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Repressive Laws in India

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REPRESSIVE LAWS IN INDIA

– *Saumya Uma*

Unlike protective laws that aim at preserving and protecting the human rights of the people, repressive laws / draconian laws empower the state to address specific issues and contexts in a manner that violates human rights of individuals in the “larger interests” of society. Repressive laws are an off-shoot of state repression and are intended to control situations of violence, political dissent, dissent based on ideology and dissent from majority practices.

Two types of repressive laws exist - those that have provisions that are unjust / unfair / unequal; and those laws that have the scope for unjust, unfair or unequal implementation due to a corrupt / biased / inefficient administrative apparatus. Typical characteristics of repressive laws include the following:

- They contain vague and wide definitions of crimes;
- They contain a wide ambit for application, designed to include a large number of individuals;
- They invariably involve vesting state agencies with enormous powers over individuals, often without adequate safeguards against their misuse - including increased powers of search, seizure, arrest, detention, interrogation etc.;
- Ordinary and established court processes are subverted, by setting up of special courts;
- Court hearings are not conducted in an open, transparent manner;
- They prescribe stringent punishment including life sentences and death penalty, often disproportionate to the crime alleged to have been committed; and
- Such laws are justified in the name of public interest / larger interests of society including national security, public order, preservation of democracy etc.

Human rights organizations and sections of civil society have raised concerns over repressive laws for the following reasons:

- They violate rule of law;
- They create inroads into Constitutional guarantees of fundamental rights, and curb / undermine personal liberties of individuals;

- They are in direct contradiction with values of democracy;
- They are prone to misuse and are misused by state agencies, targeting the most vulnerable groups and communities;
- They are used to stifle voices of political dissent; and
- They undermine internationally recognized standards of human rights.

I. LAWS RELATED TO PREVENTIVE DETENTION

‘Preventive detention’ means the detention of a person without trial, justified by a suspicion or reasonable probability of the person committing an offence. In India, the history of preventive detention laws dates back to the days of British colonial regime, when, the government was empowered to detain anybody on mere suspicion.¹ This British legacy was adopted by the Indian Constitution-makers after the independence of India. The Indian Constitution allows preventive detention laws to be passed against its people, on grounds of ‘national security’ and ‘maintenance of public order’.² Article 22 of the Constitution allows an individual to be detained by state agencies without charge or trial for up to three months, even during peacetime and non-emergency situations. The safeguards provided for situations of detention are not extended to situations of preventive detention.³

In accordance with Article 22 (4) of the Indian Constitution, an Advisory Board headed by a sitting judge, is formed by the government to ensure that the detention is justified, before the detention period is extended beyond three months. The authority is not required to disclose facts relating to the detention if such a disclosure is against public interest.⁴ A petition for a writ of *habeus corpus* may be filed in the High Court or Supreme Court, resulting in the detaining authority being called upon to justify the detention.

In addition to the Constitutional provision, Preventive Detention Act was passed by the Parliament in 1950. When this expired in 1969, it was replaced by Maintenance of Internal Security Act (MISA) in 1971, Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA) in 1974, the National Security Act (NSA) 1980 and The Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980. All these laws allow for preventive detention. Though MISA was subsequently repealed, the other

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- 1 Bengal Regulation – III of 1818 (Bengal State Prisoners Regulation); see also Rule 26 of the Rules framed under the Defence of India Act, 1939 which allowed detention if it was “satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial to the defence and safety of the country. Elaborated in *Emperor vs. Sibnath* AIR 1945 PC 156
 - 2 Entry 9 of List I and Entry 3 of List III of the Ninth Schedule of the Indian Constitution.
 - 3 Article 22 (1) and (2) of the Indian Constitution provide for protection against detention and arrest of individuals, while Article 22(3) expressly provides that these safeguards would not apply to a person who is “an enemy alien” or to “any person who is arrested or detained under any law providing for preventive detention.”
 - 4 Article 22(6) of the Indian Constitution

laws continue to remain in existence along with state legislations of a similar nature⁵ and anti-terrorism laws that also provide for similar provisions.

The very first case that came up before the Indian judiciary subsequent to enacting the Indian Constitution was that in which the preventive detention of a well-known communist – *A.K. Gopalan* – was challenged in the Supreme Court. The court, on this occasion, decided that the law of preventive detention could not be challenged on the ground that fundamental freedoms guaranteed under Article 19 of the Indian Constitution had been violated.⁶ This ruling was subsequently overturned in *Maneka Gandhi's case*.⁷ On the issue of preventive detention, some of the principles laid down by the courts are as follows:

- The power of preventive detention is a “necessary evil” and is tolerated in a free society in the larger interest of security of the State and maintenance of public order.⁸
- A distinction exists between preventive and punitive detention, the object of preventive detention being not to punish a person for having done something wrong, but a precautionary measure to prevent the person from doing so.⁹
- Preventive detention in public interest is justified, and that such a law is intended to strike a delicate balance between the personal liberties of an individual and the safety of the country and society at large.¹⁰
- Preventive detention is a serious invasion of personal liberty and such meager safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the Court.¹¹
- Law of preventive detention must pass the test of reasonable and fair procedure established by law for deprivation of personal liberty; such scrutiny would be done by the judiciary;¹²
- Any unreasonable or unexplained delay in furnishing to the detained person the grounds of detention, with the basic documents, or in considering the person’s representation, would vitiate the detention and entitle the detained person to be released.¹³

⁵ Examples of state legislations providing for preventive detention are the Maharashtra Prevention of Dangerous Activities of Slum Lords, Bootleggers and Drug Offenders Act, 1981; Maharashtra Control of Organized Crimes Act (MCOCA) 1999; Gujarat Prevention of Anti-Social Activities Act, 1985; and A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986.

