IMPLICATION OF NATIONAL SECURITY LAWS ON HUMAN RIGHTS

NATIONAL LAW SCHOOL OF INDIA UNIVERSITY,

BENGALURU

{Dissertation submitted in the partial fulfilment of requirements for the award of the Degree of Master of Law (LL.M). -2020-21}

Submitted by:

Bharti

(LLM/931/2020)

Under the guidance of:

Mr. Kunal Ambasta,

(Assistant Professor of Law, NLSIU)

□□□□ □□□□□□□□□ □□

गर □□□ □□ □□□□□□□□ □□ □□□□□ कर अमन □□ □□□ □□□□□□

□□ □□□□□□ बस □□□□□□□ पर मर कर □□□□□ □□□□□□

□□□ □□ □□□ बस □□□□ □□ □□□□□□□ □□□ □□ □□□□□□□

□□□□, □□□□□□ □□ □□□□□ पर रहट □□ तरह □□ □□□□□ □□□□□□□□

□□ □□□□□ □□□ □□ □□□□□□□□ □□ □□□□□ □□.

~ □□□

Translation:

If the country's security means

that strikes must be crushed to dye the peace in deeper hues

that the only martyrdom should be the one attained on borders

that the only art should be which blossoms on the ruler's windowpane

that the only wisdom should be which waters the land from the authority's well

that the only labour should be which sweeps the floors of royal palaces

TABLE OF CONTENTS

CERTIFICATE OF SUPERVISOR

This is to certify that this dissertation titled 'IMPLICATIONS OF NATIONAL SECURITY LAW ON HUMAN RIGHTS', submitted by Ms. Bharti (ID No. 931) in partial fulfilment of the requirements of LL.M. Degree for the academic session 2019-20 at National Law School of India University, Bengaluru, is a bonafide research work carried out by her under my guidance and supervision.

Mr. Kunal Ambasta

National Law School of India University,

Bengaluru

Place:

Date:

DECLARATION BY CANDIDATE

I, Bharti, a student of LLM (Human Rights), hereby declare that the work titled "*Implications Of National Security Laws On Human Rights*" submitted as a part of the requirements for the award of the Degree of Masters in Law and submitted to the National Law School of India University, Bangalore is an authentic record of my own work and carried out during a period of February 2021 to August 2021 under the supervision of Mr. Kunal Ambasta (Assistant Professor of Law, NLSIU). I hereby declare that the work and views reflected in this dissertation are my original work and the citation has been provided for the references drawn from the prior existing work.

Bharti

National Law School of India University,

Bengaluru, 2020-21

Date: 01.09.2021

Place: Bengaluru

ACKNOWLEDGEMENTS

I am thankful to my supervisor Mr. Kunal Ambastha for his guidance, suggestions, and time that helped me in conceptualizing and designing the scheme of this work. I am thankful to him for guiding me throughout the process of research and writing and providing me interesting insights that enhanced my research. Having been interested in the idea of the nation, suppression of people by State, and human rights violations perpetrated by the idea of nationalism, I wanted to study the role of law in human rights violations and suppression that happen in name of national security. At the beginning of my research, I had very broad idea, it was only with the help of my supervisor that I could narrow down the scope and make a coherent structure for this research paper.

I would also like to thank Ms. Rashmi Venketesan who taught me the course on Contemporary Human Rights. This course helped me a lot in shaping my ideas and research on the role and importance of the State in the human rights discourse. I would like to thank our Vice-Chancellor, Prof. (Dr.) Sudhir Krishnaswamy for the constant support and encouragement throughout this course. I am thankful to the library staff for being available and helping me in navigating through various online resources during my research.

I would like to thank my friends Aakanksha Bhardwaj, Preetam Bharti, and Priyanka Hazarika for their constant support and encouragement in times of distress, in spite of being busy with their own work and struggles.

Lastly and most importantly, I would like to thank my parents who have been an inspiration and constant pillar of support throughout my law school journey. They have not just provided me with the resources which they were deprived of, but also the constant mental and emotional support that has been instrumental in getting through difficult times.

ABBREVIATIONS

AFSPA	Armed Forces (Special Powers) Act, 1958
AIR	All India Reporter
i.e	That is
CrPC	Code of Criminal Procedure, 1974
COMP.	Comparative
IPC	Indian Penal Code, 1860
J	Journal
L.	Law
MISA	Maintenance of Internal Security Act, 1971
NHRC	National Human Rights Commission
NSA	National Security Act, 1980
PDA	Preventive Detention Act, 1950
POTA	Prevention of Terrorism Act, 2002
PSA	Jammu and Kashmir Public Safety Act, 1978
SCC	Supreme Court Cases
TADA	Terrorist and Disruptive Activities (Prevention) Act, 1987
TRANSNAT'L	Transnational
UN	United Nations

UAPA	Unlawful Activities (Prevention) Act, 1967
v.	Versus

LIST OF STATUTES

- Armed Forces (Special Power) Act, 1958
- Code of Criminal Procedure, 1974
- Constitution of India, 1950
- Indian Penal Code, 1860
- Jammu and Kashmir Public Safety Act, 1978
- Maintenance of Internal Security Act, 1971
- National Security Act, 1980
- Preventive Detention Act, 1950
- The Prevention of Terrorism Act, 2002
- Terrorist and Disruptive Activities (Prevention) Act, 1987
- Unlawful Activities (Prevention) Act, 1967

LIST OF CASES

- Anuradha Bhasin vs Union of India, AIR 2020 SC 1308[1]
- A. K. Gopalan v. State Of Madras, 1950 AIR 27
- A. K. Roy v Union of India (1982) 1 SCC 271
- Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273
- D.K. Basu v. State of West Bengal, (AIR 1997 SC 610)
- Kartar Singh v. State of Punjab, 1961 AIR 1787
- Kedarnath Singh v. State of Bihar, 1962 Supp. (2) S.C.R. 769
- Modern Dental College v. State of M.P., 2016 (7) SCC 353
- People's Union of Civil Liberties v. UOI, on 16 December, 2003
- Romesh Thappar vs The State of Madras, (1950) S.C.R. 594

IMPLICATIONS OF NATIONAL SECURITY LAWS ON HUMAN RIGHTS

CHAPTER I

INTRODUCTION

"Liberty and security have always been at loggerheads. The question before us, simply put, is what do we need more, liberty or security? Although the choice is seemingly challenging, we need to clear ourselves from the platitude of rhetoric and provide a meaningful answer so that every citizen has adequate security and sufficient liberty. The pendulum of preference should not swing in either extreme direction so that one preference compromises the other. It is not our forte to answer whether it is better to be free than secure or be secure rather than free. However, we are here only to ensure that citizens are provided all the rights and liberty to the highest extent in a given situation while ensuring security at the same time."

