AN ANALYSIS OF THE NATIONAL SECURITY LEGISLATIONS IN INDIA AND THEIR IMPACT ON THE LIBERTY AND DIGNITY OF THE CITIZENS

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SUPERVISOR CERTIFICATE

This is to certify that DEBANGA BHUSAN GOSWAMI has completed his dissertation titled "AN ANALYSIS OF THE NATIONAL SECURITY LEGISLATIONS IN INDIA AND THEIR IMPACT ON THE LIBERTY AND DIGNITY OF THE CITIZENS" under my supervision for the award of the degree of MASTER OF LAWS of National Law University and Judicial Academy, Assam.

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DECLARATION

I, DEBANGA BHUSAN GOSWAMI, do hereby declare that the dissertation titled "AN ANALYSIS OF THE NATIONAL SECURITY LEGISLATIONS IN INDIA AND THEIR IMPACT ON THE LIBERTY AND DIGNITY OF THE CITIZENS" submitted by me for the award of the degree of MASTER OF LAWS of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise

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TABLE OF CONTENT

TABLE OF CASES

TABLE OF STATUTES

1. 1860- The Indian Penal Code
2. 1872- The Indian Evidence Act
3. 1881- Bengal State Prisoners' Regulation Act
4. 1915- Defence of India Act
5. 1919- Anarchical and Revolutionary Crimes Act
6. 1942- Armed Forces (Special Powers) Ordinance
7. 1950- The Constitution of India
8. 1950- Preventive Detention Act
9. 1958- Armed Forces (Special Powers) Act
10. 1967- The Unlawful Activities (Prevention) Act (amended in 2004, 2008, 2013, 2019)
11. 1971- Maintenance of Internal Security Act (amended in 1975)
12. 1973-The Code of Criminal Procedure
13. 1980- The National Security Act (amended in 1984)
14. 1987- Terrorist and Disruptive Activities (Prevention) Act
15. 2002- Prevention of Terrorism Act
16. 2005- Right to Information Act

TABLE OF ABBREVIATIONS

1.	&	And
2.	AIR	All India Reporter
3.	CAA	Citizenship (Amendment) Act
4.	CAB	Citizenship (Amendment) Bill
5.	Crim.	Criminal
6.	Etc.	Etcetera
7.	Ibid	Ibidem
8.	ICCPR	International Covenant on Civil and Political Rights
9.	KMSS	Krishak Mukti Sangram Samiti
10.	p.	Page
11.	MISA	Maintenance of Internal Security Act
12.	NIA	National Investigation Agency
13.	NSA	National Security Act
14.	Ors.	Others
15.	POTA	Prevention of Terrorism Act
16.	SC	Supreme Court
17.	SCC	Supreme Court Cases
18.	TADA	Terrorist and Disruptive Activities (Prevention) Act
19.	UAPA	Unlawful Activities (Prevention) Act
20.	v.	Versus
21.	WP	Writ Petition

CHAPTER 1: INTRODUCTION

1.1. INTRODUCTION

The Constitution of India, 1950 (hereinafter the Constitution of India) represents the collective aspirations of the people of India to lead a life of liberty and dignity. Towards this, Part III of the Constitution of India guarantees certain sacred and inalienable rights to the people of India which are indispensable for leading a free and dignified life. In order to prevent and remedy encroachment of those rights by the state, a mechanism has been provided within Part III of the Constitution of India through which the citizens can approach the Supreme Court of India (hereinafter the SC) as well the high courts.

One of the most important aspects of the rights provided under Part III of the Constitution of India is the right to life and personal liberty under Article 21[1]. This article provides that the life and personal liberty of a person cannot be restricted or deprived by the state without following the procedure which is established through law of the land. In the initial years after the independence of India, the meaning of Article 21[2] was construed in a limited sense and was understood to be procedural due process. However, this notion was changed by the SC, in the case of *Maneka Gandhi v. UOI*. [3] The SC held that it is not sufficient that the procedure laid down under the law is duly complied with. It is equally important that the law and the procedure laid down in it should be just, fair and reasonable. To sum up the position, the liberty of a person can only be deprived through accurate compliance of a procedure which is laid down in a just, fair and reasonable legislation. This can be termed as the essence of the limited government in India where the arbitrary exercise of power by the government is limited and circumscribed by the principles present in the Constitution of India and evolved by the judiciary.

