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Balancing Individual Rights vs. National Security in Constitutional Law: A Critical Analysis

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ABSTRACT

Individual rights are always claimed to be unaffected in democratic countries around the world; while this statement is theoretically valid, it is unrealistic, given that human rights are not eternal and are vulnerable to abuse. Indeed, it may be claimed that all countries around the world suffer human rights concerns, albeit to varied degrees. One of the most common reasons for these violations is national security. Individual rights and national security are both crucial ideas in the existence of a democratic society, and they are frequently considered as interconnected, with opposing interests such that prioritising one results in Individual rights and national security are both crucial ideas in the existence of a democratic society, and they are frequently considered as connected, with opposing interests such that prioritising one leads to the neglect or abuse of the other. When considering the aforementioned perspective, one question that emerges is whether it is possible to reconcile the competing demands of national security and individual rights. Through conceptual analysis, an investigation of the legal and ethical concerns, arguments in favour of both interests, and a review of significant cases on the topic, this paper seeks to shed light on the aforementioned question while also analysing the topic of debate as a whole. The word "harmonising" aptly describes the study's objective, which is to strike a balance between safeguarding national security objectives and upholding the important civil liberties protected by the Indian Constitution. This balancing entails the need to ensure that counterterrorism measures do not impose excessive restrictions and that they comply with constitutional norms.

Keywords: National Security, Individual Rights, Human Rights, liberty, detention, violations, implementation, infringement.

I. INTRODUCTION

Today's definition of "national security" encompasses more than just maintaining territorial integrity; it also covers dangers to international unity and interference with the lives of innocent people. As a result, nations have enacted strict laws that seriously violate people's right to

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privacy and personal freedom. These may also entail holding someone without allowing them to be heard or undergoing the process of a fair trial. Now, this is a real problem since it denies the individual the fundamental rights that humans have just by virtue of being human. Therefore, such cruel laws are detrimental to a democratic government, particularly when they are abused or implemented arbitrarily. In the ever-more complicated world, the delicate balance between civil freedoms and national security is not only important, but also very difficult to achieve. The laborious process of governance addresses both ideas at once, creating a paradox between them since the application of one influence the predominance and enjoyment of the other. The freedoms of speech, communication, association, and mobility that are enjoyed in a democracy are closely related to the possibility of violent acts that have the ability to severely destabilise or destroy the state. On the other hand, it is evident that strict and severe enforcement of security regulations may readily lead to violations of fundamental human rights and civil liberties. The two ideas are difficult to synchronise in a place like India, where it has always been difficult to achieve equilibrium because of its big and diverse population, strained ties with some of its neighbours, and improper enforcement of anti-terrorism laws. On countless occasions, the state has had to find the ideal balance between people's freedom and civil liberties because both are crucial to the country's effective governance. Protecting a country's national security and preserving civil liberties are both equally important for true state governance. Both are inextricably linked; one cannot exist without influencing the other. Every government should strive for two-way harmony and reconciliation. Thus, achieving the optimum balance is both morally and legally needed, as too much of either could jeopardise the foundation of a free and just society. The security of a state refers to the protection of sovereignty in whatever shape or form, as well as the prevention of any activity that has the potential to cause terror in society and instil fear in the minds of its residents. The term "civil liberties" as it is used in Indian democracy refers to intrinsic rights that are necessary for living a happy and dignified life. These include the right to equality, free speech and expression, the freedom to profess and practise religion, privacy, and protection from oppressive behaviour. The key authentication mark of a just and fair legal system is its commitment to the provision and availability of such civil freedoms, along with proper safeguards for them. In the Indian context, a variety of civil liberties have been guaranteed under the Constitution enforced in 1950, which also describes the procedures for defending and upholding these rights. To address societal security concerns, it's important to build trust and confidence in governments. This can be achieved by highlighting the validity of actions without making them too covert. Through an examination of legal provisions, judicial interpretations, and case studies, this aims to shed light on the delicate

balance that India strives to achieve – one that respects its security concerns while safeguarding the democratic values that define its identity. By exploring the nuances of harmonizing these seemingly opposing forces, seeks to uncover how the Indian Constitution provides the framework for this endeavour. Which contributes the larger discourse on reconciling security and liberty in an increasingly complex world.