- ***Anuradha Bhasin v. Union of India***

AIR 2020 SC 1308[1]

The National Security laws are considered significant to preserve the sovereignty of the state from external and internal threats to the lives and public order. India has had the laws in force against the threats that pose the more serious threat and has the ability to affect the territory exponentially. Some of these threats include the crimes of terrorism, separatism, public disorder, and organized crime in the form of national security laws. The distinct feature of the set of crimes covered and punished under the national security laws is that they not only affect the rights and liberty of the citizens but also threaten the authority and sovereignty of the State. These laws aim to protect the sovereignty and authority of the State rather than just protecting

the individuals who form the nation. The punishment and procedure under these laws are more stringent than ordinary criminal laws.

In the traditional understanding of the human rights the State is one of the most significant entities, as it is provided with the role of protector as well as an enabler of these rights. Drawing from this, it is important to note that in this discourse protecting the legitimacy of the State is a crucial part of protecting human rights. The legitimacy of a democratic and constitutional republic is garnered from the participation of the citizens, transparency, and popular support. This traditional understanding has changed over years and the State is no longer the only entity that confers rights to the citizens.

The threat to the security of a nation can be attributed to two reasons – internal and external. When these threats arise due to external factors or from external jurisdiction, it becomes important to curb, prevent and protect the sovereignty of the State and to ultimately protect the rights of the citizens. However, this issue becomes complex when the threats are posed because of internal reasons. The State has the responsibility to protect the fundamental rights of its citizens and provide a remedy when these rights are violated. But when these rights are not absolute, especially when it threatens the authority of the state itself. In order to protect its own sovereignty, the state has to make laws at the expense of the rights of its citizens.

The National Security laws exist as Central as well as State legislation. One of the major aims of these laws is to prevent and punish these crimes. The purview of these laws has become even more broader with the age of the internet and technological advancements. These advancements have not only changed the nature of crimes being committed but has also increased the scope and ability of the State to scrutinize and criminalize under these laws. This includes increase in the surveillance and scrutiny over the daily lives of the citizens. The effects of such mechanisms increase exponentially in the areas where the special laws such as AFSPA has been functional for a long period of time. This leads to the normalization of the stringent laws which are enacted as special laws only to be used in special or exceptional circumstances.

OBJECTIVES OF THE STUDY

- To study the important features of the national security laws in India that have evolved over time after independence.
- To study the impact of Indian national security laws on human rights.
- To examine the role and power granted to the executive under the national security laws.
- To study the judicial review of the cases pertaining to the legislations that are enacted with the objective of protecting national security.
- To look for an alternative approach to preserve national security that would limit the power of the executive and ensure maximum protection of human rights.

REVIEW OF LITERATURE

The issue of human rights violations by the State through National Security laws has been there since the colonial era. It has also been referred to as the issue of internal security and public order. The author has analyzed the Constitutional Assembly Debates regarding internal security, defense, and preventive detention. These debates reflect the approach and vision of the Constituent Assembly while drafting the exceptions in the cases of fundamental rights. The debates concerning the preventive detention laws mirror the way in which colonial experience shaped the constitution provisions on freedom of speech and expression and the safeguards entrenched in the criminal procedure.

The author, Granville Austin, has done remarkable work in analyzing and providing the overview of the Constitutional Assembly Debates while highlighting the important aspects of the constitution-making process. The author has termed his book, *'The Indian Constitution: Cornerstone of the nation'*,[1] as a history book, rather than a law book. This book provides theme-based study of the constitutional assembly debates.

[1] Granville Austin, The Indian Constitution: Cornerstone of the nation, OUP (1999).

In the article, *'Colonial Continuities: Human Rights, Terrorism and, Security Laws in India'*,[2] authored by Anil Kalhan, Gerald P. Conray, and others, the authors examine the ways in which the practices and patterns rooted in the colonial era are being maintained by the State after Independence. This paper is based on a study conducted by the members of the Committee on International Human Rights of the Association of the Bar of the City of New York. These members consulted various lawyers, judicial officers, government officials, scholars, accused charged under the anti-terrorism laws, and their family members. The objective of this study was to examine the human rights violations arising from the anti-terrorism and national security laws.

In the paper, *'National Security Laws in India: The Unraveling of Constitutional Constraints'*,[3] the author, Surabhi Chopra analyses the national security legislation in India. The author argues that there are checks and balances that exist in form of electoral democracy, legislative scrutiny, judicial review, and constitutional rights. These checks and balances play an important role in upholding the accountability of the actions of the State. However, they have not been able to restrain the executive power and their actions that are enabled by the national security legislation. The author further argues that these wide executive powers that lead to human rights violations are further enabled by the judiciary and the legislature. In this way, the legislature and the judiciary have endorsed these powers in principle rather than holding the executive accountable for such violations.

In the article, *'Human Rights Implications on National Security Laws in India: Combating Terrorism While Preserving Civil Liberties'*,[4] authored by C. Raj Kumar, the author analyses the history of national security legislation in India. The author has examined the human rights implications the constitutional provisions pertaining to the emergency. The author also analyses the preventive detention laws in light of the human rights framework in India. The author differentiates between human security and national security and proposes a way forward in

[2] Anil Kalhan , Gerald P. Conroy, Mamta Kaushal & Sam Scott Miller, Colonial Continuities: Human Rights, Terrorism, and Security Laws in India, 20 COLUM. J. Asian L. 93 (2006).

[3] Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints, 17 OR. REV. INT'l L. 1 (2015).

[4] C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism While Perserving Civil Liberties, 33 DENV. J. INT'l L. & POL'y 195 (2005).

which the legislation and strategies pertaining to National Security should take into account the human rights protection.