⁶ *Gopalan vs. State of Madras* (1950) S.C.R. 88 / AIR 1950 SC 27

⁷ *Maneka vs. Union of India* AIR 1978 SC 597

⁸ *Francis Coralie Mullin vs. The Administrator, Union Territory of Delhi & others* AIR 1981 SC 146

⁹ *Ibid* at para 3

¹⁰ See *Mohd. Alam vs. State of West Bengal* AIR 1974 SC 917

¹¹ *Ram Krishna vs. State of Delhi* (1953) S.C.R. 708

¹² *Supra* n. 7

¹³ *Virendra vs. State of Maharashtra* (1981) Cr. L.J. 1283 (2) S.C.; *Ramachandra vs. Union of India* AIR 1980 SC 765; *Kubic vs. Union of India* AIR 1990 SC 605 (para 15)

Through provisions that deny bail to undertrials, such as through anti-terror laws, detention laws are indirectly being enacted, but these are outside the purview of the Constitutional safeguards as the accused is charged with a crime for which he / she is tried over a period of years, and languishes in judicial custody till such time as the trial is concluded and guilt ascertained.

India is one of the few countries in the world that, through its Constitution, allows for preventive detention during peacetime. The European Court of Human Rights outlawed laws on preventive detention many years ago, irrespective of legal safeguards for its use,¹⁴ thereby indicating the adverse impact of preventive detention on human rights of individuals. International Covenant on Civil and Political Rights, which India has ratified and whose provisions India is bound by, also allows for a deviation from stated human rights only in situations where a national emergency is declared.¹⁵ The human rights community in India has had two approaches to the issue. Some sections have demanded that the government repeals all laws related to preventive detention, including the Constitutional provision, while other groups have suggested incorporation of further safeguards to prevent the misuse of such laws.¹⁶

II. ANTI-TERROR LAWS

Since the 1980s, specific laws came to be enacted to address the issue of terrorism. These include the Terrorist and Disruptive Activities (Prevention) Act (TADA) 1987, the Prevention of Terrorism Act (POTA) 2002 and the amendments to Unlawful Activities (Prevention) Act (UAPA) in 2004 and 2008. By enacting these laws, the government has treated terrorism to be a special crime that warrants special and stringent laws.

Terrorist and Disruptive Activities (Prevention) Act (TADA) was formulated in 1987 against the backdrop of growing violence in Punjab. 'Terrorism' was not defined under this law.¹⁷ The judiciary has stated that it is not possible to give a precise definition of terrorism, but that what distinguished terrorism from other forms of violence was the deliberate and systematic use of coercive intimidation.¹⁸ From 1984 onwards, approximately 75000 people were detained under TADA; of these, at least 73000 cases were subsequently withdrawn for lack of evidence.¹⁹ The conviction rate under TADA was less than one percent,²⁰ indicating that more than 99% cases booked under the law were not backed by substantive evidence. Though the Supreme Court upheld the validity of the TADA in *Kartar Singh vs. State of Punjab*,²¹ the law was criticized by

¹⁴ See judgement of European Court of Human Rights in *Jecius vs. Lithuania*, decided on 31 July 2000, available at http://www.echr.coe.int/eng/Press/2000/Jul_Aug/Jecius%20jud%20epress.htm (accessed on 8 January 2009)

¹⁵ Art. 4 of the International Covenant on Civil and Political Rights, 1966

¹⁶ See for example, recommendations of South Asian Human Rights and Documentation Centre to the National Commission to Review the Working of the Constitution (NCRWC) in 2000. A summary of the recommendations on preventive detention are available at *Human Rights Features*, HRF/26/00, 25 September 2000

¹⁷ S. 3(1) listed out intention and terrorist acts covered by the law

¹⁸ *Hitendra Vishnu Thakur vs. State of Maharashtra* AIR 1994 SC 2623

¹⁹ V.Venkatesan, 'Terror of a Bill', *Frontline*, Vol. 17, Issue 16, 5-18 August 2000

²⁰ *Ibid*

²¹ 1994 SCC (3) 569

human rights organizations as well as political parties on various counts. Justice Pandian, who led the majority judgment in Kartar Singh's case, opined that the law was necessary to strengthen "vigilance against the spurt in the illegal criminal activities of militants and terrorists", but this judgment failed to take into account the harm done to a large number of innocent people. Justice H. Suresh (retd.) calls the law "irrational" and "unjust".²² It was permitted to lapse in May 1995 by the P.V. Narasimha Rao government, due to reports of widespread abuse. However cases initiated under it continued to have legal validity and remained pending in courts.

