, under the definition given by the UAPAA: “Whoever, with intent to threaten ... the security of India ... does any act by using ... firearms, noxious gases ... or any other substance (whether biological or otherwise) of a hazardous nature, in such a manner as to cause or likely to cause ... damage to or destruction of property ... in order to compel ... any other person to do or abstain from doing any act, commits a terrorist act”.

A similar trend can be observed in many other countries in the context of the “war against terror”. As stated by a prominent international organisation, the International Federation for Human Rights, the use of ambiguous definitions “often make it possible to criminalise legal forms of the exercise of fundamental freedoms (such as the freedom of assembly or expression), peaceful political and social opposition and lawful acts”.<sup>44</sup>

Similarly, the Chhattisgarh Special Public Security Act 2005 (CSPA) provides for the draconian punishment of imprisonment for up to seven years for committing an “unlawful activity”, which is defined on the basis of loose terms such as committing an act, uttering words, writing or making visual representations which (i) “constitute a danger or *menace to public order, peace and tranquility*”; or (ii) “interferes or *tends to interfere* with maintenance of public order”; or (iii) “interferes or *tends to interfere* with the administration of law”<sup>45</sup>.

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<sup>38</sup> See for example Article 15, ICCPR: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed”.

<sup>39</sup> Report of the Secretary General (2003), *Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, United Nations document A/58/266, p. 13.

<sup>40</sup> See U.N. Special Rapporteur on the Independence of Judges and Lawyers, U.N. document E/CN.4/1998/39/Add.1, paragraph 129.

<sup>41</sup> Human Rights Features (2004), *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA's Second Coming*.

<sup>42</sup> See Section 15, Unlawful Activities (Prevention) Amendment Ordinance, 2004 and Section 3 (1)(a), Prevention of Terrorism Act, 2002.

<sup>43</sup> Human Rights Features (2004), *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA's Second Coming*.

<sup>44</sup> International Federation for Human Rights (2005), *Counter-Terrorism versus Human Rights: The Key to Compatibility*, p. 22.

<sup>45</sup> Section 2(c), Chhattisgarh Vishesh Jan Suraksha Act

The lack of preciseness of terms such as “menace to public order” or tending to interfere with public order or the administration of law not only breaches the principle of legality and gives undue discretion to interpret *who* is a menace to public order or interferes with the administration of law, but also infringes upon the free exercise of other fundamental rights.

### ***Violation of the right to life***

The Armed Forces (Special Powers) Act 1958 (AFSPA) gives the armed forces extraordinary powers in areas declared as “disturbed”. Such powers include sweeping powers of search, seizure, arrest as well as the power to destroy arms dump, positions, shelters, etc.<sup>46</sup>. The AFSPA has been described by human rights organisations as “one of the more draconian legislations that the Indian Parliament has passed in its 45 years of Parliamentary history”.<sup>47</sup> Similarly, the Jammu and Kashmir Disturbed Areas Act 1992 (JKDAA) grants any executive magistrate or police officer above a certain rank extraordinary powers in “disturbed areas”. Most notably, the AFSPA grant army officers the power to “fire upon or otherwise use force, even to the causing of death” against anyone “acting in contravention of any law or order prohibiting the assembly of five or more persons”.<sup>48</sup> The JKDAA gives the same power to police officers along with the power to *shoot to kill* “any person who is indulging in any act which may result in serious breach of public order”.<sup>49</sup> These draconian provisions blatantly violate the right to life protected both by the Constitution and the ICCPR. Under international and domestic law, the right to life is a non-derogable right - it can neither be suspended in times of public emergency nor limited on the grounds of national security.

Besides violating international human rights norms, these special laws have been unable to effectively tackle the security concerns that prompted their adoption. Instead, they have contributed to a vicious circle of violence and human rights abuses. For example, in the context of the North East, “the use of the AFSPA pushes the demand for more autonomy, giving the peoples of the North East more reason to want to secede from a state which enacts such powers and the agitation which ensues continues to justify the use of the AFSPA from the point of view of the Indian Government”.<sup>50</sup> The AFSPA has clearly “failed to contain, let alone resolve, all insurgency problems in the North-East”.<sup>51</sup> When the Act was first imposed in Manipur, there were four armed opposition groups in the state, today there are over two dozen.<sup>52</sup> With this in mind, arguably, the imposition of security laws has served to heighten insecurity rather than provide greater security.