In his book, *'Wages of Impunity: Power, Justice and Human Rights',*[5] K. G. Kannabiran draws a contrast between the behavior of the state agencies in colonial and post-colonial India and he argues how it has been the same. The author further points out the tendency of the state to term political problems as the issue of 'law and order'. The author has also analyzed the amendments to the National Security Law in his article, *'Erosion of Constitutional Safeguards',* in which he highlights the preventive detention powers enabled by this law and subsequent amendments to it.

The classic essay, *'"National Security" as an Ambiguous Symbol'*[6] by Arnold Wolfers was one of the early and important work that analyzed the concept and ambiguity of the terms 'national interest' and 'national security' at the time when the new international human rights regime was emerging with the UN. The author argues that these terms should be scrutinized with particular care. The author discusses how these terms may mean different things in different contexts and does not have any precise meaning.

The author Gautam Navlakha has authored various articles in the Journal, Economic and Political Weekly. In these articles he has examined various issues, from contrasting the budget and armed forces that are employed within India to the suppression of communities who are charged under these laws.

STATEMENT OF RESEARCH PROBLEM

These laws have been enacted and re-enacted from time to time, however, there are consistent elements that have been reincarcerated in the new laws after being repealed in the older version of laws. These elements include the enabling of preventive detention, ambiguity in scope, and excessive executive power which leads to the violation of basic human rights of the citizens.

[5] K. G. Kannabiran, *The wages of impunity*. New Delhi: Orient Longman (2004).

[6] Arnold Wolfers, "National Security" as an Ambiguous Symbol, Political Science Quarterly, Vol. 67, No. 4 (Dec., 1952), pp. 481-502.

These laws put the issue of national security at odds with the human rights of the citizen. However, the preservation of national security should include the protection of human rights for the progressive realization of these rights. The efficacy and impact of these laws need to be examined in this light.

SCOPE AND LIMITATION OF THE STUDY

In this research paper the author has only studied the Indian legislation and history in the context of national security laws. The author has studied the historical context and evolution of these laws with time.

HYPOTHESIS

The national security laws should account for human rights violations. These laws should be inclusive of the safeguards and restraints based on the constitutional principles in order to minimize and avoid the human rights violations. The executive power and arbitrariness have been enabled by the legislature as well as the judiciary by not putting enough constitutional restraints and checks in the legislations on national security. The scope of national security laws should be defined in order to curb the arbitrary power granted to the police and enforcement agencies under this law.

RESEARCH QUESTIONS

- What have been the important features of the national security laws in India that have been enacted post-independence?
- What has been the role of the judiciary in shaping and building the jurisprudence of balancing fundamental rights with national security?
- How have the national security laws evolved and changed from the colonial era and early post-constitutional era?

RESEARCH METHODOLOGY

The researcher has used the doctrinal method of research for this study. This study provides the descriptive as well as analytical study of the national security laws. The researcher has utilized both primary as well as secondary sources for this study. The primary sources includes the case laws, law commission report, constituent assembly debates and statutes. The secondary sources include the articles, books, news reports.

TENTATIVE CHAPTERISATION

The first chapter is the synopsis of this research paper. In this chapter, the researcher has laid out the background, objectives, literature review, hypothesis, scope and limitations, statement of the research problem, and research method that has been used by the researcher for this research paper.

The second chapter provides an overview of the Indian laws on national security and their colonial legacy. It provides a historical background of National Security laws in India and discusses the changes that have occurred in these legislations over a period of time since independence. It also looks at the discussions and discourse on the national security in the Constituent Assembly Debates and the International developments regarding the same. It further studies the impact of these laws on the human rights and civil liberties of the ordinary citizens.

In the third chapter, the researcher examines the constitutional framework and restraints that are in place with respect to national security laws, by studying the provisions from these legislations and cases pertaining to the same. In this part, the researcher also examines the role and authority given to the executive in the laws on national security. This chapter further analyses the common feature that has been consistent in the national security laws that have been enacted at different points in time by the Indian State.

In the fourth chapter, it studies the judicial review in the cases pertaining to national security laws. It further studies the role of the judiciary in these cases, as to how it has enabled the abuse

of power by the executive and how has it balanced the security of the State and the citizens with the protection of the fundamental rights of the citizens in some cases.

In the fifth chapter is the last chapter of this research paper. In this chapter the researcher provides the conclusion of this research paper and the observations in an attempt to fulfill the research gap identified in the statement of the research problem. In this part, the researcher also provides the answers to the research questions laid out in the synopsis based on the study carried out during this research.

CHAPTER II

HISTORICAL AND CONSTITUTIONAL ASPECTS OF NATIONAL SECURITY LAWS IN INDIA

The national security laws have been in existence in India since colonial era. During the colonial era, preventive detention laws were enacted to preserve public order, especially at times when the independence movement was at its peak.[7] These laws were criticized and resisted by the Indians who were part of the freedom movement, who were also the main targets of such laws. At that time, these laws were used to curb dissent and resistance from the Indians who were against the colonial government. The colonial government had enacted the Defence of India Act in 1915 and later in 1939 that enabled preventive detention. The act allowed the preventive detention for six months while making it possible to do so without informing the person of the grounds of his arrest.[8] This act was passed to curtail the resistance from the Indians that came as a result of World War I. It was also reenacted later in 1939 in the wake of World War II when the independence movement was at its peak. During this time, the colonial regime also established the exception in such cases that provided the law-making power to the executive. This power was overly used by the Governor General to issue ordinance regarding preventive detention.

The impact of these laws and their application on the nationalist movement played out in the Constituent Assembly. The Constituent Assembly had many members at the receiving end of these draconian laws, especially those that enabled the preventive detention with negligible procedural safeguards.[9] This is also reflected in the Constituent Assembly debates on Article 20 and Article 22, which provide for the constitutional protections necessary to ensure a fair procedure. The Assembly also debated the number of restrictions on fundamental rights and

[7] C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties, 33 DENV. J. INT'l L. & POL'y 195 (2005).

