INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 1

2021

Revisiting National Security Laws in India & Reconciling the Differences with Civil Liberty

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ABSTRACT

This article aims at examining the national security legislations in India which have been the apple of discord between the forerunners of human rights and the guardians of the nation. A discussion on the history and the Constituent Assembly Debates helps in comprehending the rationale behind embodying the national security laws. The objective of this article is to test the validity of these laws on the whetstone of the Constitution. The issue of keeping them out of the scope of judicial review has also been addressed. Reports of SAHRDC on security laws in India have been cited to understand the atrocities that have committed against humanity in the name of securing the borders. The powers of the executive have led to the enhancement of abuse of power on human rights. Amidst this uproar, the Supreme Court through a series of judgements like the Modern Dental College and Anuradha Bhasin judgements has successfully struck a balance between the national securities and civil liberties. Certain reformative steps have been included as suggestions for humanizing the existing laws.

I. INTRODUCTION

Amidst the altercations between the two giants of jurisprudence rests the age-old debate of national security and civil liberty. The atrocities and decimation brought about by the English civil war and the peremptory rule of the Rump Parliament convinced Thomas Hobbes of the need for a strong central government which is the only instrument capable of safeguarding the interests and well-being of the people. 'Leviathan' published in 1561 continues to remain the most influential justification on the absolute power of the state. According to him, the will of the individuals is a subject of interminable conflict unless subordinated by a supreme political authority. The idea of absolutism propounded by Hobbes was at odds with the Treatises of Government'. According to Locke, power must be given to the sovereign with the trust that it will govern in a manner that would mitigate the state of affliction and agony. In case of its violation by the state, 'the trust must necessarily be forfeited, and power

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devolves into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.[3]

Although most Constitutional democracies of the world have adopted the Lockean approach towards the existence of this dichotomy between civil liberties and National Security, there have been innumerable instances around the globe where one has outweighed the other. Draconian laws have been drafted in many nations where individual liberty is sacrificed at the altars of national security.

India's position on this issue has witnessed major paradigm shifts over the past few decades. The Constitution of India, through various provisions inscribed as a pledge to safeguard the interests of the society. The makers of the Constitution were aware that freedom cannot exist in a vacuum and unbridled freedom may lead to a state of social chaos. Hence, they incorporated certain restrictions on rights to freedom so that checks and balances can be imposed in the case of disorderliness. The geographical conditions and the historical blood bath witnessed by this nation made the legislators realize that the restrictions imposed by the Constitution will not suffice and securing the country from internal threats was more important than guarding the frontiers. This led to the evolution of special laws dealing with national security.

II. NATIONAL SECURITY LAWS IN INDIA:

The main objective of the security laws is to protect the nation from threats. While purportedly present to protect national security, the national security laws vest unregulated and rampant powers in the investigating agencies to circumvent the procedures established to protect the fundamental rights of the citizens. Armed Forces (Special Powers) Act (AFSPA), enacted in 1958 to deal with the separatist movements in Nagaland. It gives power to the government to declare any area as a "disturbed area" where Armed forces can operate alongside the police[4]. National Security Act (NSA), enacted in 1980 is a reflection of both PDA and MISA (now repealed). Under this Act, even basic rights like the right to be informed and the right to legal aid is not provided to the accused[5]. Hence this law is popularly known as "no vakeel, no appeal, no daleel" (no lawyer, no appeal, no argument).

Unlawful Activities (Prevention) Act (from now onwards UAPA) was enacted in 1967 to safeguard the integrity of India. But after TADA and POTA were repealed, the government amended the UAPA in 2004 to control and prevent terrorism by incorporating specific

[3] LOCKE, 385(1960).
[4] Armed Forces (Special Powers) Act, 1958, No. 28, Acts of Parliament, 1958(India), §§ 3-4.
[5] National Security Act, 1980, No. 65, Acts of Parliament, 1980(India), §§ 8, 11(4).

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chapters to deal with terrorist activities. After the amendment of 2019, individuals without having affiliation with any of the declared terrorist organizations can also be detained and prosecuted under the UAPA[6]. By misusing the power, it is entrusted with, the government can control, monitor, and curb any dissent.