### **AN ENVIRONMENT FAVOURABLE TO HUMAN RIGHTS ABUSES**

As summarised by Amnesty International, one of the leading international human rights organisations, “the sweeping powers bestowed upon security forces [...] have fostered a climate in which security forces and other agents of law enforcement commit human rights abuses with impunity”.<sup>53</sup> In fact, besides special laws that directly violate fundamental rights, security situations tend to create an environment whereby blatant abuses of fundamental rights are tolerated – and even some times encouraged – in the name of the “greater good”. Most notably, enhanced powers granted to security forces for safeguarding national security have resulted in widespread arbitrary arrests and detentions, disappearances, extra-judicial killings and torture, including rape.

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<sup>46</sup> Section 4, Armed Forces (Special Powers) Act, 1958

<sup>47</sup> South Asia Human Rights Documentation Centre (1995), *Armed Forces Special Powers Act: A study in National Security tyranny*.

<sup>48</sup> Section 4, Armed Forces (Special Powers) Act, 1958

<sup>49</sup> Section 4, Jammu and Kashmir Disturbed Areas Act, 1992

<sup>50</sup> South Asia Human Rights Documentation Centre (1995), *Armed Forces Special Powers Act: A study in National Security tyranny*.

<sup>51</sup> Asian Centre for Human Rights (2005), *An analysis of Armed Forces Special Powers Act, 1958*.

<sup>52</sup> *Ibid*

<sup>53</sup> Amnesty International (2005) *Briefing on the Armed Forces (Special Powers) Act, 1958*.

Little regard is given to the fact that the right to life, the rights against arbitrary arrest and detention and the right not to be subject to cruel, inhuman or degrading punishment or treatment are all non-derogable and “non-limitable” rights enshrined either in the Constitution or the ICCPR. In the absence of state support, systematic and thorough documentation of cases has proved very difficult and only a few organisations have engaged in such a Herculean and risky task.<sup>54</sup> Below are a few examples of cases that have created nationwide outcry and public protests at the abuses committed by the security forces in the name of security. They are not only sporadic incidents but represent a larger trend.

In Manipur, the torture, rape and extra judicial killing in July 2004 of 32-year old Thangjam Manorama by members of the Assam Rifles has become an emblematic case of abuses committed in the North East under the Armed Forces (Special Powers) Act (AFSPA).<sup>55</sup> Manorama’s case would have gone unnoticed without the ire of a group of women marching naked in the streets of Imphal draped in a big banner which read: “Indian army rape us! Kill us!” According to an Asian human rights organisation<sup>56</sup>, “it [the murder] is yet another glaring example of how draconian legislations and the absolute failure of the rule of law could create a devastating effect upon the people of the country and yet the perpetrators could walk away free with complete impunity”.<sup>57</sup> Subsequent public protest across the state demanded the repeal of the AFSPA, forcing the government to set up a panel to review the law. However, the panel’s recommendation to repeal the AFSPA has been ignored.

Like Manipur, Kashmir continues to witness serious human rights abuses by security forces. In September 2006, Human Rights Watch, another leading international human rights group, released a 150-pages report titled, “*Everyone lives in Fear: Patterns of Impunity in Jammu and Kashmir*”<sup>58</sup>, product of two years extended and well-documented research.<sup>59</sup> The report documents an overwhelming number of cases of killings, disappearances, torture and arbitrary detentions. In its executive summary, Human Rights Watch makes the following statements:

“Indian army and paramilitary forces have been responsible for innumerable and serious violations of human rights in Kashmir. Extrajudicial executions are widespread ... Most of those summarily executed are falsely reported to have died during armed clashes between the army and militants in what are euphemistically “encounter killings” ... Indian security forces have long been responsible for enforced disappearances .... Kashmiri human rights defenders say that at least eight thousand people have ‘disappeared’ since the conflict began; most were last seen in the custody of troops ... Torture of detainees, in particular severe beatings during interrogations of suspected militants and their supporters, remains the norm ... Kashmiris are often arbitrarily and illegally detained”.<sup>60</sup>

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<sup>54</sup> Some organisations include the People’s Union for Civil Liberties, the Committee for Information and Initiative on Punjab, Amnesty International, and Human Rights Watch

<sup>55</sup> The following account has been given by the General Secretary of PUCL in a letter addressed to the National Human Rights Commission: “It has been reported to us that in the early hours of July 11 a 32 year old woman Thangjam Manorama [...] was shot dead by the personnel of 17th Assam Rifles. It is reported by the family of the deceased that some members of the Assam Rifles forced their way into their house sometime after 12.30 a.m. after breaking down the front door. They asked for Th. Manorama and later dragged her out of her bedroom and slapped her around in the courtyard. The family is reported to have admitted that she had been a member of the underground PLA but had retired three years back on account of ill health. [...] The local villagers found her bullets riddled body lying abandoned near Yaipharok Maring village in the morning. The status of the body was such, the family maintains, that the victim appeared to have been killed after sexual molestation. PUCL Bulletin (2004), *Rape in Manipur*.”