Prevention of Terrorism Act (POTA) was enacted by the National Democratic Alliance (NDA) government in 2002, against the backdrop of the attacks on the World Trade Centre in New York on 11 September 2001. Several attacks in the state of Jammu and Kashmir, and the attack on the Indian Parliament in December 2001 acted as catalysts for the enactment. POTA allowed for detention of a suspect up to 180 days without filing charges in court. It also allowed authorities to withhold identity of witnesses, treated confessions to police as admissions of guilt, and included provisions for banning organizations and for cracking down on funding for terrorism.

One of the most high-profile arrests under POTA was not of a terrorist, but of a politician from Tamil Nadu – V. Gopalaswami alias Vaiko.²³ It was also widely reported that in 2002-3, the law was misused to arrest and detain hundreds of Muslims in Gujarat for years without a trial.²⁴ Syed Abdul Rehman Geelani, described as a mastermind in the attack on the Indian Parliament in 2001, was given a death sentence by a POTA court but was subsequently acquitted by the High Court and the Supreme Court in 2005 because of lack of evidence. Over a 100 Parliamentarians had signed a petition for repeal of POTA, and the National Human Rights Commission pointed to its misuse.²⁵ POTA was repealed in 2004. Prime Minister Manmohan Singh, while expressing the decision to repeal the law, stated that "the law had caused unnecessary harassment to many sections."²⁶ In 2004, a People's Tribunal was held in Delhi, where persons booked under this law without any cause testified in public. The Tribunal highlighted the fact that *adivasis* and *dalits* who were engaged in land reforms and protested against bonded labour were falsely labeled Naxallites and booked under this law, and that charges under POTA had also been made against children, illiterate persons and poor farmers.²⁷

²² Justice Hosbet Suresh, *Fundamental Rights as Human Rights* (Mumbai: Sabrang Communications and Publishing Pvt. Ltd., 2003), at p. 76

²³ He was arrested under POTA by the Tamil Nadu Chief Minister Jayalalithaa for making a public speech in support of Liberation Tigers of Tamil Eelam (LTTE) in the year 2002.

²⁴ For more details, please see Zakia Jowher and Mukul Dube, *POTA in Gujarat and Its Meaning for India*, 15 August 2004, available at http://www.sacw.net/Gujarat2002/Dube_Jowher15August2004.html (accessed on 8 January 2009)

²⁵ Statements issued by the National Human Rights Commission under the chairmanship of Justice J.S.Verma, in July 2000 and November 2001.

²⁶ 'I am Proud We Repealed POTA: PM', *Indian Express*, 4 September 2005, available at <http://www.expressindia.com/news/fullstory.php?newsid=53928> (accessed on 9 January 2009)

²⁷ For reports of testimonies presented at the Tribunal, see Sukumar Muralidharan, 'Untold Stories', *Frontline*, Vol. 21, Issue 07, March 27-9 April 2004, available at <http://www.hinduonnet.com/fline/fl2107/stories/20040409001704400.htm> and 'POTA - A Movement for its Repeal', *Combat Law*, Vol. 3 Issue 1, April-May 2004, available at http://www.combatlaw.org/information.php?article_id=406&issue_id=16 (accessed on 9 January 2009)

Amendments to Unlawful Activities (Prevention) Act (UAPA), 1967: The United Progressive Alliance (UPA) government had repeatedly said that India already has a number of stringent laws such as NSA and UAPA, and hence there was no necessity to enact another specific anti-terror law. However, when it repealed POTA in 2004, it brought about amendments to UAPA. These included increased punishment for committing acts of terrorism, enhanced police powers of seizure, communication intercepts made admissible as evidence and extended periods of detention without charges to 90 days from the original 30 days. In the backdrop of terrorist attacks in Mumbai in November 2008, the UPA government introduced anti-terrorism provisions by bringing about further amendments to the UAPA. Detention without bail for up to 180 days for Indians, indefinite detention without bail for foreigners and reversing the burden of proof in many instances are some of the amendments brought about.²⁸

Concerns about Anti-terror Laws

Human rights groups and public-spirited citizens have been deeply concerned about anti-terror laws for a variety of reasons, some of which are given below:

- Some opine that such laws are “intrinsically draconian”;²⁹
- They define the offence in very broad term, giving scope for the state officials to use wide discretion in enforcing the law, and therefore to its misuse. This contravenes the established principle in criminal law - that an offence is defined in clear, definite and unambiguous terms;
- They allow for confessions made to the police as evidence of admission of guilt. This is contrary to provisions under ordinary criminal law where police confessions are not admitted as evidence of guilt, due to the possibility of confessions being made under coercion / duress / custodial torture;
- These laws shift the burden of proof on the accused person, presuming guilt of the person unless the person proves his / her innocence. This violates the established right to be presumed innocent unless proved guilty;
- These laws make an exception to the rule of trials in an open court (where they are open to public scrutiny) by either conducting ‘in camera’ (closed door) trials or conducting trials in heavily armed court rooms where public access is prevented;
- By allowing the identity of the witnesses to be withheld, the laws deny the accused person the right to cross-examination of the witness to prove his / her innocence;