[8] See Id

[9] Granville Austin, The Indian Constitution: Cornerstone of the nation (1966).

personal liberty which would be essential to main public order, peace, and stability.[10] The provisions regarding Emergency were also inserted into the Constitution by the Fundamental Rights Sub-Committee. During the debates on the restrictions on the fundamental rights and personal liberty, the word 'reasonable' was added to the restrictions. This amendment was moved by Thakur Das Bhargava.[11] However, the functionality of this terminology is to be analyzed in this project, especially in context of the national security laws.

The gravity of the issue of national security in India has been recognized by the Indian State ever since its Independence. In early post-colonial years, the significance of these legislations was embedded in the attempt to achieve stability in the newly formed state. These laws came in light of the partition and its after-effects. It was considered important to ensure that the State has enough power to protect itself against the secessionist movements and the communal disharmony that remained as a consequence of partition. Since then, the Indian State has accordingly enacted laws from time to time to protect national security and maintain public order. It began in the wake of the violence that was surged as the outcome of the partition of India, followed by the secessionist movements.

The Indian Penal Code, in its chapter VI defines the offences against the State.[12] This chapter includes the offences of attempting or conspiring to wage war against the State, assaulting President of India/ Governor of any State, and sedition. The law of sedition under IPC, on the similar lines to the national security laws, seeks to punish any person who 'attempts to bring into hatred or contempt or excites or attempts to excite disaffection the government established by law'. The implementation of this provision does not criminalizes the speech that instigates or causes violent acts of terror alone but it also punished the 'excitement of disaffection towards the state' and lately it has started to capture the views expressed online through social media platforms which has increased the spectrum of speech that qualifies to be causing 'disaffection towards the government'.[13]

---

[10] See *Id.*

[11] See *Ibid* at 73-74.

[12] Indian Penal Code, 1860.

[13] Why Indian Police arrested Disha Ravi, *Livemint.*

The constitutionality of section 124A was analyzed and upheld in the case of Kedarnath Singh vs. State of Bihar.[14] However, court clearly interpreted the scope of the provision based on the pre-constitutional history and the constituent assembly debates. The court held that the offence under 124A would constitute of the words that have tendency to disrupt public order or create disturbance by resorting to the violence.[15] It is important to note that the constitutionality of this provision was upheld only to the extent where there is incitement of violence or the intention of creating public disorder.[16]

In spite of having the abovementioned crimes in place in the IPC, the government has time and again enacted special laws for national security. These laws have always included the public order and maintenance of peace as an essential part of national security. The Preventive Detention Act was enacted in February 1950, just a month after the enactment of the Constitution. This Act empowers the government to detain any person for the period of one year without any charge. This law came as a response to the violence that outbroke as a result of partition after the Independence.[17] At the time of enactment of this law, it was noted that this legislation will only be applicable for twelve months. It was further stated by the Minister that enactment of any permanent legislation enabling preventive detention would require more deliberation and study.[18] Despite this, this act was re-enacted for nineteen years.

The PDA was being reenacted, however a special law, AFSPA, was also passed in 1958 to regulate and cope with the secessionist movements and insurgency that was taking place in different parts of the country.[19] It has been enforced in the north-eastern states at various points of time and is applicable in the state of Jammu and Kashmir till today. Unlike other national security laws, which are mostly used by the police and government officials, under AFSPA, the

---

https://www.livemint.com/news/india/explainer-why-indian-police-arrested-disha-ravi-a-22-yr-old-climate-activist-11613468790546.html

[14] Kedarnath Singh v. State of Bihar, 1962 Supp. (2) S.C.R. 769.

[15] See *Id*.

[16] See *Id.*

[17] Pradyumna K. Tripathi, Preventive Detention: The Indian Experience, 9 AM. J. COMP. L. 219, 222 (1960).

[18] A.G. Noorani, Preventive Detention in India, Economic and Political Weekly, Oct. 5, 1991, at 2608.

[19] See *Id.*

military and the armed forces have power over civilians of the 'disturbed areas' where this law is in force.

Only two years after the PDA expired, the government enacted the Maintenance of Internal Security Act (*hereinafter MISA)* in 1971.[20] MISA had reincarcerated the preventive detention measures that lapsed with the expiration of the PDA. These powers were made even more stringent after a few years of enactment of this law, as the government declared national emergency. During the period of emergency, the procedural protections provided in MISA were not applicable anymore and this law was used extensively.

Even though these laws deemed inapplicable after the emergency was lifted and the people severely affected by these laws were elected to the government, MISA was ironically repealed only for the newly elected government to propose that the preventive detention measures should be incorporated in the ordinary law.[21] This proposal didn't come into the force, however, this government did enact a special law, National Security Act (*hereinafter NSA),* which has preventive detention measures that are in force till date.[22]

Meanwhile, the government had also enacted the UAPA in 1967 which enabled the power of the State to hold any person in preventive detention. This law also has a provision for deeming the organization as unlawful. The UAPA was also amended after the terrorist attacks in Mumbai in 2008 to added the different version of provisions which were earlier repealed from different anti-terror laws i.e. TADA, POTA.

The Constitution provides that the State can put reasonable restrictions under Article 19 if it is for protecting the security of the State. In the case Romesh Thappar v. The state of Madras,[23] the circulation of a weekly magazine was banned under the Maintenance of Public Oder Act, 1949 applicable in the State of Madras. It was contended by the state that this was done in light of public safely and public order, and hence was a reasonable restriction as stated in Article 19 (2). In this case the Supreme Court noted that the expression 'security of the state' used in Article 19

[20] The Maintenance of Internal Security Act, 1971

[21] Anil Kalhan et al., Colonial Continuities: Human Rights, Terrorism, and Security Laws in India, 20 COLUM. J. ASIAN L. 93, 135 (2006).

[22] See *Id.*

[23] Romesh Thappar vs The State of Madras, (1950) S.C.R. 594

is not same as the terms used in the Madras Act i.e. 'public safety and public order'. The court held that the restriction in Article 19 (2) would only be applicable in the cases where there is serious threat of violence and uprise that would affect the security of the State.