<sup>56</sup> The Asian Human Rights Commission, a Hong Kong based regional NGO.

<sup>57</sup> Verma R. (2004), *Activists call for Repealing Indian Law for Peace in Manipur*, One World South Asia.

<sup>58</sup> Human Rights Watch (2006), “*Everyone Lives in Fear: Patterns of Impunity in Jammu and Kashmir*.”

<sup>59</sup> Human Rights Watch sent research teams to both Jammu and Kashmir from 2004 to February 2006, and to Azad Kashmir in 2005 and 2006. Additional research was conducted by telephone, email and in meetings with NGO’s and officials in New Delhi, Islamabad and other countries.

<sup>60</sup> *Ibid*, p. 2

Few local human rights organisations work fearlessly on these burning issues. Those who take the risk like Jalil Andrabi – a lawyer active in setting up district committees to make visits to jails and detention centres – disappear. He was found dead on March 27, 1996 (three weeks after his arrest) with a gunshot wound on his head and signs of torture on his body. Acting upon the directions of the High Court, the “Special Investigation Team” found that a Major in the Indian Army and some soldiers under his command were responsible for the abduction and killing. However, the army failed to produce the Major before the High Court, claiming that his term of service had been terminated.<sup>61</sup> The National Human Rights Commission indicted the Indian Army for persistently refusing to hand over the perpetrators and observed that the case was “a source of continuing embarrassment to the country”.<sup>62</sup>

In Punjab, Jaswant Singh Khalra, a human rights activist, made an attempt to document a fraction of the cases of disappearances in Punjab. Along with a colleague, he investigated the illegal cremations conducted by the Punjab police between 1984 and 1994 in three crematoria of the district of Amritsar. Khalra had approached the Supreme Court to investigate the matter, but “disappeared” on September 6, 1995 before the Court could hear the matter. It will be impossible to know precisely how many people have disappeared in Punjab during the ten years of “insurgency”, but the Central Bureau of Investigation (CBI) – acting under the instructions of the Supreme Court – has confirmed 2,097 illegal cremations in the three Amritsar crematoria alone. CBI investigations also revealed the role of the police in the “disappearance” of Khalra. In 2005, six police officers were finally convicted for his abduction and murder by a Delhi trial court, after ten years of relentless efforts by human rights organisations and Khalra’s family as well as national and international pressure to obtain a conviction in the case.

#### **LACK OF ACCOUNTABILITY AND IMPUNITY: THE SOURCE OF ALL ODDS**

The lack of accountability of the police and the armed forces has favoured a climate of impunity, which encourages the human rights abuses described above. This situation will persist as long as security forces are given the impression that no matter how much they breach fundamental rights, they are above the law, as they are acting for the *protection of national security*. The right to an effective remedy is a non-derogable right enshrined in the ICCPR<sup>63</sup>, which cannot be limited on the grounds of national security. However, provisions contained both in the Code of Criminal Procedure, 1973 and in special security laws have led simultaneously to the absence of effective remedies for the victims of human rights abuses, and *de jure* or *de facto* impunity for the perpetrators. *De jure* impunity is the direct result of legal provisions and regulations that provide immunity from prosecution to perpetrators. *De facto* impunity is the failure to prosecute as a result of the lack of capacity or political/institutional will to do so.