²⁸ For more details, see Praful Bidwai, *New Anti-Terror Laws Draconian Say Activists*, available at <http://ipsnews.net/news.asp?idnews=45179> (accessed on 9 January 2009)

²⁹ Ashok Agrwal, ‘State Repression in India: Behind the Mask of Democracy’, *Combat Law* Vol. 1, Issue 1, April-May 2002, available at <http://works.bepress.com/ashokagrwal/1/> p. 6 (accessed on 9 January 2009)

- The laws restrict / negate the powers of courts to award bail to the accused; and
- Anti-terror laws are prone to misuse as they make in-roads into established standards of human rights and safeguards against their violation by state agencies.

Will Stringent Laws Counter Terrorism?

Many believe that stringent laws are required to counter terrorism. This belief is inspired by the logic that such laws will deter terrorists from indulging in acts of terrorism. Those who advocate for a stringent law to counter terrorism also believe that it will make it easier for the police and the prosecution to investigate, prosecute and make perpetrators accountable for acts of terrorism.

Opponents of anti-terror laws raise the following arguments:

- Stringent laws cannot deter terrorists as those who are ready to kill and to be killed do not think of stringent laws;
- Terrorism cannot be countered unless the causes of terrorism are addressed. These include deprivation and denial of democratic rights that have pushed many youth to glorify acts of terror, alienation and disillusionment of people which are then misused to indoctrinate them about the advantages and need for acts of terror;
- It is certainty of the law, and not the severity of the law, that can deter any crime. Certainty of the law comes from its effective and non-discriminatory implementation by state agencies;
- Even when stringent anti-terror laws were in force, terrorist attacks could not be prevented;
- Existing laws such as Unlawful Activities (Prevention) Act (UAPA) 1967, the National Security Act (NSA) 1980 and the Disturbed Areas Act 1990 are adequate to deal with terrorism; and
- Stringent laws to counter terrorism plant the seeds for future violence.

III. SECURITY & OTHER STRINGENT LAWS

The infamous Rowlatt Act, also known as the Anarchical and Revolutionary Crimes Act of 1919, set a precedent for giving unchecked powers to the colonial government to arrest and imprison suspects without trial. After independence, a series of state laws were enacted including the Punjab Disturbed Areas Act, Bihar Maintenance of Public Order Act, Bombay Public Safety Act and Madras Suppression of Disturbance Act, aimed at curbing forces that were using religion to incite violence. In 1970, the West Bengal government passed the West Bengal (Prevention of Violent Activities) Act in response to rise in the Naxalite movement. Since the 1970s, a spate of laws

came to be enacted to address specific contingencies.³⁰ These were categorized as “extra-ordinary laws”. Ujjwal Kumar Singh speaks of how extraordinary laws are presented as problem-solving measures, and are usually surrounded by discourses asserting their indispensability and on the other hand, assurances that having come in response to specific situations, they are not everlasting.³¹

Maintenance of Internal Security Act (MISA) was a law passed by the Indian Parliament in 1973 under the leadership of Prime Minister Indira Gandhi. This law was enacted purportedly to counter civil and political disorder in India as well as foreign-inspired sabotage, terrorism and threats to national security. It gave the Prime Minister and the enforcement agencies powers of indefinite preventive detention of individuals, search and seizure of property without warrants, in direct contravention of Constitutional guarantees of fundamental rights and established standards of human rights. During the national emergency in 1975-77, thousands of people, including political opponents, are believed to have been arbitrarily arrested, detained, tortured and in some cases, forcibly sterilized. Lalu Prasad Yadav, L.K.Advani and Atal Bihari Vajpayee are some notable political leaders imprisoned under this law. The law was repealed in 1977 pursuant to a change of government.

Armed Forces (Special Powers) Act (AFSPA) is a law that has been in operation since 1958. It was first used in Nagaland in response to the Naga independence movement in the late 1950. It was subsequently introduced in Mizoram and Manipur, and briefly in Assam. In 1972, it was extended to all the seven North Eastern states.³² It is said that the AFSPA is a colonial instrument, modeled on the Armed Forces Special Power Ordinance 1942, which had been enacted to neutralise the Quit India Movement. AFSPA grants power to the Central government and the governor of the state to declare any particular area as a “disturbed area” if it is of the opinion that the use of armed forces to aid civil power is necessary.³³ Upon this declaration, AFSPA sanctions the Indian armed forces with:

- power to shoot to kill civilians for the commission / suspicion of commission of specified offences (Section 4 (a));

³⁰ These include Jammu and Kashmir Public Safety Act (1978); Assam Preventive Detention Act (1980); National Security Act (1980, amended 1984 and 1987); Anti-Hijacking Act (1982); Armed Forces (Punjab and Chandigarh) Special Powers Act (1983); Punjab Disturbed Areas Act (1983); Chandigarh Disturbed Areas Act (1983); Suppression of Unlawful Acts Against Safety of Civil Aviation Act (1982); Terrorist Affected Areas (Special Courts) Act (1984); National Security (Second Amendment) Ordinance (1984); Terrorist and Disruptive Activities (Prevention) Act (1985, amended 1987); National Security Guard Act (1986); Criminal Courts and Security Guard Courts Rules (1987) and the Special Protection Group Act (1988).