The Indian jurisprudence on human rights has evolved significantly and has also incorporated many norms from the international legal instruments to give recognition to them as fundamental rights under the Constitution of India. The Supreme Court has streamlined and condensed the authority and power of the police and enforcement authorities in line with the Constitutional rights through various judgments.[24] In these cases that court has also constituted regulations and guidelines for the police to follow in instance of arrest, interrogation and preventive detention for the people charged under the ordinary offences under IPC. The restrictions on the authority of the police were considered important for enhancing and protecting the fundamental rights enshrined in the constitution and the guidelines issued therefrom were necessary to discourage the abuse of power by the police and limit their authority in this regard. However, the court has refrained from giving such regulations or curbing the authority of police or the armed forces in the cases pertaining national security. This can be attributed to the fact that these cases are considered more threatening and harm inducing. However, this has led to decline in the standard of proof required to take actions in the cases pertaining to national security.

Despite the fact that different governments have passed different laws for preserving national security for different reasons, with different objectives and at different points in time, there hasn't been any significant and substantial change in these laws to show legislative application of mind or intent. Though the strictness and implementation of these laws have changed at different points in time.

[24] Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273; D.K. Basu v. State of West Bengal (AIR 1997 SC 610)

CHAPTER III

EVOLUTION OF THE NATIONAL SECURITY LAWS IN INDIA

Preserving the sovereignty of the State was one of the most significant post-colonial challenges for India, to be able to achieve the Constitutional aspirations. This was especially significant with the presence of the tensions and challenges that emerged due to the partition. This was also followed by the successionist movements that were frequently arising after a few years of independence. However, as it has been elaborated in Chapter I, the provision of the law enacted after the independence have been passed on till date through various special legislations. These legislations have been enacted at different points in time which the stated objective of preserving national security, sometimes referred to as internal security and public order. The national security laws have never defined or enlisted the components of the national security and has allowed the discretion to the police and enforcement officials to decide what it entails within its scope.

Article 22 of the Indian Constitution provides a procedural safeguard according to which an arrested person has to be produced before the Magistrate within twenty four hours of such arrest and has to be told the grounds of such arrest very clearly. These safeguards are not applicable if the person is detained under a preventive detention law.[25] Clause four to seven of this Article recognizes and lays down the provisions regarding the preventive detention.

The preventive detention has been a consistent part of these legislations, along with lower standard of proof and grounds in the detaining orders.[26] The wide scope of these legislations leave the possibility of ambiguity and abuse of the power by the executive authorities. One of things that has persisted through enactments, repealing and reenactment of these laws is the excessive power that it provides to the executive and the dilutions of procedural protections granted to the accused under the ordinary penal laws.[27] The continuing and consistent repealing

[25] Article 22, Constitution of India.

[26] Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints, 17 OR. REV. INT'l L. 1 (2015).

[27] See *Id.*

and enacting of similar provisions through these legislations also shows us the legislative sloth. It has also been pointed out as a new strategy of the State to come up with different and overlapping preventive detention laws for different class and categories of people.[28] The Author Kannabiran argues that this is a strategy to divide the protest and decrease the scope of challenges to these laws in the Court.[29] He argues that a stringent legislation against the 'lumpen element or a smuggler' is very unlikely to evoke a protest. This decreases the possibility of legislative or judicial challenge to these laws as it is convenient for the society to take such moralistic stance against these set of people which provides a justification for these laws. The court also follows the same standard and upholds such measures which leads to laying down of such principles which gets embedded in the system with time.[30] Such principles are then extended to other activities and spheres, and are used to suppress the political dissent and protests.

Even after the repealing of the PDA and MISA, and upliftment of the Emergency, the legacy of these laws and provisions have been carry forwarded by the laws and specific amendments to them that are applicable even today. These laws include NSA, UAPA, and many laws that are applied only to specific States such as AFSPA, Jammu and Kashmir Public Safety Act, 1978 including other legislations. The wide scope of these laws can be attributed to the objectives of these laws which is to protect the national security, prevent threats and harm to the sovereignty of the State and to maintain public order. However, such objective would deem redundant if these laws lead to abuse of power and excessive exploitation through them.

Section 5A of the NSA states that when the detention is made on two or more grounds under section 3 of the Act, such order is to be treated as if it has been made separately for each ground. It further states that:

> *"**5A. Grounds of detention severable** ... on two or more grounds, such order of detention shall be deemed to have been made separately on each of such grounds and accordingly -*

[28] K.G.Kannabiran, Erosion of Constitutional Safeguards

[29] See *Id.*

[30] See *Id.*

(a) such order shall not be deemed to be invalid or inoperative merely because one or some of the grounds is or are—

(i) vague,

(ii) non-existent,

(iii) not relevant,

(iv) not connected or not proximately connected with such person, or

(v) invalid for any other reason whatsoever,"

In this way, the Act actively enables the detention on the grounds that are vague, non-existent and not relevant. This section was inserted in the NSA by an amendment in 1984. It was stated that this was the result of the uncertainty created by contrasting judgments, where some stated that the suspension of one ground would deem the detention order invalid on the other hand some judgments stated that it would be necessary to invalidate all the grounds in order to invalidate the detention order. It was stated that it was to do away with this ambiguity that this section was added through the 1984 amendment.[31]

Further, section 5A (b) of the act states that,

"the Government or officer making the order of detention shall be deemed to have made the order of detention under the said section after being satisfied as provided in that section with reference to the remaining ground or grounds."

This section limits the scope of judicial review in the cases filed under section 3 of the act.

Further, in section 8 of the act, it is stated that the person can be detained without being informed of the grounds or reasons for the same up to five days, or up to fifteen days when the reasons can be recorded for such exception. Such provisions provide very wide and strong powers to the police and enforcement officials without imposing any accountability on them for the same. The problem is not limited to the scope of most of these laws, but also in the levy that it grants to

[31] K. G. Kannabiran, Erosion of Constitutional Safeguards, Economic and Political Weekly, Vol. 20, No. 18 (May 4, 1985), pp. 786-788.

police. It also eliminates the possibility of compensation or remedy by stating that the action taken under this act in good faith and overrules the possibility of brining any legal action against the Central or the State government.[32] In this way, the NSA does not only leave the gaps in the law that leads to abuse of power, it also restricts the remedy available to the person charged under this law.