However, this is not the reality experienced by the Indian citizens. The fundamental freedoms of the citizens of India are often violated by those in power in order to serve their own vested political interests. This is most often done under the pretence of national security. And one of the tools used by them is preventive detention. Preventive detention

[1] Article 21, Constitution of India, 1950
[2] Ibid
[3] *AIR 1978 SC 597*

is a concept which allows the state to restrict the liberty of a person even before he is alleged to have committed an offence.[4] This is done when the state believes that the concerned person is going to commit an offence which can be prejudicial to the public order, public safety, sovereignty, security of the nation etc. It can be understood by juxtaposing it with the concept of punitive detention where the state restricts the liberty of a person when he is alleged to have committed an offence.[5]

Prima facie, the concept of preventive detention appears to be antithetical to the ideas of rule of law and limited government. However, the makers of the Constitution of India incorporated it to enable the executive to deal with extraordinary circumstances. Clauses (3) to (7) Article 22[6] of the Constitution of India lays down the law and procedural safeguards with respect to use of preventive detention. Taking the advantage of this provision, which was supposed to be used in rare circumstances, the successive dispensations have enacted, amended and grossly misused certain legislations to curb the liberty of its citizens. These legislations were enacted in the name of national security. They contain many draconian provisions which curb rights and freedoms which are to the granted to all the citizens under a constitutional democracy. Some of these rights include right to know the reasons for detention, right to speedy and effective trial, right to be heard, right to give representation, right to defend etc.

If we trace the history of national security legislations using tools such as preventive detention, we can find that these laws have not started to be enacted after independence. On the contrary, they have a long history. Such laws were first started to be used by the British colonial rulers in order to maintain their rule in India and control any form of unrest and instability that may arise out of the struggle of the Indian people for independence and self-determination. The British colonial rulers used laws like Bengal State Prisoner's Regulation, 1818, Defence of India Act, 1915, Anarchical and Revolutionary Crimes Act, 1919 in order to crush revolutionary sentiments in India. The modern national security legislations enacted in India carry on the legacy of the laws enacted in the British era.

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[4] MP Singh, *VN Shukla's Constitution of India* (11th Ed, Eastern Book Company, Lucknow 2008) 241
[5] Ibid
[6] Article 22, Constitution of India, 1950

Many national security legislations which were enacted after independence were either repealed or lapsed due to presence of sunset provisions. Some of the examples of such laws are Maintenance of Internal Security Act, 1971, Terrorist and Disruptive Activities (Prevention) Act, 1987 and Prevention of Terrorism Act, 2002. Three major national security legislations that are still in force on the present date are the National Security Act, 1980, Unlawful Activities (Prevention) Act, 1967 and Armed Forces (Special Powers) Act, 1958. Out of them, the National Security Act, 1980 and Unlawful Activities (Prevention) Act, 1967 were initially enacted for different purposes. These laws were later armed with sharp teeth by successive regimes. However, the travesty is that these laws were neither effectively used for their original purposes and nor for the purposes for which they were later amended. Instead, they became weapons to threaten fearless democratic voices whose only crime was to utilise their constitutionally guaranteed rights.

1.2. STATEMENT OF PROBLEM

National security legislations occupy an important position in the realm of constitutional law because they have an impact on the life and liberty of the citizens, which is protected by the constitutions across the world. And India is no exception. National security legislations were initiated by the British colonial rulers. After independence, the democratically elected governments enacted many national security legislations and some of them are still in force today.

The enactment and implementation of the national security legislations is a crucial issue under the constitutional framework, which needs to be adequately addressed. Alleged misuse of these legislations has brought them to the forefront of the national debate. In order to analyse the compatibility of the national security legislations *vis-à-vis* the constitutional scheme of India, it is necessary to undertake a comprehensive and wholesome study of the national security legislations in pre-independence India as well as post independence India and analyse their impact in the liberty and dignity of citizens.

1.3. REVIEW OF RELEVANT LITERATURE

- MP Singh, *VN Shukla's Constitution of India* (11th Ed, Eastern Book Company, Lucknow 2008)

This is one of the most acclaimed works in the field of constitutional law India. In this particular book, the researcher referred to the expositions on Article 21 and Article 22 of the Constitution of India. The author explains the wide application of right to life which is not restricted to mere survival or animal existence but includes life which is based on dignity. The individual liberty is also guaranteed under Article 21 of the Constitution. The national security legislations should be viewed on the touchstone of this expansive and liberal interpretation of right to life and civil liberties. Any unreasonable provision providing wide discretionary power to the executive under a national security law can have an adverse impact on the dignity of a citizen, along with curtailing his liberty. Security concerns cannot override the protection of a dignified life in a liberal democracy like India. As analysed by the author, transformation of the Indian constitutional law from procedure established by law to due process reflects this commitment.