³¹ Ujjwal Kumar Singh, *The State, Democracy and Anti-Terror Laws in India*, (New Delhi: Sage Publications, 2007) at p. 28

³² These are the states of Assam, Manipur, Mizoram, Meghalaya, Tripura, Nagaland and Arunachal Pradesh.

³³ Armed forces is defined as “the military and Air Force of the area so operating” in the 1972 version of the law. Para-military forces such as the Assam Rifles, created through a separate law but placed under the operational control of the army, also enjoy the powers and protection sanctioned by AFSPA.

- a license to destroy any property suspected to be used by insurgents (Section 4 (b));
- power to arrest any person without a warrant and to use any amount of force “necessary to effect the arrest” (Section 4(c));
- power to enter and search any premises at any time of the day or night without any search warrant to recover arms, ammunitions, explosives etc (Section 4 (d));
- a duty to hand over a person arrested under AFSPA to the nearest police station with the “least possible delay” (Section 5); and
- a protection from legal proceedings unless specifically sanctioned by the Central government (Section 6).

The government finds AFSPA a necessary measure to prevent the secession of the North Eastern states. The army finds the law essential to fight insurgency. The Supreme Court upheld the validity of AFSPA in 1997, but placed checks on the armed forces’ use of powers conferred on them by the law, and interpreted the provisions of AFSPA in a strict and narrow manner so as to reduce scope for abuse.³⁴ This includes a strict reading of the provision vesting the armed forces with a duty to produce the arrested person at the nearest police station with “the least possible delay”, which the court said could not exceed 2-3 hours. However, this has been diluted to some extent in a subsequent judgment of the Supreme Court.³⁵

A government-appointed committee to review if AFSPA should be retained, repealed or modified, headed by Justice Jeevan Reddy, recommended a repeal of the law.³⁶ Numerous reports exist of alleged abuse of the law, pointing to extra-judicial killings, custodial torture, rape and deaths, enforced disappearances and other violations of human rights civilians suspected to be engaged in insurgency.³⁷ Experts opine that this law violates Indian and international legal standards.³⁸ Observers have pointed out that insurgency and under-development are intricately linked in the North Eastern region of India,³⁹ thereby suggesting that a more long-lasting solution to the issue of insurgency could be development of the region.

³⁴ *Naga People’s Movement of Human Rights vs. Union of India* (1998) 2 SCC 109

³⁵ *Masooda Parveen vs. Union of India and the Others*, Writ Petition (Civil) 275 of 1999, decided on 2 May 2007

³⁶ A full report of Jeevan Reddy Committee that reviewed AFSPA is available at <http://www.hinduonnet.com/nic/afa/> (accessed on 9 January 2009)

³⁷ See for example Asian Centre for Human Rights, *The AFSPA: Lawless Law Enforcement According to the Law?* A representation to the Committee to Review the Armed Forces Special Powers Act, 1958, 21 January 2005

³⁸ For further details, see South Asian Human Rights Documentation Centre, *Armed Forces Special Powers Act: A Study in National Security Tyranny*, available at http://www.hrdoc.net/sahrdc/resources/armed_forces.htm (accessed on 10 January 2009)

³⁹ South Asian Human Rights Documentation Centre states the following: Assam produces 25% of all the petroleum for India, yet the petroleum is processed outside the state, thereby depriving the state of revenue; Manipur is 22% behind the national average for infrastructural development and the entire North Eastern region is 30% below the national average. The states in the region are also largely unconnected to the rest of India by rail. Ibid

National Security Act, 1980 is a law that provides for preventive detention in certain cases to prevent a person from acting in a manner prejudicial to the defence of India, the relation of India with foreign powers, the security of India, maintenance of public order and maintenance of supplies and services essential to the community.⁴⁰ The law allows for preventive detention of up to two years of persons believed to have committed offences under the Act. The Act provides for grounds of detention to be informed to the person detained, within a prescribed time limit. The law also provides for constituting Advisory Boards consisting of three persons, to be headed by a High Court judge, before whom all information relating to detention of persons under the Act would be placed for scrutiny.⁴¹ In July 2008, a government-appointed Administrative Reforms Commission headed by Veerappa Moily, submitted a report to the government recommending an amendment to NSA and to add a separate chapter to it with the aim of increasing the Central government's role in tackling terrorist activities.⁴²