There has also been a considerable overlap in the legislations which has been also been justified. The forty third report of Law Commission of India that recommends the enactment of a law for National Security and also provides a draft bill.[33] In this report, the importance and objectives of UAPA are stated and further, it has been stated that these objectives and provisions have bearing on national security and hence, they should be consolidated in a new statute that specifically deals with the national security. The report further states that it has incorporated the foreign legislations that are relevant to the Indian conditions. It is to be noted that this report is not grounded in any study, or data as to what have been the serious threats to the national security. It doesn't study the gaps in the law which would better the investigative or procedural methods. It also doesn't refer to the outcomes and impact of the statutes that it goes on to adopt and consolidate the provisions from.

The National Security Act, that was enacted in 1980 did not show much similarity or incorporation of the National Security Bill proposed by the Law Commission in its report. The reason for this could be the change in the government or it might be because the bill was drafted when the before the emergency was imposed and the law was enacted post – emergency. However, both the bill and the act reflect the approach of the executive and the legislature when it comes to laws on national security. This importance should be reflected in the laws that are drafted with the objective of preserving national security.

One of the other features of these laws is that it seeks to punish people before the crime has been committed. In criminal law jurisprudence, one requires to examine the existence of both *mens rea* and *actus reus,* and a strong causal link between the two which has to be proved beyond reasonable doubt in order to establish that the accused is guilty. This link has been not just given

[32] Section 16, National Security Act 1980

[33] 43rd Law Commission of India Report, 1971

less relevance in national security laws but has also been consciously done away with in many provisions and in practice. There has been a trend under these laws of punishing people before the crime has been committed or their causal connection to any existing threat has been established. These laws surpass the need to establish such causal connection, not just before the preventive detention order, but even during or after it has proven redundant as to what is the exact 'harm' or 'threat' that is seeking to prevent.

In the constitutional democracy, the courts play a significant role in protecting the rights and interests of the minority communities. The national securities laws have been enacted in light of the political uprisings. The PDA came as a response to the violence that occurred during the partition of India, MISA came in wake of emergency, NSA was enacted and amended during the time Punjab was experiencing political and separatist uprisings, AFSPA was enacted in light of the Naga separatist movement and UAPA was amended to include provisions repealed in TADA and POTA after the Mumbai terrorist attacks. In such cases it becomes important for the court to step in to ensure checks and balances on executive power. As can be seen, the national security laws have time and again been enacted for the special reasons, threat or circumstances that have arisen at some point in time. However, they remain in existence in some form or the other even when such threat or circumstances have been resolved or is no longer there.

CHAPTER IV

THE FUNCTION OF JUDICIAL REVIEW IN THE CASES PERTAINING TO NATIONAL SECURITY

The national security laws, specifically the NSA, does not only provide the executive with wide powers with negligible accountability, it also limits the scope of judicial review over these ambiguous and arbitrary powers. These laws provide huge discretion to the executive to determine and decide based on their interpretation without having any regulation to guide them for the same. The higher the rank of the official, the lesser is the accountability and guidance for him to take decisions under these laws.[34]

Under AFSPA, the Central or the State government has the power to declare an area as a 'disturbed area'.[35] The act does not in any way define or indicate any parameter to state what would be a 'disturbed area'. It only states that the authority to declare any areas as 'disturbed areas' is with the Central or the respective State government. The judicial review in such a case would only entail the review of the procedure adopted by the government, as the substantive parts are not clearly defined in the statute. However, the decision of the government can be substantively reviewed if the bad faith on part of the government can be established.

In NSA, the good faith is presumed,[36] and the detaining order is deemed to be made as per section 3 after being satisfied by the grounds stated therefrom.[37] This leads to reversal of the presumption of innocence, as it presumes the validity of the grounds and good faith on part of the enforcement officials and the burden of proof is on the accused to prove that the grounds were invalid or that the decision was taken in the bad faith. This limits the scope of judicial review to only determine the procedural checks and takes away the possibility of substantive review.[38]

---

[34] See Supra, Surabhi at 23

[35] Section 3, AFSPA

[36] Section 16, National Security Act 1980

[37] Section 5A (b), National Security Act 1980

[38] Section 3, National Security Act 1980

These laws also have procedural hurdles to seek judicial review as they provide the administrative review measures that have to be undergone before seeking judicial review in the court. These administrative mechanisms exist in both, NSA and UAPA, in form of Advisory Boards for reviewing the detention orders.

Under NSA, the detaining order has to be produced before the advisory board within three weeks from the detention of a person. However, this can overlook in the cases where the person acts in any manner prejudicial to the defence of India or Security of India or of any State.[39] In this way, the minimal protection provided in the act is also surpassed in the cases pertaining to the security of the state. As per the act, Section 11 (4) of the act bars the detained person from making any legal representation regarding the proceedings and orders of the advisory board and that the report of the advisory board shall be confidential.[40] The administrative review proceedings with the advisory board is not public and prevents the accused from seeking legal representation.[41] These provisions lead to hurdles and limits the scope of judicial review and remedial measures that can be sought from the courts otherwise.

The provisions of the national security laws providing wide and unclear definitions, and preventive detention has been upheld by the courts time and again citing the concern for maintenance of law and order, and preservation of national security. In A.K. Gopalan v. State of Madras,[42] the court analyzed the difference between the 'due process' and 'procedure established by law'. The court held that the due process is not a necessary requirement under Article 21 of the Constitution. The constitutionality of PDA was upheld in this case.

In the case of A.K. Roy v Union of India,[43] the court determined the constitutionality of the National Security Act. In this case the petitioners challenged the preventive detention powers stating that the grounds for the same were wide and ambiguous. The court observed that the expression 'security of India' given in section 3 of the NSA are uncertain but at the same time it

---

[39] Section 14A, National Security Act, 1980

[40] Section 11 (4), National Security Act, 1980

[41] See *Id.*

[42] A. K. Gopalan v. State of Madras, 1950 AIR 27.

[43] A. K. Roy v Union of India, (1982) 1 SCC 271

expressed the difficulty in defining the expression. It upheld the constitutionality of section 3 of the act and stated that this section cannot be deemed unconstitutional for the reason of uncertainty or vagueness. The court held that since these expressions cannot be defined precisely the court should strive for narrower construction of these terms. The court also stated that the preventive detention laws should be applied to minimal and serious cases.

