BALANCE BETWEEN NATIONAL SECURITY AND INDIVIDUAL LIBERTY- LEGAL FRAMEWORK FOR COVERED UP TERRORISM ISSUES IN INDIA

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ABSTRACT

This paper examines the tension between individual liberty and national security considering India's counterterrorism legal framework, a state whose unique geopolitical situation and historical conflicts put it at the forefront of the objectivities of domestic and international terrorists. But when they touch the outer limits of constitutional guarantees such as the rights to life, liberty, and free speech, these legal frameworks that include the UAPA and NSA regularly pose hard questions. The article reviews the problems these laws present, particularly concerning cases of alleged covered-up terrorism incidents, through the lens of legislation, court decisions, and case studies.

The research also assesses the role of judiciary review in preventing possible overreach by law enforcement, particularly for important cases. The paper tries to fine feasible recommendations for a more balanced approach, line better judicial supervision, privacy safeguards, and more transparent legal definitions, by contrasting with international opinions on the concept of balance between national security and individual liberty. Finally, this paper emphasizes the significance of the established democratic system that guarantees civil rights and effective war against terrorism to save individual liberty and national security. Since the rights of innocent people should not be violated, there is a need to balance civil liberties with anti-terrorism concerns and enact legislation that will permit law enforcement to take decisive action against the terrorist organization.

In the current world, maintaining a highly delicate balance between the strong requirement of national security and protecting citizens' liberties is of great importance. The essay builds on a relationship between India's anti-terrorism legislation and the Indian Constitution. Nations in this contemporary security environment and transnational danger simultaneously need to safeguard civil rights and maintain national security. This essay explores challenges of maintaining balance regarding India's national security and liberty for individual citizens.

Introduction-

This needs to protect civil liberties and maintain national security often becomes a frequent collision in today's increasingly integrated and complicated world. The important basic rights and freedoms will have to be balanced against the need to maintain a safe and secure environment. The states will have to assert themselves against all threats to their security in such a manner as not to betray the essence of their democratic ideals, which is a very subtle balance-case and was especially well expressed in the anti-terrorism laws. Perhaps the very epitome of this delicate balance has been exemplified in the Indian legal structure, with policies on anti-terrorism carefully interweaves into the values espoused in the country's constitution.

This discussion attempts to reconcile two opposing demands, one to preserve civil liberties and the other to protect national security, a democratic society assumes that these two goals reinforce each other. Achieving an appropriate balance is necessary both ethically and legally, as too much could threaten one of the foundations of a free and fair society.

In modern approach the concept "national security" goes well across the original understanding that involved the idea of defending one's country against potential invaders. Protection is required for a wide spectrum of dangers, terrorism forms one of the most urgent threats for it symbolizes an international threat which merges the different political, ideological and cultural contours.

Even during emergency, the constitution of India plays a crucial role in protecting the deterioration of individual liberties as a rule of law of the country. India faces many security challenges in thriving democracy. Many civil liberties are protected in the constitution, which also sets out how these rights can be defended and preserved.

This article aims to examine the aspect of balancing individual liberties and national security requirements under anti-terrorism law of the country.

Unlawful Activities Prevention Act-

Indian constitution was adopted on 26 November 1949 and came into force in January 1950. Many rights were granted to its citizens through the constitution. Very soon it became clear that if these rights were unregulated, then the equilibrium of the working if the state would become seriously hampered. The first amendment of the constitution of India took place in

1951 as there were some necessities which replace Article 19 clause 2 which introduce some restriction while practicing these rights.

Under the Unlawful Activities Prevention Act, the goal was to make a law concerning procedure for gaining information; criminal procedure code, 1973 was to be implemented for trial of accused[1], UAPA was enacted by both the houses of parliament and President of India on 30, December 1967[2]. The objectivities and reasoning mentioned in the original legislation stated that it aims at stopping any unlawful action through which individuals or organizations would resort to.

Following the 9/11 attacks[3], anti-terrorism legislation became far stricter in all liberal countries, this provided the agitated countries that had experience with terrorist activities in one of the most advances country, the opportunity to enact punitive legislation, this tragedy faces hardly any opposition at the time too as the world was stunned. Indian conditions were akin as of September 26, 2001, and onwards[4]. The state must protect its citizens from this violating their rights; however, it cannot do so at the price of the minority's rights in that country.

These previous anti-terrorism legislations have been repealed as they gave no practical safeguards and extensive authority to the executive[5]. The public is turning even more against the UAPA with each revision as it still stands for the same things. When the UAPA was enacted, legislators debated whether it was necessary and might be misused, and opposition parties expressed their objections. The government responded that at that time, an arbitrary ban on the group would not have occurred because the Act demanded that it bear the burden to prove the prohibition of an organization.