Official Secrets Act (OSA), 1923 was another law enacted by the British colonialists to protect their rule over India, by addressing the issue of espionage. The law remains in force till date. The disclosure of any information that is likely to affect the sovereignty and integrity of India, the security of the State, or friendly relations with foreign States, is punishable by this Act. A person prosecuted under this Act can be charged with the crime even if the action was unintentional and not intended to endanger the security of the state. The Act only empowers persons in positions of authority to handle official secrets, and others who handle it in prohibited areas or outside them are liable for punishment. The law also empowers the magistrate to issue search warrants under specific circumstances (Section 11). The OSA makes an exception to freedom of information requests under the Freedom of Information Act, if the information requested amounts to an official secret in the opinion of the government. **The Central Civil Service Conduct Rules, 1964** complement the OSA by prohibiting government servants from communicating any official document to anyone without authorization. The government-appointed second Administrative Reforms Commission recommended a repeal of the OSA as it found it to be incongruous with the regime of transparency in a democratic society and a "convenient smokescreen" to deny public access to government information.⁴³ However, the recommendations have been turned down by the government.

State laws relating to **Disturbed Areas** typically have provisions for state governments to declare an area to be a "disturbed area". Pursuant to the declaration, the state administration is vested with wide-sweeping powers such as firing upon persons

⁴⁰ Section 3 (1) and (2), The National Security Act, 1980

⁴¹ Sections 9-11, The National Security Act, 1980

⁴² 'For details, please see 'National Security Act to be Amended: Moily', *Business Standard*, 17 May '08, available at <http://www.business-standard.com/india/storypage.php?tp=on&autono=37734> (accessed on 8 January 2009)

⁴³ Report of the second Administrative Reforms Commission, titled 'Right to Information: Master Key to Good Governance. See also 'Official Secrets Act a Convenient Smokescreen', *The Hindu*, 12 December 2005, available at <http://www.hindu.com/2005/12/12/stories/2005121212990300.htm> (accessed on 9 January 2009)

contravening certain orders, and powers to destroy arms dumps and fortified positions. The laws also allow for a deployment of security forces without the continuous supervision of the district magistrate, who would normally authorize every step of aid to the civil operations. The varied state laws on the issue, such as the Assam Disturbed Areas Act 1955, The Chandigarh Disturbed Areas Act 1983, The Punjab Disturbed Areas Act 1983 and the J & K Disturbed Areas Act 1992, also exempt state agencies from suits, legal proceedings and prosecution unless specifically sanctioned by the state government. Such provisions allow for human rights violations to be committed with impunity by state agencies, as the perpetrators are shielded from prosecution through procedural requirements. The Disturbed Areas (Special Courts) Act 1976 provides for special courts to be constituted for conducting speedy trials of scheduled offences.

IV. ANTI-POOR LAWS

Some laws adversely impact the rights of the poor, the underprivileged and the homeless. An example is the **Bombay Prevention of Begging Act, 1959**, which makes begging in public places a crime punishable in law. This law, extended to Delhi in 1960, provides for arrested persons to be tried in special courts, and if convicted, sent to institutions / 'homes'. Till date, there are no known cases registered under the Bombay Act, though beggars are routinely detained. Detention of beggars, for all practical purposes, acts as preventive detention. Since individuals do not opt for begging out of choice, many detained persons return to begging after their period of detention. A survey in Delhi has indicated that many beggars are able-bodied and educated, forced into beggary by unemployment.⁴⁴ Another study has indicated that 99% of the men and 97% of the women got into beggary due to poverty.⁴⁵

India's anti-beggary laws derive inspiration from the vagrancy laws during British colonial rule in India. The law is criticized by concerned citizens and groups, on the ground that the laws criminalize beggary rather than address the socio-economic causes of beggary through a cohesive and humane national policy for beggars in India. Senior lawyer and human rights activist Rani Jethmalani opined as follows: "The aggressive anti-beggar legislation is aimed at wiping the desperately poor off the city's radar so that society can continue to neglect them without pricking its collective conscience."⁴⁶

The debate around land acquisitions, sanctioned by the **Land Acquisition Act 1894**, bring to the fore tensions between owners of land, including small farmers, and the multi-national corporations. The Land Acquisition Act of 1894 was formulated with the purpose of facilitating the government's acquisition of privately-held land for 'public purposes' that are defined solely by the state. Backed by this law, the state attempts to acquire agricultural land for Special Economic Zones (SEZs), mineral-based industries, industrial infrastructure (rail, road, power, water etc.) and other forms of industrialization, at allegedly lower rates than the market value. Such land required for public purpose is often inhabited by the poor and marginalized; land acquisition

⁴⁴ Neeta Lal, 'Criminalizing Beggars Instead of Rehabilitating Them', *Info Change News and Features*, June 2007, available at <http://infochangeindia.org/200706205546/Human-Rights/Features/Criminalising-beggars-instead-of-rehabilitating-them.html> (accessed on 9 January 2009)

⁴⁵ Study conducted by Action Aid International in 2004; Action Aid Report 2004

⁴⁶ *Supra* n. 44

therefore leads to peasants losing their land and sources of livelihood and creates massive unemployment, apart from a devastating impact on the environment. The compensation provided under law is often hardly a substitute for the loss of property and livelihood. Adequate rehabilitation and proper relocation of land owners and their families who are displaced by the state's actions, is a crucial issue. Singur⁴⁷, Nandigram⁴⁸, Kashipur,⁴⁹ Kalinga Nagar⁵⁰ and Raigad⁵¹ are examples of sites of violent clashes between the local people on one hand, and state agencies and private actors who act on behalf of corporate giants on the other.