- Shylashri Shankar, *Scaling Justice: India's SC, Social Rights and Civil Liberties* (1st Ed., Oxford University Press 2009)

The role played by the SC in the development of Indian democracy is extremely vital. Like any other democratic institution, the journey of the SC is filled with shifts and changes. After emergency, the apex SC became more conscious about its role as the guardian of the rights provided by the Constitution of India to the citizens of this country. However, the judges of the court understood the operational constraints in a democracy guided by separation of power. Thus, though concerns have been raised about judicial overreach, the judges have tried to strike a much required balance. Such a role assumes greater importance in the context of national security laws where a strong contradiction can be seen between the emphasis of the executive on greater discretion and judiciary's concern to protect the fundamental rights.

- Amartya Sen, *The Argumentative Indian: Writings on Indian History, Culture and Identity*, (3rd ed., Farrar, Straus and Giroux, New York 2005)

In this book, Nobel Laureate and eminent economist Amartya Sen celebrates the rich culture of reasoning, arguments, debates and discussions that have always been present in India. He chooses to focus on four major aspects of India i.e. politics, culture, reason and voice. In the present times, where divisions across various lines as well as narrow ideas have become the norm, the book is a reminder that an unbiased look at the history of India will help in finding solutions to the problems that are being faced by the country. The book becomes relevant for the present study for its exposition on public reasoning. Public reasoning is based on the idea of active involvement of the public in governance and finding solutions to problems that concern the nation as a whole. The idea is being used by the researcher to argue for a robust national security framework which will be based on rights and inclusiveness.

- C. Raj Kumar, 'Human Rights Implications of National Security Laws in India: Combating Terrorism while preserving Civil Liberties' (2005) Denver Journal of International Law and Policy 195

This article provides a comprehensive analysis of the national security framework in India and its impact on human rights. Here, the author tries to trace the origins of liberty and delves on the debate of liberty being an offering of a constitution versus it being an inherent right of every human being which is merely facilitated by a constitution. Then, the next issue discussed by the author is maintaining the balance between national security and human rights. The notion that national security is necessarily antithetical to human rights is not supported by the author and it is being established that it is the constitutional duty of a government to protect the unity and integrity of the nation and ensure that the same time that the human rights of its citizens are not infringed upon. There is also a discussion on the reasons for implementation of the recent security legislations which had disproportionate measures to deal with the security threat posed to the nation.

- Pradyumna K Tripathi, 'Preventive Detention: The Indian Experience' (1960) The American Journal of Comparative Law 291

At the outset, the author makes a brief comparative analysis between the civil liberties provisions in the Constitution of India and the Constitution of the United States of America to highlight the presence of harsh security legislations in both these countries in spite of such provisions. An important issue discussed by the author and which is relevant for the present discussion is the presence of certain contradictions in the Constitution of India with respect to civil liberties. On one hand, the Constitution of India provides wide rights under Articles 14, 19 and 21. On the other hand, effective right to legal defence is curtailed under Article 22 and Parliament is given the power to enact legislations on this issue. Independent India has never spent a single day without security legislation with harsh provisions. However, security legislations were envisaged as emergency measures to be in rare circumstances. The author argues that since the ultimate aim of the national security legislations is to protect a democracy, it would be self-defeating if these laws are implemented with complete disregard for democratic values

- David H Bayley, 'India's Experience with Preventive Detention' (1962) Pacific Affairs 100

The author embarks upon a journey to understand the application of preventive detention laws in India. He describes the context in which the first national security legislation of independent India came into existence and the manner in which it was implemented and judicially interpreted. The insight which the researcher gathers from this article is interpretation of the idea of national security laws from the perspective of the development of a democracy. The author views the debate on national security laws, *inter alia*, as debate on strict authoritarianism *versus* democratic action in place. For a democracy to be successful, the citizens need to internalise democratic behaviours rather than being these continuously forced upon them. Necessity of harsh security laws reflects the lack of development of democratic self-discipline.