Section 197 of the Code of Criminal Procedure 1973 (CrPC) bars courts from taking cognisance of an offence alleged to have been committed by a public servant – including police officers – or a member of the armed forces while “*acting or purporting to act in the discharge of his official duty*”, except with the “*previous sanction*” of the state or central government, as the case may be. Special laws, such as the Armed Forces (Special Powers) Act, 1958 contain similar provisions barring prosecution without prior government sanction “*in respect of anything done or purported to be done in exercise of the powers conferred by this Act [the AFSPA]*”.<sup>64</sup> In practice, these provisions amount to *de facto* impunity because government sanction is almost never granted, especially in the cases of abuses perpetrated in a national security context. Amnesty International reported that of almost 300 cases from Jammu and Kashmir investigated by the police and forwarded to the union Government for sanction, not a single case has been granted sanction.<sup>65</sup>

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<sup>61</sup> Ibid p. 49

<sup>62</sup> National Human Rights Commission, Annual Report, 2001-2002, p.29.

<sup>63</sup> Article 2(3), ICCPR

<sup>64</sup> Section 6, Armed Forces (Special Powers) Act, 1958; Section 6, The Jammu and Kashmir Disturbed Areas Act, 1992; and Section 6, The Punjab Disturbed Areas Act, 1983.

<sup>65</sup> Amnesty International (2005) *Briefing on the Armed Forces (Special Powers) Act, 1958*.

The Unlawful Activities (Prevention) Act goes much further and provides for *de jure* impunity. In fact, even requiring sanction is left out, it simply bars prosecution against officers of the state and central government for anything which is “*in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder*”. It further bars any legal action against a “*serving or retired member of the armed forces or paramilitary forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism*”.<sup>66</sup> Given the fact that it is “practically impossible to prove that a police officer has acted without good faith in abusing the provisions”<sup>67</sup> of the Act, or that a member of the armed forces has acted in bad faith in the course of an operation directed at combating terrorism, these provisions embed a strong culture of impunity. As far as violation of human rights by members of the armed forces is concerned, even rights-affirming legislation like the Protection of Human Rights Act, 1993 provide that state human rights commissions cannot take up such cases<sup>68</sup> and that the National Human Rights Commission can only seek a report from the central government into the alleged abuses – without being allowed to inquire further – before making its recommendations to the government.<sup>69</sup> In addition to these examples of “legalised impunity”, the lack of accountability also finds its roots in police practices which make it very difficult for a victim of abuses by security forces to obtain justice. The most widespread of these practices is the refusal to register a First Information Report (FIR).

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<sup>66</sup> Section 49, Unlawful Activities (Prevention) Act, 1967

<sup>67</sup> Human Rights Features (2004), *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA's Second Coming*.

<sup>68</sup> Section 21(5), Protection of Human Rights Act, 1993

<sup>69</sup> Section 19, Protection of Human Rights Act, 1993

## CONCLUSION

Instead of viewing compliance with human rights as impediments to national security, it is essential to consider an alternate paradigm: compliance with human rights of *all* the people of India as central to national security. Kofi Annan, the Secretary General of the United Nations, pointed to this necessary relationship in the context of the fight against terrorism:

“We should all be clear that there is no trade-off between effective action against terrorism and the protection of human rights. On the contrary, I believe that, in the long term, we shall find that human rights, along with democracy and social justice, are one of the best prophylactics against terrorism”.<sup>70</sup>

Integrating the protection of human rights into the protection of national security requires reform on several fronts. Conceptually, it is time to percolate a “people-centric” model of security into public debate, by asserting the importance of the security of individuals. National security threats can no longer be seen to come solely from sources of external aggression, the culpability of state actors in violating rights in the name of security must also be dealt with through democratic processes. Borrowing from the tenets of the global “human security” concept, as well as resituating the idea of national security within the context of the Constitution and international human rights frameworks, can also lend greater ideological clarity and stronger human rights leanings to shape a new understanding of security.

India’s repressive security legislation reflect the “authoritarian impulse”. Special security laws tend to violate fundamental rights by providing for extraordinary, unhindered powers buttressed by provisions granting impunity to security agents. With national security as the shield and law as the facilitator, security forces are able to commit abuses with impunity. Legal reform is a clear imperative. First, all provisions of security laws which either directly violate or lean towards violation of fundamental rights must be repealed. Second, legal provisions which require prior governmental sanction to prosecute members of security force or provide for *de jure* impunity must also be repealed.

Systemic reform of institutions and public agencies, such as the police, should be prioritised, particularly to strengthen accountability. To this end, it is imperative to enable *independent* investigations of allegations of abuse by security forces. More generally, it is essential to *reconcile* security and human rights by creating a rights-affirming culture to supplant the culture of impunity.

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<sup>70</sup> Extract from a speech by Kofi Annan, Secretary-General of the United Nations, to the members of the Security Council, 18 January 2002.