These laws place the burden of proof on the accused to prove his innocence, which is a breach of natural justice. Once a person is detained under these security laws, it does not entitle him to exercise his right to a fair trial, right to be informed, right to legal aid, hence causing civil death of such person. The Draconian laws like TADA and POTA have been repealed, their horror lives on with the acts like NSA and UAPA, along with the provisions that make jail the rule and bail the exception before the guilt is even proved.

III. THE CONSTITUTIONAL VALIDITY OF SPECIAL LAWS CURTAILING INDIVIDUAL LIBERTY

The Constitution of India has empowered the Government to make laws on national security. The South Asia Human Rights Documentation Center (SAHRDC) argues in its accommodation to the National Commission to Review the Working of the Constitution (NCRWC) in August 2000, that the Indian Constitution is the only one in a democratic country to have expressly authorized preventive detention[7]. The rationale behind incorporating Article 22 in the Constitution cannot be understood without looking into the minds of the framers of the Constitution. Article 15 of the draft Constitution which ultimately took the shape of Article 22 was one of the most unwelcomed moves which received huge public uproar. The public disdain towards this law stemmed from the preventive detention laws prevalent during the British era. Bengal State Prisoner's Regulation III of 1818, the Rowlatt Act, Defence of India Act,1915, and 1939 to name a few are examples of the brutal laws of those times.

Thakur Das Bhargava proposed an amendment with certain features like- a person should not be detained except otherwise in cases of grievous situations which is a threat to public harmony and State's security. The detention should take place after the executive explicitly proclaims that such a need has arisen. This proclamation cannot be questioned in a court of law.

[6] Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019(India), §§ 35-36.
[7] *Government Decides to Play Judge and Jury 98 (2001) (Critically Examining the Prevention of Terrorism Ordinance of 2001)*, SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, [hereinafter SAHRDC].

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T. T. Krishnamachari proposed an amendment that authorized the Parliament to lay down the maximum period of detention. It also vested the power with the Parliament to determine the classify the cases which qualified for a detention period longer than three months without the approval of the advisory board. This amendment proposed by T. T. Krishnamachari was carried out. By the 16th constitutional amendment, preventive detention laws were passed for maintaining 'public order'. Meaning thereby, an Indian citizen can be preventively detained not just because he is considered a threat to security but also to maintain public order.

Generally, any individual who is detained has the due process rights provided in Articles 22(1) and 22 (2) that an individual has the right to know "as soon as may be" the grounds for arrest. He has the right to consult and be represented by a lawyer of his choosing. The police must produce an arrested individual before a judicial magistrate within 24 hours of his arrest. Detention of an arrested person is prohibited for more than 24 hours unless the magistrate orders to do so. But the same rights are not accorded to the individuals in preventive detention. Instead, they are granted a limited and modified set of procedural rights by the constitution as Article 22(3)(b) says: Nothing in clauses (1) and (2) shall apply to any person who is arrested or detained under any law providing for preventive detention. The Constitution does not draw concrete deadlines for informing the detainee about his grounds of detention or to challenge the same. As per Article 22(6), the government also has a large measure of discretion over what it will disclose to a detainee. The information which is deemed to be against the public interest by the government is not disclosed. The Constitution empowers Parliament to prescribe by law the circumstances under which a person is detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board following the provisions of sub-clause (a) of Article 22(4) and the maximum period for which a person is detained under any law providing for preventive detention.

So, the Indian Constitution unquestionably provides for preventive detention that is not governed by the Code of Criminal Procedure and Indian Evidence Act**.** The Constitution provides for preventive detention powers that do not require full due process rights for detainees but do not prohibit such rights either. However, the NSA grants detainees only the exiguous procedural rights listed in the Constitution.

IV. SCOPE OF JUDICIAL REVIEW ON NATIONAL SECURITY LAWS:

The expansive powers given to the executive by the National security laws are enlarged by restricting the judicial review over them. For example, under AFSPA, once an area is

declared as "disturbed", there can be no substantive review unless it is shown that the central or state government made the decision in bad faith and was not genuinely "of the opinion" that civil authority needed to be supplemented with military force[8].

Similarly, if a decision has been made to detain a person as a preventive measure then it cannot be reviewed on substance. The NSA only allows judicial review on whether the decision-maker complied with the necessary procedure.[9]

Security laws like NSA and UAPA set up administrative review mechanisms that the detainee must exhaust before approaching for judicial review. As per section 10 of NSA, every preventive detention order has to be placed before an advisory board that confirms the order or recommends revocation[10]. Similarly, every declaration under the UAPA that an organization is 'unlawful' must be placed before a review committee Section 4 of UAPA.