1.4. AIMS AND OBJECTIVES

The aim of the present dissertation paper is to do a comparative analysis of major national security legislations in India. These include the legislations that were enacted by the British colonial masters in India before independence. In order to successfully complete the analysis, several aspects of these legislations have to be studied.

The objectives are as follows:

First, this paper attempts to trace the history of the legislations. While doing this, the researcher aims to find out the reasons behind the enactment of the legislations. In order to understand the scheme of the legislation, the researcher undertakes a study of the salient provisions of the legislations and tries to connect them with one another. Then, the researcher proceeds to analyse the amendments to the legislations and the political and economic backdrop in which the amendments were introduced.

Second, this paper attempts to understand the implementation of the legislations at the ground level. In order to achieve this, the researcher takes up significant judicial pronouncements under each of the legislations. The, the researcher proceeds to study them in detail in order to find out approach of the judiciary towards these legislations.

Third, the paper attempts to do a comparative analysis of the national security legislations based on the provisions and manner of implementation. The comparative analysis is being done in two phases. First, the researcher aims to do a vertical analysis of the national security legislations. Here, the researcher compares and contrasts the national security legislations enacted by the British colonial masters before independence and those enacted in independent India by the democratically elected governments. Next, the researcher aims to do a horizontal analysis of the national security legislations. Here, the researcher compares and contrasts the national security legislations which were enacted after India gained independence.

1.5. SCOPE AND LIMITATIONS

The scope of this paper extends to the following. First, it encompasses the legislative history of the following national security legislations: Bengal State Prisoners' Regulation Act, 1881, Defense of India Act, 1915, Anarchical and revolutionary Crimes Act, 1919, Armed Forces (Special Powers) Ordinance, 1942, Unlawful Activities Prevention Act, 1967, National Security Act, 1980, Armed Forces Special Power Act, 1957 Maintenance of Internal Security Act, 1971, Terrorist and Disruptive Activities (Prevention) Act, 1985 and Prevention of Terrorism Act, 2002.

It also includes a detailed analysis of the scheme of these legislations with emphasis on key provisions. The paper studies the landmark judgements associated with the legislations. However, the limitation of the paper is that it studies the legislations only from the perspective of restrictions imposed on the liberty of a person through preventive detentions provisions and other mechanisms such as stricter bail provisions.

1.6.RESEARCH QUESTIONS

The present dissertation paper examines the following research questions:

1. What were the objectives of the British colonial government behind the enactment of various security legislations?

2. What were the objectives behind the enactment of various national security legislations in post-independence India by the Parliament of India?

3. What is the approach of the Indian judiciary towards the implementation of the national security legislations?

4. Do the national security legislations enacted in the post-independence era by the democratically elected governments reflect the draconian provisions of the national security legislations enacted in the British colonial era?

1.7. RESEARCH METHODOLOGY

The research conducted is descriptive in nature and analytical in method. Taking into account the nature of the topic, the researcher has decided to pursue a doctrinal research. The researcher has extensively relied on primary legal materials such as legislations and case laws. Researcher has also taken help of secondary materials such as journal and newspaper articles in order to supplement his understanding derived from study of the primary material. Based on the study of the above discussed material, the researcher has formulated research questions which he tries to answer in the subsequent sections of this paper.

The nature of the topic of the dissertation paper demands wider emphasis on the primary legal materials i.e. the national security legislations enacted in India. The paper also relies on the seminal judicial pronouncements associated with the legislations, wherever available. Reliance is placed on the *ratio decidendi, obiter dicta* and judicial discussions and factual account of the cases.

1.8. CHAPTERISATION

In order to carry out an effective study on the topic "**An Analysis of the National Security Legislations in India and their impact on the Liberty and Dignity of the Citizens**", the researcher has planned the research design in the following manner:

Chapter 1: This chapter provides an introduction to the concept of national security legislations. In addition to this, it includes a statement of problem, review of relevant literature, aims and objectives, scope and limitation, research questions and research methodology. This chapter is termed as '**Introduction**'.

Chapter 2: In this chapter, the researcher makes an attempt to trace the origin, assess the salient features and analyse the implications of the national security legislations enacted in pre-independence India. The chapter is termed as '**National Security Legislations in Pre-independence India**'.

Chapter 3: After independence, the democratically elected governments in India enacted a number of national security legislations and some of them are still in force today. The researcher endeavours to analyse the implementation of the security legislations still in force as well as the approach of the judiciary towards these legislations. This Chapter is termed as '**National Security Legislations in Post-Independence India (Still in force)**'.