The laws passed for preserving national security should be tested by considering the necessity of the same. This can be tested under the proportionality test. The court in the case, Modern Dental College v. State of M.P,[44] the court stated that the principal od proportionality is inherent in the scheme of Indian Constitution. The same can be found in the jurisprudence on the reasonable restrictions under Article 19 of the Constitution. In this case the court laid down the four components of the proportionality test. These components included, firstly, the there has to be a legitimate goal for a measure to restrict any rights. Secondly, it has to be a suitable means for furthering the said goal of the measure. Thirdly, such measure should only be taken in absence of a less strict alternative that will be equally effective for the achieving the said goal. And lastly, the said measures should not have any disproportionate effect on the rights.

This test was re-analysed in the case Anuradha Bhasin v. Union of India.[45] In this case, the court considered the conflict and balance between the security and liberty. The court remarked that in case where one has to make a choice between these two, it should not choose either of the extremes and rather try to balance the both. In this case, the petitioner challenged the number of orders of the government to shut down educational institutions, mobile and landline connectivity, and internet shut down.

The main argument of the State in favour of these orders was that these orders were passed in anticipation of security threats and to maintain the law and order. The Solicitor General in this case argued that these orders were passed in furtherance of the duty of the State to protect its citizens. It was further argued that the orders restraining the movement of citizens were passed by the Magistrate under section 144 of the CrPC and that they have the best knowledge of circumstances that exist in the local area. The necessity in relation to these laws is defined as

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

[45] Anuradha Bhasin v. Union of India, AIR 2020 SC 1308[1]

"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."[46] This definition has been cited by the court in Anuradha Bhasin and has been utilized in the proportionality test in this case.

The concept of National Security has been ambiguous even beyond Indian legislation. Although the term 'national security' and 'national interest' have been established in the international political discourse but the meaning and understanding of the concept differ.[47] The group that raises the concerns over national security generally ignores the comprises with the basic rights that result from the stringent national security policy.[48] Arnold Wolfers in his classic essay has stated in furtherance to this "it would be an exaggeration to claim that the symbol of national security is nothing but a stimulus to semantic confusion, though closer analysis will show that if used without specifications it leaves room for more confusion than sound political counsel or scientific usage can afford."[49] He perceives security as a value that can be there in varying degrees in different nations.

While dealing with combating against the threat to national security the state agencies have to take up mechanisms and actions that violate human liberty and rights of the individuals. The growing technology has made the surveillance mechanisms far more easier than earlier and it also poses new challenges to the security which gets a response from the state in form of more violations of rights of the individuals.

This approach is important in the context of traditional meaning and definition of the national security, however, in the modern view of national security where it seeks to protect an ideology more than borders, the question of national security can alter the meaning of justice and as a consequence can result in exclusion of people from this conception who happen to be outside of

[46] 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)

[47] Arnold Wolfers, "National Security" as an Ambiguous Symbol, Political Science Quarterly, Vol. 67, No. 4 (Dec., 1952), pp. 481-502.

[48] See *Id.*

[49] See *Id.*

that particular ideology.[50] The aim of the National Security should be broadened to go beyond the physical harm to include the civil liberties of all the citizens. With the advancement of technology, the measures of security have becomes more limiting for the citizens. Such concerns have existed for quite a long time. One needs to enquire as to why are we presently encountering the expanding of public safety to incorporate so a wide range of chances when the state should be more equipped to protect its citizens without violating their rights. The development of national security thus conveys with it established and legitimate concerns that contradicts the constitutional aims of Justice set out for the nation.[51] These are established in the fundamental joining of expected dangers to the national security foundation. The national security framework was made exclusively to ensure government foundations. Its aim at that point was protection of the State itself, for it to be able to ensure that Justice prevails.[52]

In international as well as national discourse on national security there is a lack of required harmony and balance between national security and human security.[53] Even though the right to life and civil liberties of an individual has expanded and are no longer derived from the State in the International regime, it hardly plays out in the national context when it comes to abuse of power by the government.[54] To overcome this, we need a more complex analysis of the power and sovereignty of the State rather than more and more focus on the State.

[50] Daphne Barak-Erez, 'Distributive Justice in National Security Law' (2012) 3 Harv Nat'l Sec J 283.

[51] Alec Stone Sweet &Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 CoLUA.J. TRANSNAT'L L. 72, 75-76 (2008).

[52] See *Id.*

[53] Barry Buzan, *People, States and Fear: An Agenda for International Security Studies id Post Cold War Era,* Hemel Hampstead: Harvester 1991

[54] Georeg Sorsen, Individual Security and National Security: The State Remains the Principal Problem, *Security Dialogue* 1996 27: 371

CHAPTER V

CONCLUSION AND SUGGESTIONS

The national security and human liberty have been in a conflict which resonates in the national security laws. These laws often lead to human rights violations that have been justified over time in name of the sovereignty of the state, maintaining law and order, and preserving national interest. The grounds of national security and defense have also been the exception under the fundamental rights under Article 19. The national security laws very often lead to violation of basic human rights, many of which are also recognized as the fundamental rights in the Constitution of India. This often leads to the notion that the protection of human rights is at odds with national security. However, I argue that the protection of fundamental rights should be considered a crucial part of preserving national security.

The procedure and punishment prescribed under the national security laws have been more stringent than the ones prescribed under the IPC and CrPC. This approach reflects how the laws which are there to protect the security of the citizens are subsidiary to the preservation and protection of the sovereignty of the State. The consistency of provisions that undermine the liberty and freedom of citizens, like by preventive detention, reflects the approach of the State that protection granted to the fundamental rights of the citizens are subsidiary to the protection of national security and maintenance of public order.

The human rights of the individual have evolved over the period of time in both National and International realm. However, there incorporation and consideration in the National Security Laws is yet to be seen in India. Over last few years, the right to privacy has been recognized as a fundamental right under Article 21 of the Constitution. However, this right has not been incorporated in the national security jurisprudence and hence, it has been constantly violated during search and seizure in the cases pertaining to national security. In such cases, it becomes important to streamline the national security jurisprudence with human rights that have evolved over a period of time.

These laws are enacted for the reason of special circumstances that leads to a threat to national security or public order but they continue to exist even after the threat is no longer there. In this wat, with time such stringent laws which are supposed to be used in the exceptional cases becomes institutionalized and are entrenched in the lived experience of the people who are at the receiving end of the repression caused by these laws.