Laws related to "criminal tribes" have also been the subject of considerable debate and discussion.⁵² During the colonial rule in India, British authorities labeled certain categories of castes and tribes as "criminal". Through the Criminal Tribes Act of 1871, once a tribe was "notified" as criminal, all its members were required to register themselves with the local magistrates, failing which they would be charged with crimes under the Indian Penal Code. In 1952, the Government of India repealed the 1871 Act, and enacted the Habitual Offenders Act. This Act does not differ substantially from the 1871 Act. The Habitual Offenders Act sanctions the police to investigate a person's "criminal tendencies" and whether his / her occupation was "conducive to settled way of life". A list of tribes have been classified as "habitual offenders" in 1959 under this Act.

The social category known as the "denotified and nomadic tribes of India" covers approximately 60 million people, who are treated as criminals merely because they are born in communities that are classified as "habitual offenders". Some are included in list of Scheduled Castes, Scheduled Tribes and Other Backward Classes. The law relating to criminal tribes / habitual offenders is an illustration of how stereotype and prejudice about marginalized social groups gets translated into law, leading to stigmatizing populations. The Habitual Offenders Act negates two important human rights principles:

- a) all human beings are born free and equal; and
- b) right to be presumed innocent unless proven guilty.

The U.N. Committee on the Elimination of Racial Discrimination (CERD) has asked India to repeal the Habitual Offenders Act and rehabilitate the denotified and nomadic tribes.⁵³

⁴⁷ The strife was over land acquisition by the state government on behalf of the Tatas for constructing an automobile factory.

⁴⁸ The clash related to land acquisition for the purpose of building a SEZ by an Indonesian company – Salim group.

⁴⁹ In Kashipur, based in Rayagada district of Orissa, the local people have been fighting the Birlas (Utkal Alumina Ltd.) since 1994

⁵⁰ In January 2005, several people were killed in police firing in Kalinga Nagar, Jajpur district of Orissa over parting of their lands to the Tatas and other corporates.

⁵¹ In Raigad, Maharashtra, a powerful struggle is being waged against acquisition of 35000 hectares of land for SEZ, proposed by Reliance Industries.

⁵² For a detailed study and analysis, see Dilip D'Souza, *Branded by Law: Looking at India's Denotified Tribes* (New Delhi: Penguin, 2001)

⁵³ CERD made this Concluding Observation after reviewing its 15th – 19th periodic reports in 2007; Para 11 of CERD/C/IND/CO/19, 5 May 2007

Laws and policies related to hawking and street vending are another example of how class bias and prejudice adversely affect the right to life and livelihood of the underprivileged and the marginalized. Eviction drives ordered and implemented by municipal authorities routinely lead to extortion, confiscation / destruction of the property of hawkers and street vendors, as a result of which they work in constant insecurity. The Supreme Court, in *Sodhan Singh vs. NDMC*, upheld every individual's right to earn a livelihood, and directed all state governments to regulate the use of municipal spaces through hawking zones. It said:

*If properly regulated according to the exigency of the circumstances, the small traders on the sidewalks can considerably add to the comfort and convenience of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. An ordinary person, not very affluent, while hurrying towards his home after a day's work can pick up these articles without going out of his way to find a regular market. The right to carry on trade or business mentioned in Article 19(1)g of the Constitution, on street pavements, if properly regulated cannot be denied on the ground that the streets are meant exclusively for passing or re-passing and no other use.*⁵⁴

A similar approach was taken by the Supreme Court in *Sudhir Madan & others vs. MCD & others*, where it pointed out the need for formulation of policies by concerned authorities so to balance the rights of pedestrians and rights of hawkers.⁵⁵ Unfortunately municipal and police authorities in many cities flout such directives. Section 34 of the Police Act empowers the police to remove any obstructions on the streets, which is routinely used to evict street vendors and hawkers, often without any notice.

V. OTHER REPRESSIVE LAWS & POLICIES

In addition to the laws discussed above, there is a larger gamut of laws that are repressive. These include

- anti-conversion laws, enacted by many states, in which the concern is not just with forced conversions but with conversions to a minority religion;⁵⁶
- S. 377 of the Indian Penal Code, which criminalizes consensual sexual acts between adults of the same sex;⁵⁷ and
- The Police Act, 1861 and state laws related to policing, most of which

⁵⁴ (1989) 4 SCC 155

⁵⁵ Judgment passed in 2006, in IA No. 394 in IA No. 356 in WP(C) No. 1699/1987

⁵⁶ For more details, see Arpita Anant, 'Anti-Conversion Laws', *The Hindu*, 17 December 2002