Chapter 4: The researcher analyses the origin as well as the implementation of the security laws that are no longer in existence. This chapter is termed as **'National Security Legislations in Post-Independence India (Repealed/Lapsed)**'.

Chapter 5: Here, the researcher does two types of comparative analysis. First, the researcher does a comparative analysis between the pre-independence and post-independence security laws. Second, a comparative analysis is done between the seminal provisions of the post-independence security laws. The chapter is termed as '**A Comparative Analysis**.'

Chapter 6: An investigation into the research questions has led the researcher to certain specific findings. In the first part of the chapter, the researcher submits his concluding remarks on the area of research. Then, an endeavour is being made to enumerate the specific findings with respect to the research questions formulated in the beginning. At last, the researcher provides suggestions with respect to the issue at hand. The chapter is termed as '**Conclusion, Findings and Suggestions'**.

CHAPTER 2: NATIONAL SECURITY LEGISLATIONS IN PRE-INDEPENDENCE INDIA

2.1 BENGAL STATE PRISONER'S REGULATION, 1818

2.1.1. ORIGIN

The Bengal State Prisoner's Regulation, 1818 (Bengal Regulation) can be termed as the first national security legislation enacted in India.[7] The provisions of all other subsequent national security legislations flow from this law.[8] It was used as a tool of repression in the British rule.[9]

The preamble of the Bengal Regulation lay down the purpose and object for which the law was brought into effect.[10] The preamble states that in the interests of defence of the state, foreign affairs or maintenance of public order and safety[11], it may be necessary to put people in custody of the government even in such cases in which no judicial proceedings are initiated against those persons or no proceedings are planned to be initiated against those persons.[12] Thus, the preamble impliedly clarifies that the general rule is that a person's liberty can only be regulated only when he has violated any existing law of the land applicable to him or is reasonably suspected of violating any existing law of the land applicable to him and needs to be in confinement until decided otherwise by a court of competent jurisdiction.

However, the preamble clarifies that there can be exceptions to the norm under certain circumstances and the legislation makes an attempt to regulate the detentions under those circumstances. In addition to this, preamble states that there should be justifications for placing such people under the custody of the government and the grounds for such detention should be reviewed in a periodic manner so as to ensure that the person's liberty is no longer restrained after the grounds have ceased to exist. The preamble also

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[7] Manoj Joshi, 'Our Colonial Heritage: Laws that remain instrument of Repression: By Application or Non-application' *The Times of India* (5 December 2020) <https://timesofindia.indiatimes.com/blogs/toi-edit-page/our-colonial-heritage-laws-that-remain-an-instrument-of-repression-by-application-and-non-application/> accessed 05 July 2022

[8] Ibid

[9] Ibid

[10] Preamble, Bengal State Prisoners' Regulation, 1818

[11] Ibid

[12] Ibid

states about giving adequate attention to the health of the person restrained as well as livelihood of the family of the person restrained. In the interests of justice, rights of the individuals and greater public good, the preamble also makes space for attaching the property of the landlords for a certain period of time.

2.1.2. SALIENT FEATURES

According section 2 of the Bengal Regulation, a person can be restrained after issuing a warrant of commitment by the government with respect to the reasons which are mentioned in the preamble and such warrant may be issued when there are no foreseeable judicial proceedings in the near future.[13] The section also states that after a warrant of commitment has been issued and the person has been confined in pursuance of the warrant of commitment, that person has to be provided the reasons for his confinement as soon as possible by the government and he should also be provided with an opportunity to put forward his case and substantiate it.[14] However, the section does not provide any time frame for providing the grounds of confinement to the prisoner as well as any time frame giving him an opportunity to defend himself. This means that the government can confine the prisoner and then indefinitely delay the process of providing him grounds of representation and opportunity of being heard by citing various reasons. This is a delay of the one of the cardinal principles of natural justice which is right to be heard. And delay of justice is deemed to be denial of justice. The suffering that a person undergoes when he is detained and does not know the reason of detention cannot be expressed.