Section 36 of UAPA allows organizations that are designated as terrorists to apply for administrative review of this decision, and UAPA and section 37 requires the central government to establish a review committee to hear this kind of challenge. UAPA does not require that every decision designating an organization as a terrorist be reviewed as a matter of course. These security laws have diluted the scrutiny provided by administrative review while preserving the hurdle it creates for an applicant seeking judicial review.[11]

Administrative review proceedings are gross injustice against the detainee as these proceedings are closed to the public and, the detainee is barred from having legal representation[12]. Moreover, the government is not bound to disclose the information regarding grounds for the order against him. The review committee order is binding on the government. There is no provision of an interlocutory order. Except otherwise overturned by the review committee, the decision of the government authority remains final. As per Amnesty International, the decision of the administrative review committee generally goes against the detainee, and in such case, he can approach High Court. However, these security laws do not provide appellate jurisdiction to the High Court over decisions of administrative review. The Constitution under Article 226 grants the High Court the jurisdiction to protect

[8] Armed Forces (Special Powers) Act, 1958, No. 28, Acts of Parliament, 1958(India), § 3; no criteria are laid down for forming such an opinion, courts are limited to checking whether the government's opinion was put on record in the appropriate way.
[9] National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India), §3.
[10] National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India), §10.
[11] Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019(India), §§ 36-37.
[12] National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India), §11(4).

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the fundamental rights of a citizen. So, to seek remedy from the High Court, the detainee has to prima facie establish the fact that his fundamental rights are violated[13].

V. THE JOURNEY OF JUDICIAL PRONOUNCEMENTS:

A. K. Gopalan v. State of Madras[14] was the first case where the validity of the Preventive Detention Act was questioned and tested on the whetstone of a tri-union- Article 14, Article 19(1), and Article 21. The Court believed that the framers of the Constitution disregarded the 'due process clause and hence the reasonability of the PDA, 1950 cannot be questioned as it stood the test of 'procedure established by law'.

A slight change in this trend came into existence with the dissenting opinion of H.R. Khanna in the **ADM Jabalpur v. Shivakant Shukla**[15] where he observed that the laws like these are an anathema to the rule of law. More than individual liberty, the values enshrined in the hallowed Constitution were at stake. His view received a majority in the **Maneka Gandhi**[16] judgment where it was stated that law should stand the test of Article 14 and Article 19.

The Supreme Court has time and again voiced against the atrocities prevalent due to these acts. It issued several Guidelines about how a confession can be just and fair in the **Kartar Singh v. State of Punjab**[17] where the constitutionality of section 15 of TADA was challenged. A Constitution Bench, in this case, reaffirmed that "no civilized democratic country has accepted confession made by an accused before a police officer as voluntary and above suspicion, therefore, admissible in evidence." They asked the central government to incorporate these guidelines in the Act by necessary amendments. But the court was silent about the consequences of non-compliance hence the same decision was carried out in POTA. The constitutional validity of POTA, commonly called India's Patriot Act was challenged in **PUCL v. UOI**[18], where the same was upheld by the Supreme Court as not being violative of the Article. Later both these acts were repealed by the UAPA in 2013.

Extra-Judicial Execution Victim Families Association (EEVFAM)&Anr. v. UOI[19](popularly called the Manipur encounter case) was a landmark judgment where a division bench of Madan Lokur and U.U. Lalit JJ. held that all incidents involving suspected

[13] *A 'Lawless' Law: Detentions Under The Jammu & Kashmir Public Safety Act*, Amnesty International , 18, 18-19 (2011); Since the administrative review boards can only review whether the government's decision was made using the appropriate procedure, rather than whether the decision was substantively sound, it is rare for a decision to be overturned.
[14] A. K. Gopalan v. State Of Madras, 1950 AIR 27.
[15] ADM Jabalpur v. Shivakant Shukla, 1967 AIR 1207
[16] Maneka Gandhi v. UOI, 1978 AIR 597.
[17] Kartar Singh v. State Of Punjab, 1961 AIR 1787.
[18] People's Union of Civil Liberties and Anr. v. UOI, on 16 December, 2003.
[19] Extra-Judicial Execution Victim Families Association & Anr. v. UOI, on 14 July, 2017.

use of excessive and retaliatory force by the Army or police in Manipur must be investigated.