This can be altered by not only limiting the use of such laws by putting accountability measures in place. Even though there have been various human rights violations which have been noted by the NHRC, there has hardly been any action taken in response to such reports. There should be laws that holds the executive authorities, armed forces and police officials responsible and accountable for the actions taken under these laws as it provides them with the wide powers.

The accountability can also be ensured by putting in place the procedural safeguards that are absent in these laws. The national security concerns cannot be the reason to normalize the general principles of criminal procedure such as presumption of innocence and proof beyond reasonable doubt. The courts should also step in to differentiate between the national security threats from political conflicts and political problems. The Constitution of India places the procedural safeguards under Article 20 and Article 22 in Part III, along with the fundamental rights. This reflects the importance given to these safeguards by the constitution makers and this should be considered by the law makers while drafting the national security legislations. It is because of lack of accountability from the police officials and armed forces that leads to even more impunity.

Even though there have been various national security laws that have been enacted, repealed and re-enacted in India from time to time, thee procedural and implementation gaps in the national security laws have been consistent with time. Moreover, the provisions of these legislation have been similar and sometimes more stringent than what was applicable in the colonial era. These laws have evolved to be more stringent with lesser safeguards in place for the accused to challenge his detention or the charges against him. This reflects the sloth and complacency of the legislature with the repressive structures that exist in the society, and their want to maintain the hegemony over the people who disagree or challenge the power of the State.

The national security laws should take into consideration not just the preservation of sovereignty but also the protection of the basic rights of its citizen. Further, these laws should consider the protection of all the citizens, especially the communities which are more vulnerable. If the very laws which are in place to protect the citizens will be used to suppress their voices it will dem the objectives of these laws as redundant. The issue of National Security holds utmost importance. It is for this reason that this issue should be dealt by rigorous law-making process rather than drafting rigorous laws.

BIBLIOGRAPHY

LIST OF STATUTES

- Armed Forces (Special Power) Act, 1958
- Code of Criminal Procedure, 1974
- Constitution of India, 1950
- Indian Penal Code, 1860
- Jammu and Kashmir Public Safety Act, 1978
- Maintenance of Internal Security Act, 1971
- National Security Act, 1980
- Preventive Detention Act, 1950
- The Prevention of Terrorism Act, 2002
- Terrorist and Disruptive Activities (Prevention) Act, 1987
- Unlawful Activities (Prevention) Act, 1967

LIST OF CASES

- Anuradha Bhasin vs Union of India, AIR 2020 SC 1308[1]
- A. K. Gopalan v. State Of Madras, 1950 AIR 27
- A. K. Roy v Union of India (1982) 1 SCC 271
- Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273
- D.K. Basu v. State of West Bengal, (AIR 1997 SC 610)
- Kartar Singh v. State of Punjab, 1961 AIR 1787
- Kedarnath Singh v. State of Bihar, 1962 Supp. (2) S.C.R. 769
- Modern Dental College v. State of M.P., 2016 (7) SCC 353
- People's Union of Civil Liberties v. UOI, on 16 December, 2003
- Romesh Thappar vs The State of Madras, (1950) S.C.R. 594

REPORTS

43rd Law Commission of India Report, 1971

NEWSPAPER REPORTS

- Why Indian Police arrested Disha Ravi, Livemint. https://www.livemint.com/news/india/explainer-why-indian-police-arrested-disha-ravi-a-22-yr-old-climate-activist-11613468790546.html

BOOKS

- Granville Austin, The Indian Constitution: Cornerstone of the nation, OUP (1999).
- K.G. Kannabiran, The wages of impunity. New Delhi: Orient Longman (2004).
- M.P. Jain, "Indian Constitution Law", 2011.

ARTICLES

- A.G. Noorani, Preventive Detention in India, Economic and Political Weekly, Oct. 5, 1991, at 2608.
- Alec Stone Sweet &Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 CoLUA.J. TRANSNAT'L L. 72, 75-76 (2008).
- Anil Kalhan, Gerald P. Conroy, Mamta Kaushal & Sam Scott Miller, Colonial Continuities: Human Rights, Terrorism, and Security Laws in India, 20 COLUM. J. Asian L. 93 (2006).
- Arnold Wolfers, "National Security" as an Ambiguous Symbol, Political Science Quarterly, Vol. 67, No. 4 (Dec., 1952), pp. 481-502.
- Barry Buzan, People, States and Fear: An Agenda for International Security Studies id Post Cold War Era, Hemel Hampstead: Harvester 1991
- C. Raj Kumar, Human Rights Implications of National Security Laws in India: Combating Terrorism While Preserving Civil Liberties, 33 DENV. J. INT'l L. & POL'y 195 (2005).

- 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).
- Daphne Barak-Erez, Distributive Justice in National Security Law (2012) 3 Harv Nat'l Sec J 283.
- Gautam Navlakha, Internal Security: Cost of Repression, Economic and Political Weekly, May 15-21, 1999, Vol. 34, No. 20 (May 15-21,1999), pp. 1171-1174.
- Gautam Navlakha, Insecure Foundations of Security, Economic and Political Weekly , Oct. 3-9, 1998, Vol. 33, No. 40, pp. 2571-2576.
- Gautam Navlakha, On Ending the War against Our Own People, Economic and Political Weekly , FEBRUARY 19-25, 2011, Vol. 46, No. 8, pp. 24-28.
- Gautam Navlakha, Reinforcing Insecurity, Economic and Political Weekly, Sep. 25 - Oct. 1, 1999, Vol. 34, No. 39, pp. 2782-2784.
- Georeg Sorsen, Individual Security and National Security: The State Remains the Principal Problem, *Security Dialogue* 1996 27: 371
- K. G. Kannabiran, Erosion of Constitutional Safeguards, Economic and Political Weekly, Vol. 20, No. 18 (May 4, 1985), pp. 786-788
- Surabhi Chopra, National Security Laws in India: The Unraveling of Constitutional Constraints, 17 OR. REV. INT'l L. 1 (2015).
- Pradyumna K. Tripathi, Preventive Detention: The Indian Experience, 9 AM. J. COMP. L. 219, 222 (1960).