
NATIONAL SECURITY VS CIVIL LIBERTIES: AN ANALYSIS ON ENEMY AGENTS ORDINANCE, 2005

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ABSTRACT

Security is one of the most important concerns of every country in today's world. It is a major concern because security of a sovereign state is considered as the duty of the government. Initially it is conceived as protection against military threats but it also includes non-military dimensions. So, to safeguard the security of their state governments tend to rely upon certain measures including military, political, diplomatic and economic power.

One such measure is this law which is widely known as Enemy Agents Ordinance. This paper investigates the working of this ordinance and how it played a major role in the security of Jammu and Kashmir. The paper also delves into the judgement and practicalities that are associated with this foremost law.

Keywords: Enemy, Ordinance, Agent, State, Military, Imprisonment, Militants, Attacks, Penalty, Weapons, Emergency.

INTRODUCTION

The Jammu and Kashmir Enemy Agents Ordinance was first issued in 1917 by the then Dogra Maharaja of Jammu and Kashmir. It is called as Ordinance since laws made during the Maharajas rule were termed as ordinances and not law. The preamble of the Ordinance notes that “in light of an emergency in the state due to ‘wanton attacks by outside raiders and enemies of state’ a need was felt to promulgate a law for the trial and punishment of such enemy agents”¹. According to this law enemy agents are basically those people who with intent to aid the enemy, does, or attempts or conspires with any other person to do any act which is designed or likely to give assistance to the military or air operations of the enemy or to impede the military or air operations of Indian forces or to endanger life or is guilty of incendiarism shall be punishable with death or rigorous imprisonment for life or with rigorous imprisonment for a term which may extend to 10 years and shall also be liable to fine². This act is used to prosecute militant supporters instead of Unlawful Activities (Prevention) Act³. This ordinance is considered more stringent than other anti-terrorism laws like the UAPA which is used in other states of India.

After the partition and the Independence of India, in 1948 the ordinance was integrated as law and further amendments were made. It was exercised by the Maharaja of Jammu and Kashmir with the help of the law-making powers to make laws, issue proclamations and promulgate ordinances conferred to him by the Constitution of Jammu and Kashmir, 1939 under the section (5) and after the repeal of the Constitution Act on 17 November, 1951 it was protected under clause (b) of section 6 of the General Clauses Act. And this ordinance was afterwards was included in the Jammu and Kashmir Constitution, 1957 under the section 157.

In 2019 article 370 of the Constitution was repealed due to which Jammu & Kashmir’s legal framework underwent several significant changes. After that the Jammu and Kashmir Reorganisation Act was passed which had in detail the list of state laws that will continue while several others laws were repealed and replaced with the existing Indian laws. The security laws such as Enemy Agents Ordinance and Public Safety Act remained sitting it’s importance and

¹ <https://www.hindustantimes.com/analysis/jammu-kashmir-tracing-the-historical-evolution-of-the-enemy-agents-ordinance-1948-101719685903162.html> last visited 12 January 2025 (3:04pm)

² <https://theprint.in/theprint-essential/no-lawyer-unless-permitted-no-appeal-whats-enemy-agents-ordinance-jk-cops-want-to-use-more-often/2148522/> last visited 18 January 2025 (2:30pm)

³ https://www.drishtiiias.com/daily-updates/daily-news-analysis/enemy-agents-ordinance/print_manually last visited 13 January 2025 (10:45 am)

the crucial role that they play in the security of the state. But the Ranbir Penal Code which the important law of the state was replaced with the Indian Penal Code in the Jammu and Kashmir after 2019.⁴

Enemy Agent is basically defined as anyone who conspires with another person to carry out an act intended to aid the enemy. Section 2 (b) of the ordinance States enemy agent as a person, “not operating as a member of an enemy armed force, who is employed by, or works for, or acts on instructions received from, the enemy”. And Section 3 of this ordinance states that even a person who fails to inform the nearest police station and the magistrate the presence of enemies and the activities of enemies that is going on in their area, and not providing any help will also be considered as guilty under this ordinance. This will also include those who harbour the enemies, being aware that arms and explosives or any equipment capable of being used for espionage or sabotage have been dumped or left behind by a raider or an enemy agent and prepare hideouts for them to stay and attack and also help them in other ways for money or has anti-national sentiments.⁵ The citizens who inform the police immediately when they find any suspicious activities that is happening in their area after the enemies have left can get immunity or protection from the law enforcement agencies. All others would be liable and will be treated as enemy agents under this ordinance.