In the year 2018, the Bhima Koregaon incident and the arrests of the activists like Gautam Navlakha, Sudha Bharadwaj, Varavara Rao, and others raised several questions against the UAPA. Does this act have a chilling effect on free speech? Does it violate the fundamental rights guaranteed under Article 14 and Article 21? Or is it another draconian law meant to arrest people with no history of violence and most importantly does it transgress the rule of law? Though the case was dismissed by a majority of 2:1 refusing the prayer of assigning a special investigative agency to probe into the Bhima Koregaon violence[20]**.** The dissenting opinion of D.Y. Chandrachud received a wide acknowledgement. He vociferously stated that the courts have to ensure that the process of investigation should be fair as this is an intrinsic requisite ensuring non-arbitrariness under Article 14 and life and liberty under Article 21. The court should side with these principles or witness a threnody to freedom. This case is a classic example of how handing over this case to the NIA by the central government ripped apart the federal structure of this nation to shreds. The NIA has been given pan India jurisdiction to investigate offences covered under this Act. Also, Section 6 of the NIA Act empowers the Central government to usurp an investigation. The Supreme Court had categorically stated taking into account the several entries contained in List I of the Seventh Schedule of the Constitution that in cases of investigation of offences committed in a state, the jurisdiction of the centre is excluded without any doubt.

In the words of Lon L. "there can be no greater legal monstrosity than a secret statute".[21]

The UAPA, 2019 piqued the interest of many once again during the anti- CAA protests. Student leaders like Safoora Zargar, Umer Khalid, and Meeran Haider were booked under this act for hatching conspiracy for inciting communal riots by the Delhi police while reprehending the NPR, NRC, and CAA. Sharjeel imam and Asif Tanha were also charged under this act because the amended UAPA allows the government to label individuals as terrorists.

The constitutional validity of the UAPA has once again been challenged in- **Sajal Awasthi v. UOI** (WP (C) 1076/2019; not finally decided yet). The decision of which is still pending before the Supreme Court of India. This act has traversed a long path and has been frowned upon by the torch bearers of human rights. The most significant question arises regarding the

[20] Romila Thapar v. UOI, on 28 September 2018.
[21] Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor HLA Hart*, The Harvard Law Review, 71(4), 630, 651 [February 1958])

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necessity of these laws. It cannot be denied that where the rights are interconnected with each other, certain limitations have to be imposed for the reason of public security. A false dichotomy has been constructed that national security cannot survive without hampering individual freedom. It is the need of the hour to strike a balance between both of them.

VI. NECESSITY TEST: WHAT SHOULD BE THE WHETSTONE OF TESTING THE NECESSITY OF SUCH LAWS?

The national security laws should be tested on the grounds of necessity. Therefore, it's imperative to understand the definition of necessity. Necessity has been defined by Bilchitz as "necessity involves a process of reasoning designed to ensure that only measures with a strong relationship to the objective they seek to achieve can justify an invasion of fundamental rights. That process thus requires courts to reason through the various stages of the moderate interpretation of necessity."[22]

If a situation so grave has arisen that nothing can be done to eradicate it unless individual liberties are overridden then it establishes legitimate reasoning as to give primacy to national security. The method of dealing with such a situation should not be extremely regressive. If it is so then an alternative method needs to be devised. A 'proportionality test' must be applied to determine the existence of a balance between national security and individual liberty. The eminent constitutional jurist, Kai Möller states that the proportionality principle is the doctrinal tool that guides Judges through the process of resolving these conflicts. The proportionality test has been propounded in two cases: Brandenburg v Ohio (German test) and in R v Oakes (Oakes test). These tests were relied upon in the **Anuradha Bhasin v Union of India[23]**. The Court in Anuradha Bhasin quoted the findings of Dr A.K. Sikri, J. in **the Modern Dental College[24]** case, which are as follows:

"… a limitation of a constitutional right will be constitutionally permissible if:

(*a*) A measure restricting a right must have a legitimate goal (legitimate goal stage);

(*b*) It must be a suitable means of furthering this goal (suitability or rational connection stage);

(*c*) There must not be any less restrictive but equally effective alternative (necessity stage).