II. A CONCEPTUAL FOUNDATION

(A) Individual Right:

Human rights refer to the inherent rights and privileges that individuals possess. Black's Law Dictionary defines human rights as the freedoms, immunities, and privileges that all individuals should have the right to in their community. Individual rights are entitled to these rights irrespective of their age, sex, ethnic groups, language, religion, nationality, or affiliation;² they are universal and by virtue of this universality, recognized by international organizations through treaties and conventions⁴ and democratic societies through their constitutions and legislations. Individual rights are not absolute and can be limited or revoked in certain situations. International law recognises that upholding human rights may not always be practical, as outlined in Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights. The Nigerian constitution allows for some rights to be derogated under certain conditions, similar to the aforementioned clauses. The Constitution of India: Fundamental Rights and Privacy India's Constitution safeguards citizens' civil freedoms by establishing fundamental rights. Although the right to privacy is not explicitly stated in the Constitution, the Supreme Court has emphasised its importance as part of the right to life and liberty in Article 21.

a. Claims for the protection of individual rights:

Civil libertarians argue that individual rights are fundamental and should not be compromised, as stated in the Universal Declaration of Human Rights, which is the primary framework for protecting human rights. Civil libertarians argue that government-adopted national security mechanisms, particularly counterterrorism frameworks, can lead to authoritarianism by prioritising national security over individual rights. Some contend that national security methods, such as mass surveillance, are ineffective and lack evidence to support their effectiveness, despite government claims. Proponents of individual rights argue that they should be safeguarded by governments worldwide, rather than being sacrificed for national security.

² For example, see the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1976), African Charter on Human and Peoples' Rights (1981), European Convention on Human Rights, among others.

Proportionality in balancing individual rights with national security means that any measure taken to protect national security must be proportional according to the necessity. For instance, any act of infringement on individual rights on the basis of upholding national security should be 'necessary, sufficient, least burdensome, and always reviewable by the court.' Also, where there is need for force to be used, it must be proportional to threats posed considering that sometimes, the situation is like 'attacking a fly with a sledgehammer.'

(B) National Security:

Security is the protection of entities or individuals from danger. National security refers to the safety of a country's governmental secrets, military might, and civilian protection. Professor Clement C. Chigbo argues that national security encompasses more than just a state's territorial integrity and political and cultural norms, taking into account unusual dangers such as pandemics and climate change.¹¹ National security refers to a state's protection against threats to its survival and citizens. Governments worldwide³ prioritise security and the wellbeing of their citizens, as stated in the 1999 Constitution of the Federal Republic of Nigeria. According to Articles 12 and 2 of the Draft Declaration of Rights and Duties of States, every state has the authority to exercise jurisdiction over its territory and its inhabitants, subject to international law's recognised immunities. Governments frequently use instruments that violate individual rights, including the right to privacy and life, in order to maintain national security. Governments use national security as an excuse to conduct mass surveillance, arbitrary arrests and detentions, suppress free speech, violate data privacy, and overextend national security legislation, all of which negatively impact citizens' rights. Examples include the Bulk Collection of Telephone Metadata and the PRISM Project by the US National Security Agency. The Indian government's Biometric Aadhaar Database, Central Monitoring System (CMS), and National Intelligence Grid (NATGRID), as well as other mass surveillance programs worldwide, have been criticised for violating citizens' rights. The National Security Act of 1980 was passed by the Parliament in 1980 after Congress regained control, and it is still in force today. Numerous PDA and MISA provisions were reinstated by this Act. It gives security forces the right to detain someone without a warrant if they're suspected of doing something that threatens public safety, economic vitality, or national ⁴security. The procedural criteria are virtually the same as those under the PDA and MISA, and it also permits preventative detention for a maximum of 12 months. The Act also grants immunity to the security personnel who participated in putting an

³ Amitai Etzioni, 'NSA: National Security vs. Individual Rights' [2014] *Intelligence and National Security*,

⁴ Sidharth, 'Surveillance vs. Privacy: Balancing National Security and Individual Rights in India' [2024] (12) (5) *IJCRT*, 4

end to the violence. The only statute allowing for preventive detention to combat terrorism in India is this one. The Act gives the Central Government or the State Government the authority to detain a person to prevent him or her from acting in any manner detrimental to the security of the State, detrimental to the maintenance of Public Order, detrimental to the maintenance of supplies and services essential to the community, or in any other manner for which it is necessary to do so. The length of any detention order issued under this act must not exceed 12 days⁵, and it may be carried out anywhere in India. Twelve months⁶ is the maximum detention time. A detention order can be changed or removed at any moment.

a. Argument in Support of National Security:

Some argue that national security should take precedence above individual liberties, while others advocate for both. One of their main reasons is the "greater". The 'good' concept suggests that ethical choices should benefit a greater number of individuals. Supporters of national security believe that prioritising national security benefits society as a whole. Some argue that enforcing individual rights during emergencies can jeopardise national security. The National Security Act (NSA) has a significant impact on India's federal system by granting both the central and state governments the authority to detain individuals for preventive purposes. This dual jurisdiction can occasionally cause friction between the two levels of government, particularly when state governments see federal initiatives as excessive. When states believe their autonomy is under threat, federal dynamics are put to the test, particularly in politically sensitive regions. For state governments, the NSA acts as a tool to maintain public order and security. It provides them with the authority to act swiftly against perceived threats without waiting for prolonged legal processes. This can be a double-edged sword; while it enables quick action, it also raises concerns about potential misuse. States often use the NSA to address local issues like communal violence or organized crime, but the lack of transparency in its application can lead to public distrust. The NSA does not work in isolation. It intersects with a number of other laws, including the Unlawful Activities (Prevention) Act (UAPA) and the Indian Penal Code (IPC). This interplay can occasionally cause problems in legal proceedings since cases may overlap across different legal frameworks. For example, the NSA permits detention without trial, whereas the UAPA focusses on pursuing terrorists and illegal activity. Balancing these rules needs careful legal manoeuvring to maintain justice and civil freedoms.

(C) Legislation Regarding The National Security And Human Right Concerns:

The expansion of national security risks to include temporary governments, local-district administration, and individual residents has pushed the general public closer to the legislation

governing these concerns. This could lead to significant limits on citizens' human rights for national security purposes. Human rights and national security are often seen as diametrically opposed. National security legislation violate individual civil liberties and human rights, putting a pressure on the constitutional system.⁹ Depriving constitutional protections to detainees charged under security laws violates the principles of constitutionalism and the rule of law, despite the State's efforts to protect the majority's freedoms. As a result, these policies may appear to prioritise safeguarding national security over other objectives. National security laws are unique in their importance and legitimacy. Security legislation is motivated by factors such as public order, terrorist prevention, and espionage, in addition to constitutionality and compliance with Grund norms. The assessment of desirability includes balancing the state's security interests with its duty to human rights. Hence, such acts causing unauthorised interferences with fundamental freedoms must be deterred in all forms and manifestations to appropriately balance social and individual interests. Since any democracy which seeks to defend itself by forfeiting individual freedoms soon discovers itself to be not the kind of State, it purposes to be. Legality in this context can be described to mean that all national security measures to be adopted by states must be in coherence with the legal framework on the protection of individual rights while upholding national security.²⁶ By this principle, it is presupposed that apart from the general human right frameworks, states have to make separate provisions for the protection of individual rights during the course of upholding national security. Such laws should also restrict the governments from deciding the level of protection or limitation of individual rights by their discretion i.e. the laws should expressly state its position as to the protection or otherwise of individual rights instead of leaving it to the authorities to decide based on their discretion. This way, the excessive use of power by the governments would be curtailed and it would be easier for citizens to hold them accountable for arbitrary human rights violation. This means that the infringement of individual rights on the basis of national security must be borne out of necessity and inevitability. The idea behind this is that to avert an evil (insecurity), one should only make use of a greater evil (infringement of rights) when there is no other better way to do it. There are also several other ways of actualizing a synergy between individual rights and national security which has been proffered by academic minds. Some of these include the strict scrutiny of government activities, transparency in surveillance programs, independent judicial reviews to mitigate potential abuse of power by the state, among others.

III. COMPARATIVE ANALYSIS WITH GLOBAL SECURITY LAWS

United States: The Patriot Act: The Patriot Act was enacted in response to the 9/11 attacks to

enhance national security measures and counter terrorism. Similar to the NSA, it grants law enforcement agencies broad surveillance powers and the ability to detain individuals suspected of terrorist activities. However, it has been widely criticized for infringing on privacy rights, enabling racial profiling, and allowing indefinite detentions without trial. While the NSA focuses on preventive detention, the Patriot Act emphasizes mass surveillance and intelligence gathering. Both laws have been accused of being misused to target specific groups, including activists, journalists, and minority communities. Additionally,⁵ concerns regarding judicial oversight, transparency, and accountability are prevalent in both legal frameworks, raising debates about the balance between security and civil liberties. It expanded surveillance capabilities, allowing for greater monitoring of phone and email communications. Critics argue that it infringes on civil liberties and privacy rights. However, supporters claim it is essential for national security. The Patriot Act has been amended several times to address these concerns, but debates about its implications continue.