Section 4 of this act deals with offences triable under this Ordinance. This Ordinance was carved as an exception from the general laws thus it has a lot of exceptional features compared to other laws.

Research Methodology

This research adopts a research design that is doctrinal in nature. This study involves an in-depth analysis of secondary resources such as websites, articles, blogs and journals and has thoroughly relied upon research papers related to the topic, the reference of which have been included for your perusal.

⁴ <https://vajiramandravi.com/upsc-daily-current-affairs/mains-articles/jandks-enemy-agents-ordinance/> last visited on 15 January 2025 (9:50pm)

⁵ <https://vajiramandravi.com/upsc-daily-current-affairs/mains-articles/jandks-enemy-agents-ordinance/> last visited on January 18 2025 (11:24am)

PROCEDURES UNDER THIS ORDINANCE

When a person is considered guilty under this law by the law enforcement agencies the following procedures are carried on:

1. The government, in consultation with the High Court, appoints a special judge to conduct the trial.
2. The accused is brought before the special judge to face charges for which he/she is liable under this ordinance.
3. By default, the accused is not allowed to engage a lawyer thus there is no legal representation.
4. The court may grant permission for legal representation as it is under court's discretion.
5. The special judge conducts the trial according to the provisions given under the ordinance
6. Details of the proceedings are kept confidential.
7. After that the special judge delivers the verdict and determines the sentence of the person guilty.
8. If the person is found guilty penalties can include death, life imprisonment, or up to 10 years of imprisonment with fines.
9. There is no provision for appeal against the verdict by the special judge.
10. . The Ordinance allows appeals for only two conditions:(i) if the sentence awarded is of life or death or (ii)if the Special Judge feels that an important question of law has arisen.
11. The government may select a High Court judge to review the special judge's decision if any appeal is initiated.
12. The reviewing judge's decision is final and binding.

13. Unauthorized disclosure or publication of any information about the proceedings or the accused is prohibited under this ordinance.
14. Violation of the confidentiality of the case can result in up to two years of imprisonment and a fine.

Despite of the fact that under the Enemy Agents Ordinance a special designated court and a special judge has to conduct a trial. But as this law is used occasionally to counter insurgency the Jammu and Kashmir high court didn't designate a special judge for the trial of those who are accused under this law this was noticed by legal experts⁶. This is considered as a challenge in the law. During an Interview to *The Print* a legal expert said that:

“There have been periodic appointments of judges to hear these cases, but at the moment there is no one. The cases under this ordinance hit a wall since the court has not designated a judge for their hearing”⁷.

JUDICIAL ANALYSIS:

After Independence the ordinance was first challenged in 1948 in the high court of Jammu and Kashmir this was on grounds of the law should be lapsed without the chance of ratification as the result of which the court ruled that it would remain in force and will be implemented in the state until repealed, and stressed on the fact that it is being protected under clause (b) of Section 6 of the General Clause Act and also under Section 157 of the Jammu and Kashmir constitution, 1957.⁸ And that the Ordinance in subject being a permanent legislation could be repealed only by a competent authority.