Therefore, even though the original Act included constitutional protection[6], it was the focus of

[1] *It's Time for the Government to Redeem Itself and Repeal the UAPA*, THE WIRE, https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa (last visited Oct. 31, 2024).
[2] Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (1967).
[3] Mark Pearson & Naomi Busst, *Anti-Terror Laws and the Media After 9/11: Three Models in Australia, NZ and the Pacific*, https://www.researchgate.net/publication/27826847_Anti-terror_laws_and_the_media_after_911_Three_models_in_Australia_NZ_and_the_Pacific (last visited Oct. 28, 2024).
[4] Ibid.
[5] Bhamati Sivapalan & Vidyun Sabhaney, IN ILLUSTRATIONS: A BRIEF HISTORY OF INDIA'S NATIONAL SECURITY LAWS THE WIRE, https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws (last visited Oct 28, 2024).
[6] Sneha Mahawar, *Terror of Unlawful Activities Prevention Act, 1967 (UAPA)*, 21 supremo amicus 103 (2020), (last visited Oct. 28, 2024).

public and scholarly investigation due to its amendments and continued limitations on minority organizations. After several amendments, anti-terror provisions were added to the UAPA in 2004. The most recent and controversial revisions, which classifies peoples as terrorists, were made in 2008, 2012, and 2019.

National Investigation Act (NIA), 2008-

To investigate and sue those who commit crimes of breach of laws enacted for the implementation of agreements, state security, and friendly relations with foreign states, international treaties, its agencies, conventions, international organizations[7], the National Investigation Agency Act of 2008 was passed.

Due to a spurt in such terrorist attacks like Mumbai attack and attack on the British Parliament, the national investigation agency act was passed by Parliament aimed for a first time to have raised professionalism in investigating these terror cases by constituting the NIA as a national agency competent to probe matters which belong to the whole territory of India. Fighting terrorism is an activity in which the federal, state, as well as local governments are invariably implicated. To fight terrorist activities, many strategies, intelligence inputs, and up-to-date databases on terrorists are required.

With local and regional field offices and rapid communication, this interagency coordination and time bound action requires a strong central body. So also, will a focused policing team with highly trained officers, and highly motivated members, professional can function quickly and effectively if the authority and support in terms of resources, and tools will be equipped to do their job appropriately. The result was the National Agency Act. Centre- state cooperation is meant to look for cases of terrorism. The seven central acts on nuclear energy, marine safety, civil aviation safety, anti-hijacking, unlawful activities, and the commitments under the SAARC Terrorism Convention limit the ambit to a limited range of scheduled offenses.

This Act covers the entire Indian continent, Indians aboard, and passengers aboard aircraft and vessels registered in India. As a result, the Criminal Investigation carried out by staff of NIA enjoys facilities equivalent to those of any police officer.

[7] Amendment to the National Investigation Agency Act, 2008: An Act of Violation, FRONTLINE (2019), https://frontline.thehindu.com/the-nation/article28758410.ece (last visited Oct. 28, 2024).

Only when the federal government suspects that a crime relates to terrorism and asks NIA to investigate it then the agency is allowed to start their investigation. It has the capability to investigate other terrorism-related offenses also.

State authority supports the Indian National Intelligence Agency in its investigation and prosecution processes of terrorist offenses. There are special courts as well, where such cases can be tires. The Supreme Court is empowered to transfer cases being preceded before such special courts within the same state or another state. All powers vested a Session Court by the code of criminal procedure will, with respect to matters within its functional area, be exercised exclusively by the special court as established by state governments appointing one or more for their respective states. After the first ninety days, no appeal will be considered in such cases. The provisions relating to acts of terrorism are specifically mentioned and dealt with in the national investigation agency act. Naturally occurring terrorist attacks that use bombs, dynamite, various gases, biological, radioactive materials.

A clear indication of how the central bureau of investigation differs from the National Investigation Agency is the fact that there is no provision for the bail in the NIA Act, 2008[8]. An accused person in custody cannot be released on bail under any circumstances and also if the accused is not a citizen of India, bail is further not allowed under the act of 2008.

The limitation of Police Act 1861 is ignored by the NIA when investigating specific crimes. Since the National Investigation Agency Act, 2008 states the power by notify the national investigation agency as they witness the commission of such crimes such as terrorism, the NIA can take suo motto measures to combat any planned crimes. This contrasts with the CBI's procedure, which is to take up the case only after the state gives its permission. The inspiration for the NIA was the American Federal Bureau of Investigation. The NIA aims to strengthen the legal framework to enable the federal government to effectively deal with the counter terrorism issues. NIA also tasked with fighting insurgency and cybercrime.