Under section 3 of the Bengal Regulation, every public official who has the custody of a state prisoner shall send a report to the state government regarding the physical condition of the prisoner as well as his conduct and those shall be taken into consideration by the government while deciding whether to extend the detention of the person or not. [15]Another important provision which has been incorporated in the Bengal Regulation is regarding the checks and balances in the process of restraining a person. [16] The system basically ensures that when a person is held or restrained under the custody of one

[13] Section 2, Bengal State Prisoners' Regulation, 1818
[14] Ibid
[15] Section 3, Bengal State Prisoners' Regulation, 1818
[16] Section 4, Bengal State Prisoners' Regulation, 1818

government official, another government official holding a responsible position or a member of the judiciary is sent to inspect the health and comfort of the prisoner and report and issue necessary orders on the treatment of the person, if and when necessary. A prisoner who is in the custody of government official has the right to send representations to the government regarding his detention.[17] And this is a continuous right which means that the prisoner is entitled to send reports to the government periodically.[18] However, the public official in whose custody the prisoner is being placed has the right to include his own observations in the representation before sending it to the government and the government has to take into account the observations of the public official while evaluating the representation of the prisoner.[19]

The person in whose custody a prisoner is to be placed is also tasked with the responsibility of providing information to the government regarding the physical ability of the person to withstand the detention, immediately after taking the person to custody.[20] The public official has to inform the government his opinion on whether, given the present health status of the prisoner, he should be subjected to the level of detention which was originally intended.[21] Moreover, the public official is also tasked with the responsibility to oversee whether the allowance which is allocated by the government for the maintenance of the prisoner and his family is being properly utilized for the originally intended purpose or not. [22]If the allowance is not used for the originally intended purpose and is being misused, then the public official has the power to ensure that it is brought to its originally intended use.[23]

Moreover, at the time of attaching the property of the landlords, the state government has to provide reason to the magistrate or the judge in whose jurisdiction the property is situated. The reasons have to be in consonance with those provided in the preamble. The attached estates have to be in proper custody of the government and they cannot be sold for the satisfaction of the decrees of the civil court. In addition, when the state government is of the opinion that the purpose for which the attachment was made has

[17] Section 5, Bengal State Prisoners' Regulation, 1818
[18] ibid
[19] Ibid
[20] Section 6 , Bengal State Prisoners' Regulation, 1818
[21] Ibid
[22] Section 7 , Bengal State Prisoners' Regulation, 1818
[23] Ibid

been fulfilled or no longer exists, then the state government has to make necessary arrangements for delivering the attached estate back to the rightful owner. While handing over the estate to the owner or proprietor, the officials have to adjust the accounts of the estate and pay back the profits which the proprietor could have earned from the estate.

2.1.3. ANALYSIS

From the above discussion, we get an idea regarding the salient features of the Bengal Regulation. One of the features worth mentioning is that the preamble plays an integral part in the implementation of the law. The standards or thresholds for the implementation of the law are not clearly laid down in the body of the law but are loosely mentioned in the preamble. The implementing authorities are to use the spirit of the preamble as guidance while implementing the legislation[24] and this led to wide executive discretion leading to human rights violations.[25] It can be argued that such an approach may not be justified in case of preventive detention and national security legislations because they deal with the life and liberty of individuals which are extremely precious rights in themselves. In such cases, providing widespread discretion to executives is not advisable.

If we have a look at the history of India, this law was enforced across the territory of India and it was used by British colonial government against the people of India having anti-imperialist tendencies and fighting for the independence of our country.[26] Any person having anti-imperialist sentiments were restrained using the law and then indefinitely kept under detention.[27] The British government used the loophole in the law regarding the lack of a time frame to convey reason for restraint and providing an opportunity to be heard.[28]

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[24] NC Asthana, 'The Future of Democratic Protests in an Illiberal Democracy' (*The Wire*, 09 February 2021) <https://thewire.in/rights/the-future-of-democratic-protests-in-an-illiberal-democracy> accessed 05 July 2022

[25] Ibid

[26] AG Noorani, 'Sedition' in Freedom Struggle' (*The Frontline*, 27 August 2021) <https://frontline.thehindu.com/cover-story/sedition-in-freedom-struggle/article35786523.ece> accessed 05 July 2022

[27] Ibid

[28] Ibid

2.2. **DEFENCE OF INDIA ACT, 1915**

2.2.1. ORIGIN

The Defence of India Act, 1915 (hereinafter Defence of India Act) was aspecial enactment which was brought into force by the governor general of India in order to curb the independence struggle which was going on at that time in India. [29]The British Government could not withstand the aspirations of the Indian people to be free of the slavery of white masters and write their own destiny.[30] As a result, they had to come up with draconian laws with the help of which they wanted to curb the independence struggle in India. [31]