[22] D. Bilchitz, *Necessity and proportionality: towards a balanced approach?*, Reasoning Rights: Comparative Judicial Engagement, 41, 41-62 (Lazarus, L., McCrudden, C. & Bowles, N. (eds.). Hart Publishing, Oxford, 2014)

[23] Anuradha Bhasin v. Union of India, 2020 SCC Online SC 25.

[24] Modern Dental College v. State of M.P., 2016 (7) SCC 353.

(*d*) The measure must not have a disproportionate impact on the right holder (balancing stage)

In **the Modern Dental College**[25] case, Court also analysed that the principle of proportionality is inherently embedded in the Indian Constitution under the realm of the doctrine of reasonable restrictions and that the same can be traced under Article 19.

Hence it can be said that Security laws are unavoidable measures as under these laws, executive accountability is very weak. By reforming the security law if executive decisions are subject to scrutiny at the initial stage, this can serve to prevent the abuse of rights. It is suggested to increase the checks and balances as it would improve the existing mechanism because they would regulate the exercise of specific powers. Multiple, routine checks, and balances incorporated in the exercise of the executive's security powers will impel public confabulations resulting in reasoned decision making. It will work as a tool against the steady curtailment of constitutional restrictions that has given legitimacy to the security laws to become oppressive. As discussed earlier in the scope of judicial review, in the case of security laws scope of judicial review is mild and judicial review is essential to keep checks and balances on enhanced executive power. In some cases, like **Kartar Singh**[26], instead of determining on balancing and proportionality, the court asked whether the provision in question "completely denies" a fundamental right, if not, the provision is valid. Test of proportionality protects rights far better than the principle enunciated in security jurisprudence of the Court.

Admittedly, fundamental rights may not be absolute, but freedom cannot grow in silos hence they require strong protection, thereby mandating a sensible necessity test as it will prevent the fundamental right from becoming either absolute or to be diminished.

VII. SUGGESTIONS AND CONCLUSION:

As per the South Asian Human Rights Documentation Centre (SAHRDC), the Criminal procedure code and Indian Penal code is enough to prosecute terrorists and separatists, hence special security laws are unnecessary[27].The criminal record data is never disclosed if the person has been arrested under NSA. These laws violate both fundamental rights and human rights. It becomes essential that this data is revealed to the NCRB for analysis. The detention period under UAPA is a bare minimum of 180 days without any provision of anticipatory

[25] Supra note 22.
[26] Supra note 15.
[27] Supra note 5.

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bail[28].The burden of proof also lies on the accused to prove his innocence[29]. This creates a huge social stigma against the individual. Therefore, the burden of proof should shift from the individual to the detaining authorities. The provision of anticipatory bail should be made available. There have been innumerable instances where these acts have gravely been misused. A provision of periodic review should be added in the present UAPA Act. The definition of terrorism has been very vaguely worded in the act. It should be more precise and 'active incitement to violence' should be considered as the ground of arrest. The NSA provides no legal aid to the accused[30]. As far as history goes the only Act with a similar provision was the Rowlatt Act, 1919. According to the 177th Law Commission Report of 2001, the total number of people arrested under Preventive Detention laws goes as high as 14,57,780. Undeniably, personal liberty can truly be enjoyed only if the security of the state is not compromised. Every nation should adopt a zero-tolerance policy towards acts of terrorism. However, the right to dissent should not be sacrificed on the altars of national security. It has been regarded as the highest form of patriotism. India's security laws give immense powers to the executive to use force, detain, prosecute, investigate, and arrest. They make deep inroads into the ideals of human liberty treasured by every human being and the ones which occupy chief positions among other values of life. Therefore, one must not be surprised by the fact that admirers of rule of law and personal liberty find it hard to attune themselves to such laws under which a person can be detained for long periods without trial. Although the want of freedom should not be oblivious to the need for security of the state, allegiance to notions of liberty cannot function in a vacuum. Hence it has become imperative to weigh the needs of both proportionally for an ideal situation where both security and liberty can co-exist harmoniously.

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[28] Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019(India), § 43(D).
[29] Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019(India), § 38(1).
[30] Supra note 8.

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