United Kingdom: The Terrorism Act The United Kingdom's Terrorism Act, first introduced in 2000 and amended several times, provides broad powers to law enforcement agencies to combat terrorism. It includes measures such as prolonged detention without charge, extensive stop-and-search powers, and restrictions on speech that may be perceived as inciting terrorism. Like the NSA and the Patriot Act, the Terrorism Act has faced criticism for infringing on civil liberties and disproportionately targeting specific communities, particularly ethnic and religious minorities. A key concern regarding the Terrorism Act is the vagueness of its definitions, which has led to individuals being detained or prosecuted based on broad interpretations of terrorism-related offenses. The act also allows authorities to ban organizations deemed extremist, raising concerns about the suppression of political dissent and freedom of expression. Critics argue that the act lacks sufficient judicial oversight, making it prone to misuse and potential human rights violations. While the Terrorism Act aims to strengthen national security, its implementation has raised concerns similar to those associated with the NSA and the Patriot Act. The balance between security and civil liberties remains a significant challenge in all three cases. The UK's Terrorism Act provides a framework for addressing terrorism-related activities, including broad powers to detain suspects without charge for extended periods. It has been criticized for potentially targeting minority communities disproportionately. Yet, the government maintains it is crucial for preventing terrorist acts. The act includes provisions for proscribing terrorist organizations and freezing assets, aiming to disrupt potential threats before they materialize.

⁵ [2004] UKHL 56; *Maneka Gandhi v. Union of India* AIR (1978) SC 597; *Hamdi v. Rumsfeld* 542 U.S. 507 (2004)

Australia: The National Security Legislation: Australia's approach to national security involves a series of laws aimed at preventing terrorism and ensuring public safety.⁶ These laws include data retention requirements, allowing authorities to access metadata for investigations. While intended to bolster security, these measures have sparked debates over privacy and government overreach. Australia's legislation emphasizes balancing security needs with individual rights, a challenge faced by many democracies today. Australia's National Security Legislation encompasses a range of laws aimed at countering terrorism and protecting national security. The legal framework includes the Australian Security Intelligence Organisation Act, the Telecommunications (Interception and Access) Act, and the Criminal Code Act, among others. These laws grant extensive powers to intelligence and law enforcement agencies, including preventive detention, metadata collection, and control orders to restrict the movements of suspected terrorists. One of the major concerns regarding Australia's national security laws is their broad scope and potential for overreach. The preventive detention measures allow authorities to hold individuals without formal charges, similar to the NSA, leading to concerns about due process and fair trial rights. Moreover, Australia's metadata retention laws enable mass surveillance, raising significant privacy concerns. Critics argue that the laws lack adequate checks and balances, allowing authorities to exercise these powers with minimal oversight. Additionally, the control order system has been criticized for imposing restrictions on individuals based on suspicion rather than evidence, potentially violating fundamental human rights. There have also been cases where journalists and whistleblowers have faced legal action for reporting on national security matters, leading to concerns about press freedom. Despite these criticisms, the Australian government defends the legislation as necessary to address modern security threats. However, ongoing debates emphasize the need for reforms to introduce stronger accountability mechanisms and ensure that security measures do not erode democratic principles and human rights.

IV. CASELAWS OF NATIONAL SECURITY VS HUMAN RIGHTS

- **Dokubo Asari v Federal Republic of Nigeria:** In the case, the appellant, Asari Dokubo was arrested by the police and charged to court on a five-count charge of conspiracy, treasonable felony, forming, managing, and assisting in managing an unlawful society, publishing of false statement and being a member of an unlawful society, which are threatening to national security. Dokubo applied for a bail pending trial and his application for bail was denied in both the trial and appellate courts. The Supreme Court

⁶ David-Mark Onyinyechi, 'Individual Rights, Terrorism and National Security in Nigeria: Issues and Challenges' [2023] (8) (11) African Journal, 15

held that when there is a threat or likelihood of threat to national security, the provisions of Chapter IV of the 1999 Constitution could be suspended. Based on the foregoing, the court has established that the individual right to personal liberty can be limited when there is threat to national security.

- **A & Ors v Secretary of State for the Home Department:** This is a British case in which the plaintiffs were detained under Section 23 of the Anti-terrorism, Crime and Security Act (2001) on the ground that they posed threat to National security. The House of Lords held by majority that the provisions of ATCSA 2001 was inconsistent with the provisions of the European Convention on Human Rights and that it is a violation of the plaintiffs' right to liberty. This case is different from the one above in the sense that the courts' judgement is in support of individual rights.