⁵⁷ For an indepth study on the issue, see Arvind Narrain, *Queer – Despised Sexuality, Law and Social Change* (Bangalore: Books for Change, 2004) and *Voices Against 377, Rights for All: Ending Discrimination Against Queer Desire under Section 377*, 2004, available at <http://www.voicesagainst377.org/content/view/full/13/27/> (accessed on 9 January 2009) Please note however that a Delhi High Court pronounced a historic judgment on 2 July 2009, in *Naz Foundation vs. Government of NCT of Delhi and Others*, W.P. (C) No. 7455/2001, decriminalizing S. 377 of the IPC. This judgment is undeniably a great step forward in the struggle for equality, dignity and non-discrimination.

facilitate political control over the police force, without creating effective mechanisms to ensure police accountability.⁵⁸

VI. ROLE OF THE JUDICIARY

The role of the judiciary with regard to repressive laws has been mixed. On one hand, the courts have generally upheld the validity of emergency, extraordinary and security laws. Courts have been inclined to accept the existence of special circumstances / contexts as reasons for a less strict interpretation and enforcement of the law, even in situations where an individual's human rights are at violated. A case in point is the judgment in *Masooda Parveen's* case.⁵⁹ On the other hand, the courts have increased public's access to justice by allowing public interest litigations and writ petitions, apart from expanding the interpretation of constitutional provisions related to fundamental rights. In *Maneka Gandhi's case*, the Supreme Court emphasized that the procedure affecting the rights of any person must be "reasonable, fair and just."⁶⁰ In situations of enforced disappearance, custodial deaths and police firing on peaceful demonstrators, the judiciary has awarded compensation of an exemplary nature.⁶¹

VII. CAMPAIGNS ON REPRESSIVE LAWS

Concerned members of civil society have come together to campaign for repealing repressive laws, through a variety of strategies. Campaign strategies include holding public meetings, demonstrations, *dharnas*, rallies, hunger strikes / indefinite fast, press conferences, letter campaigns, distributing brochures and pamphlets, presenting memorandum of demands to the government and dialoguing with policy makers. Some times, street plays, folk songs and dances and other means of popular culture are also used in spreading word about a campaign issue. Whenever required, civil society has drafted alternative laws and submitted to the government. The use of varied strategies over a sustained period of time helps in expanding support of civil society to the issue. This often persuades the government to take note of public sentiments, dialogue with concerned persons and review the law / policy accordingly.

The campaign to repeal Armed Forces (Special Powers) Act is an example of a sustained campaign to repeal a repressive law. The campaign has used many strategies including indefinite fast, public demonstrations and advocacy with key policy makers. The campaign against S. 377 of the Indian Penal Code (which penalizes consensual sexual acts between adults of the same sex) combines public action with legal strategies. The campaign on Communal Violence Bill focuses its efforts towards preventing a repressive law from being passed by the Parliament, through strategies including a media campaign, public meetings and dialogue with key policy makers. Please see the photo pages of this publication for photographs of a few campaigns on repressive laws.

⁵⁸ For an overview of police reforms in India, see Commonwealth Human Rights Initiative, *Police Reforms: India*, available at <http://www.humanrightsinitiative.org/programs/aj/police/india/history/default.htm> (accessed on 9 January 2009)

⁵⁹ *Supra* n. 34

⁶⁰ *Maneka Gandhi vs Union of India* 1978 SCC 248

⁶¹ See *Sebastian M. Hongray vs. Union of India* 1984 Cr L J 830; see also *People's Union for Democratic Rights vs. Union of India* AIR 1967 SC 355

Participation in such campaigns is open to all public-spirited members of society, including students and academics.

SUGGESTED ACTIVITY

Contribute to an existing campaign against a repressive law. Students often have positive energy, enthusiasm and refreshing ideas that could be used to strengthen an existing campaign. Here are some aspects to be considered for contributing to an existing campaign:

- Choice of campaign – choosing a campaign that is topical, and has ramifications for / activities in the city where the campaign is being planned would be useful.
- Understanding the complexity of the issue – each campaign has its own legal, political and sociological dimensions. Reading and research would help gain a clearer understanding of the issue, the historical and conceptual aspects, the work done so far in the campaign, the demands formulated by the campaign if any, etc. before the activity begins.
- Information-sharing among students – this could happen through study circles, organizing essay competitions / debates within the institution to increase students’ awareness of the issue. This will ensure that there is support from ‘within’ for students’ involvement in the campaign.
- Collaborating organizations – this involves identifying human rights groups engaged in the campaign, with whom a collaboration could be sought.
- Manner / aspects of collaboration – there needs to be a clear understanding of the ways in which students would contribute, and aspects of the campaign that the students would contribute to, to avoid an expectation gap.
- Choice of activities – while the choice of activities for the campaign would be decided by the persons / groups working on the campaign based on their assessment of the strategies likely to be most effective, students would have to assess the activities that they can take part in based on their own limitations. Some potential activities for students include production of campaign material (such as brochures, posters and placards), participation in rallies and logistical assistance to press conferences and public meetings. Students involved in popular culture could also collectively produce street plays and songs.
- Plan the follow up – it would be useful to build in an aspect of self-evaluation to assess the extent to which students learnt from this activity, and also ways in which students can continue their engagement with the campaign in future.

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