The NIA Act established the National Investigation Agency to investigate and prosecute planned crimes. State governments are expected to forward FIR or information related to a listed offense to the central government[9]. The federal government has 15days to decide whether

[8] National Investigation Agency Act, No. 34 of 2008, §§ 3–4, INDIA CODE (2008).
[9] Protection of Children from Sexual Offences Act, No. 32 of 2012, §§ 6(1)–6(2), INDIA CODE (2012).

the offense is causable depending on the report. If positive, the NIA can investigate the case as its discretion[10]. Once they take control, the state government will cooperate and will offer all documents and evidence.

Constitutional Validity-

Special laws which are labeled as anti-terrorism legislation sometimes find themselves enacted regarding special situations. The judiciary on numerous instances ensured that the law fall within the principles of the law. There have been many cases which were labeled as anti-terrorism legislation with disputes in parliament on their power of enactment.

Since counterterrorism measures are special laws, their legal history is akin to other special laws enacted from time to time for specific situations. India does not enjoy this exemption. When the first Preventive Detention Act was enacted in 1793, the British only wanted ri detain those they thought posed a threat to their establishment in India. In 1818, this was adopted much later by the Bengal East India Company. Ordinance III was another constitutional provision in complete contradiction to all fundamental rights guaranteed by the Constitution and allowed authorities to detain without trial anyone against whom there was no “reasonable causes”.

Regulation III was an effective tool for preventing political violence. Except for Bengal, Ordinance III of 1818 was the most known and applied tool of revolutionary terrorist activity suppression in British India from an early date in the country to the last twenty years. It gave the rules for the "personal restraint" of persons against whom there may be insufficient grounds for action to protect British dominions and territories of native princes from external aggression and internal conflict.

Many underground groups, which had taken to arms to achieve freedom, emerged during the turn of the 20th century and led to the surveillance of the Indian revolutionary movement. To check the rising tide, several laws were enacted during this period.

The judiciary has made appreciable strides in matters bordering on anti-terrorism legislations. On the flip side, courts have validated security, emergency, and special laws. Moreover, at

[10] ibid.

times of legal infractions, courts often tend to condone some situations which might call for a soft application and interpretation of the law.

The division of legislative powers in 1950 was not different from the one where India was under the administration of the Government of India before the Indian Constitution emerged. Under the Seventh Schedule of the Government of India Act, 1935, persons detained under this provision are to be dealt with for preventing acts of any description which may disturb public order. The framers of the Constitution thought that in a free and democratic society like India, the preventive detentions would come into place only after some careful observations and would not be readily used since these are exceptionality. The said parliament, moved by the violent and terrorist activities that allegedly were in the regions of Madras, West Bengal, and Hyderabad carried out by communist groups, made a Preventive Detention Act in the year 1950 where the intent to deal with those threats was clearly conveyed.

A.K Gopalan v. State of Madras[11] is the very first case where the Indian judiciary deliberated after the adoption of the Indian Constitution. Preventive Detention Act is neither within the purview of the emergency provision contained under part XVIII of the Constitution nor was it consequent to a declaration of war against a foreign country. Therefore, our constitution proclaims preventive detention as a distinct measure other than the provision for an emergency. Thus, the present provision concerning preventive detention becomes a distinguished feature within the constitutional domain.

Naga People Movement for Juman Rights v. Union of India is the name[12] is the name by which case the Supreme Court of India entertained the writ petition challenged against The Armed Forces (Special Powers) Act 1958 (AFSPA). Here, petitioner brought forth allegations that such legislation seriously upset the military-civilian equation, as also the Center-state balance of power. Further, it was argued that the Act had violated constitutional provisions dealing with the processes of declaration of an emergency. However, the court dismissed the claims and held that several provisions of the Act were in conformity with relevant sections of the Indian Constitution and confirmed that parliament was competent to enact such a law. Argues that AFSPA runs contrary to the constitution for allowing the armed forces to take upon them the power of maintain public order in areas declared “distributed’, a power which parliament

[11] A.K. Gopalan v. State of Madras, (1950) SCR 88 (India).
[12] Naga People's Movement for Human Rights v. Union of India, (1998) Supp. 2 S.C.R. 109 (India).

cannot delegate to the armed forces for the purposes of 'aiding civil power'. However, the Supreme Court held that the words "in aid of civil power" require the presence and need of the authority that is being aided and overrules this argument. Accordingly, AFSPA does not empower military forces to "supersede or act as a substitute for the civil authority of the state in maintaining public order," and their operations are required to be carried out in close cooperation with civil authorities.