V. CHALLENGES AND CRITICISMS OF THE NATIONAL SECURITY ACT

The National Security Act (NSA) is a significant piece of legislation that grants authorities the power to detain individuals in the interest of national security, law, and public order. While the act aims to prevent activities that threaten the state, it has been subject to numerous challenges and criticisms. Many argue that the NSA is often misused, leading to human rights violations, political suppression, and a lack of judicial oversight. This essay explores the challenges and criticisms associated with the National Security Act. The National Security Act (NSA) is like a double-edged sword. On one hand, it aims to protect the nation from threats, but on the other, it raises eyebrows about personal freedoms. Balancing security with individual freedom is a tricky business. The law gives authorities power to detain people without charge, which is meant to keep public order⁷. Yet, this can lead to issues if used too freely. People worry it might be used to silence dissent or target certain groups unfairly.

Lack of Judicial Oversight One of the primary concerns regarding the NSA is the absence of proper judicial oversight. The act allows preventive detention without the need for immediate judicial intervention, which can lead to arbitrary arrests. Detainees can be held for prolonged periods without formal charges, violating fundamental rights such as the right to a fair trial and due process. **Misuse for Political Suppression** Another major criticism of the NSA is its alleged use as a tool for political suppression. Governments and law enforcement agencies have been accused of detaining political opponents, activists, and journalists under the guise of national security threats. This misuse undermines democratic values and restricts freedom of speech and

⁷ Emerson, Thomas I. 1982. "National Security and Civil Liberties". *The Yale Journal of World Public Order* 9(78).

expression.

Human Rights Violations The NSA has been criticized for leading to severe human rights violations. Arbitrary detentions, lack of legal representation, and prolonged incarcerations without trial have raised concerns among human rights organizations. The act is often seen as a violation of the Universal Declaration of Human Rights and other international legal frameworks protecting individual freedoms. The National Security Act (NSA) has been a topic of heated debate, primarily due to its implications on human rights. Critics argue that the Act allows for detention without formal charges, which can lead to potential abuses of power. Detainees are often held without trial, raising questions about the violation of fundamental rights. This aspect of the NSA has been labeled as an extra-judicial power by some, as it bypasses the traditional legal processes meant to protect individual freedoms.

Lack of Transparency and Accountability Another challenge associated with the NSA is the lack of transparency in its implementation. Authorities often do not disclose sufficient information regarding detentions, making it difficult for detainees and their families to seek redress. The absence of accountability mechanisms allows potential misuse by law enforcement agencies without consequences. Public perception of the NSA is often shaped by media portrayals, which can be both positive and negative. While some view the Act as essential for national security, others see it as a tool for political repression. Media reports of misuse can significantly impact public opinion, leading to calls for reform. The Act's portrayal in the media often highlights the need for transparency and accountability in its application. The NSA has been seen as a threat to fundamental rights such as freedom of speech, the right to protest, and freedom of the press. Many instances have been reported where individuals expressing dissent against government policies were detained under the act. This creates a climate of fear and discourages open discourse in democratic societies.

Judicial Challenges and Calls for Reform Over the years, the NSA has faced several judicial challenges, with courts often calling for stricter implementation guidelines. Many legal experts and civil society organizations advocate for reforms, including increased judicial scrutiny, reduced detention periods, and clear definitions of what constitutes a national security threat. Judicial interpretations of the NSA have varied over time, reflecting the tension between national security and individual liberties. Courts have occasionally intervened to ensure that the Act is not misused, but the balance is delicate. The judiciary's role is crucial in interpreting the Act's provisions to prevent misuse while respecting the need for security. The judiciary plays a crucial role in keeping the NSA in check. Courts have sometimes intervened to ensure that detentions under the NSA are not abused. They review the cases to make sure the reasons for

detention are valid and not just based on vague suspicions. However, the process can be slow, and not all cases receive the attention they deserve.

VI. CONCLUSION

There is no gainsaying the fact that human rights face arbitrary breach around the world and on different grounds. However, this paper, in analyzing one of these grounds (national security) has highlighted that there are ways to reconcile the competing interests of individual rights and national security which includes proportionality, necessity, legality, among others. In order to achieve a more peaceful world, both international organizations and national governments need to jointly work to implement expert opinions on the balance of individual rights and national security. The confluence of national security imperatives and the preservation of civil liberties remains an ongoing challenge for democratic societies worldwide. Within the framework of anti-terrorism legislation, this challenge becomes particularly pronounced, as states endeavour to safeguard their citizens from threats while upholding the democratic values they hold dear. The exploration of India's approach to harmonizing national security and civil liberties through its constitutional lens reveals insights that resonate beyond its borders. The principle of 'constitutionalism' underscores that even in the face of adversity, the fundamental rights of individuals must be upheld. The Indian Constitution, with its emphasis on fundamental rights, separation of powers, and the rule of law, provides a framework that navigates this balance.