One of the landmark judgements under this ordinance is *Rehman Shagoo and Ors vs State of Jammu and Kashmir (1959)*⁹ in this case Constitutionality of the Ordinance was challenged but the Supreme Court upheld the Enemy Agents Ordinance and decided that the law is still valid even when the Constitution act under which it was featured was repealed and that all the

⁶ <https://theprint.in/theprint-essential/no-lawyer-unless-permitted-no-appeal-whats-enemy-agents-ordinance-jk-cops-want-to-use-more-often/2148522/> last visited 10 January 2025 (4:15pm)

⁷ <https://theprint.in/theprint-essential/no-lawyer-unless-permitted-no-appeal-whats-enemy-agents-ordinance-jk-cops-want-to-use-more-often/2148522/> last visited 14 January 2025 (3:48pm)

⁸ <https://www.news18.com/explainers/why-jk-police-wants-those-supporting-terror-be-tried-under-enemy-agents-ordinance-law-explained-8946338.html> last visited 22 January 2025 (1:30pm)

⁹ indiankanoon.org/doc/1741748/ last visited 14 January 2025(5:15pm)

findings enlisted in the case proves that the subjects involved and the investigation agencies is free to charge the liable according to the sections given in the ordinance. And also, that ordinance in substance dealt with public order, criminal law and procedure and not defence, which was within the exclusive domain of the Central Government.

USE OF THE ORDINANCE IN MODERN TIME:

The Enemy Agents Ordinance is still being fruitfully used in the legal system of Jammu and Kashmir instead of Unlawful Activities (Prevention) Act¹⁰. Many of the citizens who were found guilty did face trial under the said ordinance in spite of its low public profile. Most of the data regarding the people being prosecuted under this law is not available as the data is confidential in nature. Most of the people living there says that this ordinance is still used in cases which are mostly related to perceived threats to state security and separatism.

One of the notable cases under this ordinance is the case involving *Maqbool Bhat* (founder of Jammu Kashmir Liberation Front. This case culminated in his execution in Tihar Jail in 1984. This case also highlights how this act was also applied in a high-profile case which involves a political leader.

In 2024, Enemy Agents Ordinance was widely discussed when there was an attack in Reasi, Jammu and Kashmir.

“The Director General of Police (DGP) R R Swain after the investigating the attack said those found assisting militants in Jammu and Kashmir should be prosecuted by investigating agencies under the Enemy Agents Ordinance, 2005. He said that this law is firmer than the Unlawful Activities (Prevention) Act (UAPA) and It gives the guilty punishment of either a life term or a death sentence¹¹”.

“The fighters can’t be brought under the realm of investigation. Those who support them, if we are talking of investigation there, I’ve said somewhere that they will be treated as enemy

¹⁰ <https://www.drishtijudiciary.com/editorial/enemy-agents-ordinance-2005> last visited 16 January 2025(6:18pm)

¹¹ <https://theprint.in/theprint-essential/no-lawyer-unless-permitted-no-appeal-whats-enemy-agents-ordinance-jk-cops-want-to-use-more-often/2148522/> last visited 10 January 2025 (2;16PM)

agents,” DGP R.R. Swain said¹².

Since this ordinance is used occasionally the DGP of the Jammu and Kashmir stressed on the fact that to tackle the instability that is happening the state this ordinance must be used.

CONCLUSION

The Enemy Agents Ordinance of 2005 is regarded as a strict legal tool in Jammu and Kashmir. This ordinance is specially designed to tackle the region's insurgency, with roots which dates back to 1917. The mention of this act by the Director General of Police of Jammu and Kashmir signals a potential coagulate approach towards militancy, their activities and its supporters. Most of the time citizens tend to commit the crime when they are intimidated by the enemies here the investigation agencies should play their role so that no innocent person is unlawfully tried. If the existing legislative law is unable to tackle the increase of militancy, the government should think about bringing into play the Enemy Agents Ordinance for greater good and wellbeing of the citizens.

¹² <https://theprint.in/theprint-essential/no-lawyer-unless-permitted-no-appeal-whats-enemy-agents-ordinance-jk-cops-want-to-use-more-often/2148522> Last visited 22 July 2024 (1:50PM) / last visited 19 January 2025 (12:35pm)