Undoubtedly one of the most well-known MISA cases was ADM Jabalpur v. Shivkant Shukla[13], which revolved around the interpretation of Section 16A (9) of MISA. The context of this case was defined largely during the time of emergency in 1975. Soon after that declaration, around 100,000 people, from journalists and activists to intellectual and politicians, were detained under MISA, many of whose detentions were arbitrary and subject to court challenge. The whole scenario became turbulent as this majority judgment by the Supreme Court decided that MISA and all the other detention law related to emergency were legal as well as ruled that not even the High Courts could entertain any writ petitions pertaining to habeas corpus while challenging the arbitrary detentions during the emergency. Indian Judiciary witnessed one of the toughest moments. Significantly, this Court emphasized that no right given to citizens by Article 21 of the Indian Constitution was curtailed or even diminished in any time of emergency. Justice H.R Khanna expressed concern at this interpretation in the most principles dissent.[14]

The Supreme Court has examined cases related to Terrorist and Disputes Activities (prevention) Act (TADA) and Prevention of Terrorist Act (POTA). The leading case is Kartar Singh v. State of Punjab[15], popularly known as "Kartar Singh." The two principal reasons for which the petitioners contended that TADA was unconstitutional were as follows: first, that the central legislature did not possess the jurisdiction to enact the legislation; and, second, that some of its provisions, such as Section15, by virtue of which confessions made before a police officer could be regarded as evidence, directly counter to the guarantee given in Part III of the Constitution Of India. The petitioners also argued that TADA violates humanitarian law and

[13] A.D.M., Jabalpur v. Shivakant Shukla, AIR 1976 SC 1207 (India)
[14] Civil Society Constitutional Law Criminal Law Democracy and Rule of Law Elections Freedom of Speech Fundamental Rights History. History and law Human Rights Independence of judiciary.Judiciary Politics Special Issue: Emergency Supreme Court et al., Revisiting the emergency: A Primer – the leaflet The Leaflet – An independent platform for cutting-edge, progressive, legal, and political opinion. (2020), https://theleaflet.in/revisiting-the-emergency-a-primer/ (last visited Oct 29, 2024).
[15] Kartar Singh v. State of Punjab, (1994) 3 S.C.C. 569 (India).

universal human rights, which shows lack of bias and true failure to pursue the basic elements of justice and fairness, which are a part of the legal system. The Supreme Court examined the petition, which the petitioners averred was symptomatic of a 'witch-hunt' against innocent people and suspects, abetted by the uncontrolled and unscrutinized powers bestowed under the challenged acts, branding them as criminals and hounding them mercilessly, evoking an atmosphere of dread redolent of institutionalized terror that jews lived under during nazi era. The Peoples' Union of Civil Liberties (PUCL) has also put forth similar apprehensions relating to POTA.

None of the above acts had "the voice of unconstitutionality," and their constitutionality was upheld because none of the provisions of these acts violated the fundamental right to a fair trial by contravening established evidentiary rules or allowing practices such as coerced confessions, anonymous witnesses, or prolonged detention periods. Supreme Court upheld the constitutionality of TADA in the kartar singh case while it approved the constitutionality of POTA in the PUCL case. The court differentiated terrorism as a matter falling not only under the ambit of "law and order" or "public order," but the "defense of India", making it justify parliament's law-making powers in this respect. In both judgments, the court eased apprehensions related to civil liberties by highlighting the severity of the threat terrorism poses. Specifically in Kartar Singh, this court held TADA constitutionally valid by recommending periodic review of cases and enforcement of some safeguards in recording confession.

The court recognized the fact that terrorism poses big threats to the security and sovereignty of nations and thus should not be treated as a law-and-order issue belonging to the jurisdiction of the State. It reiterated parliament's authority to enact laws against terrorism, citing that it is a collective need of the world. Besides, the court held that a law cannot be held unconstitutional based on the possible abuse of the law.

It has also been argued that the law lacks constitutional validity, based on the National Investigation Agency Act 2008, especially concerning the powers it assumes for investigation. No nexus is established here to make list II justify the establishment of the NIA, as in Shamim Ansari's case. The term "Central Bureau of Intelligence and Investigation" appearing in union list consequently limits the authority of the Central Government to investigate crimes, since such powers have been constitutionally assigned to police officers under the Criminal Procedure Code (CrPC) and are primarily a state affair. Although this authority is thus curtailed

by Article 249 and Article 252 of the constitution, List II concerns "police" which is under the governance of the state. The centre has no legislative competence in this field, except for the provisions contained in 2A of List I. Article 249 enables parliament to enact laws on state list subjects for a period of one year if they fall within the purview of national interest, and Article 252 permits the enactment of laws applicable to two or more states with their mutual consent. List I deals with legal offences of the subjects as in that last, and setting up NIA has created a right on the NIA to enact legislation under the NIA act itself.

There is provision that has been placed as such at List I which says it deals with the defense of India read with Article 355 of the Constitution conferred powers and rights upon the centre to enact legislation concerning defense to the country.

Balance between Individual liberty and National Security-

There was a great debate in the constituent assembly over the need to achieve a balance between security demands and protection of civil rights, particularly the right to a fair trial. Essentially, the argument presented legal redress against detention without one's volition under the banner of public defense. Between 1946 and 1949 India gave the highest priority to issues of defense and public order. Instances of civil disturbances in India occurred only after independence, owing to mass migration and sectarian strife following the partition. Under these circumstances, members of the assembly collectively agreed that preventive detention acts were an exact tool for the prevention and deterrence of crime with minimal opposition voiced during discussions. There were anxieties among the delegations that governments might abuse their powers to enforce preventive detention as a compulsory measure which would be violative of some basic human rights. In this respect, defenders of non-coercive detention were worried about the right to a fair trial and its constitutional protection from possible abuses in public defense by law-enforcement agencies and governmental actors. The public reaction to the resolution of the Assembly to authorize preventive detention was apparently significantly unfavorable, reflecting the fear of directive over-reach that has its roots in the historical experiences of life under colonial-era preventive detention regulations in India.

Ultimately, preventive detention clauses were included in Article 22 of the Constitution[16]. Incongruously, Article 22 also guarantees protection against unlawful detention and the right

[16] India Const. (1950).

to arrest, unless the detainee is in preventive detention. A significant portion of the constitutional debate focused on the type of clauses that needed to be included to prevent unjustified life sentences. Legal protection in the event of notary arrests is required by Article 22 ensures parliamentary control over the minutes of the advisory councils and the maximum length of detention. The protection of freedoms was only made possible by later judicial determination of Article 21, which guarantees the right to life and personal liberty even before legal proceedings. In the entire historical case of Maneka Gandhi v Union of India[17] the definition trial in article 21 of the constitution was interpreted in the light of the full scope of human rights clause[18].

The Supreme Court abandoned its neutral stance toward the Constitution, adopted an unabashedly moral stance, and established the rule that all government actions must be just, reasonable, and right not irrational, fantastic, or authoritarian. Since preventive detention falling under Article 22 often results in a violation of personal freedom within the meaning of Article 19 (1)(d), it is interesting to note that the same decision also applied to inherent contradictions in the constitution that arise from the provision on preventive detention.

The scope of Fundamental rights is so great that the constitution prohibits the legislature or state assemblies from passing laws and the federal and state governments may adopt rules or take measures that would restrict their exercise. While Article 359 states that Article 20 and Article 21 cannot be suspended during a state of emergency, the Constitution only allows the suspension of constitutional rights in exceptional circumstances, like those in certain other countries.

Conclusion-

India's approach towards balancing the nation's need for national security and that of individual rights has emerged as a developed legal system that includes security interests for the nation in addition to democratic values for the state. Laws like UAPA and NIA have been created to extend national security even further when terrorism threatens the nation ever more rapidly. Nonetheless, the implementation of such laws, though essential to the protection of the state,

[17] Maneka Gandhi v. Union of India, AIR 1978 SC 597 (India).
[18] Diganth Raj Sehgal, How Well Does India Maintain Balance Between National Interest and Human Rights, IPLEADERS (2020), https://blog.ipleaders.in/well-india-maintain-balance-national-interest-human-rights/ (last visited Oct. 30, 2024).

has created much alarm over civil liberties, particularly in the realms of individual rights such as freedom of speech and protection against arbitrary detention.

This research has reviewed the pros and cons of the current statutory regimes. The judiciary has played an important in maintaining a balance, preventing counter-terrorism measures from being violative of constitutional rights. Oversight by the judiciary is very important to avoid the possible misuse of anti-terrorism statutes, and recommended reforms including greater transparency, well-defined procedural safeguards, and regular review mechanisms aim to strengthen these checks.

The task of eradicating terrorism is very critical for the national security. It is, however, important not at the cost of eroding democratic principles embodied within the Indian Constitution. This therefore would ensure a strengthening accountability but coupled with safeguard civil liberties in an approach that aligns well enough with both the obligations posed by the Constitution towards such counter-terrorism actions as well as with the global standard of human rights as respects the state's as well as people's right.