In order to understand the implementation of the law, we need to understand the situation prevalent during World War I. During the period of World War I, Britain was actively involved in fighting the war and was incurring heavy financial as well as human resource losses. As a result of this, the British government needed additional manpower and additional financial resources in order to continue fighting the war. Thus, the government planned on obtaining those resources from its colonies. However, there were certain problems in this. The British government thought that the people in those colonies fighting for their independence will not support the British government in fighting the war with man and financial resources. Moreover, they may also take advantage of the war situation and create unrest within the colonies which will make it difficult for the British government to control the situation. However, the situation was not exactly as expected by the British, at least in India. They British government did not receive as much resistance as it had expected.[32] On the contrary, it had received some support from the people across the spectrum in the hope that if Indians will help the British in fighting the

[29] C. Raj Kumar, 'Human Rights Implications of National Security Laws in India: Combating Terrorism while preserving Civil Liberties' (2005) Denver Journal of International Law and Policy 199
[30] Ibid
[31] Ibid
[32] Uday Balakrishnan, 'Reflections on a Massacre: 100 years since Jalianwalabagh' *The Hindu* (12 April 2022) <https://www.thehindu.com/opinion/op-ed/reflections-on-a-massacre/article26810100.ece> accessed 05 July 2022

war then it might help in changing the attitude of the British towards India and they might get some form of autonomy. [33]

However, they also received some form of resistance, especially in the provinces of Bengal, Bihar and Punjab. These areas can be termed as the epicenters of Indian independence movements in the first decade of the twentieth century. Moreover, certain measures taken by the British government such as the partition of Bengal as well as the colonization bill in Punjab further antagonized the revolutionaries in these areas. The result of such tendencies could be also felt abroad. In places such as Canada and United States of America, members of the Indian communities, especially the Sikh community, made efforts to participate in the independence struggle. The Ghadar Party, formed with the support of the Indians living abroad with the intention of gaining independence, mobilized widespread support for the independence movement and tried to form alliances with foreign forces such as Germany. When the British became aware about these developments in India as well as different parts of the world, their problems multiplied. They had to fight the war as well as control the independence movement in India at the same time. In order to achieve this, they needed the assistance of a legislation that provided the authorities with wide discretionary powers to deal with any anti-imperialist activities with an iron hand. This gave birth to the Defence of India Act.

2.2.2. SALIENT FEATURES

The Defence of India Act was to remain in force till six month after the end of the war.[34] The apparent purpose of the Defence of India Act in essence was to prohibit any act prejudicial to the interests of the empire and its war endeavors.[35] It criminalized many activities and they included communicating with enemy, abetting the activities of enemy in any manner, conspiring or attempting to conspire against the British Empire.[36]

The Defence of India Act creates an entirely new judicial mechanism which can be used to address the cases falling under the ambit of the Defence of India Act in an expedited

[33] Ibid

[34] Prasenjit Chowdhury, 'With Apologies to none' *The Statesman* (New Delhi, 24 April 2019)<https://www.thestatesman.com/opinion/with-apologies-to-none1502748388.html> accessed 05 July 2022

[35] Ibid

[36] Ibid

manner. Under the mechanism, every local administration has the capability to establish a special court of judicial commissioners.[37] Every such court would have three judicial commissioners and the eligibility criteria for becoming a member of the judicial commissioners is to be sessions court judge for at least three years or a pleader in the chief court for at least ten years. Thus, there is no requirement of being a judge of the high court for becoming a member of the court of judicial commissioners.[38] This was a serious dilution of the standard of eligibility as the members of the court of judicial commissioners had the power to take crucial decisions on subject touching national security and they had the responsibility to balance it with the right to life and liberty of a person.[39]

Coming to the procedure governing trial in the courts of judicial commissioners, standard procedure of weighing evidence followed under the Indian Evidence Act, 1872 is dispended with. The depositions provided to the magistrates and recorded by a magistrate could be used by the court without even giving a right to cross-examine to the adverse party. Under section 137 of the Indian Evidence Act, 1872[40], whenever a witness is presented by one party and he provides his testimony, the attorney of the opposite party has the right to cross-examine the witness. This right is taken away under the Defence of India Act. In addition this, the legislation allows that the evidence of people are to be be used even after they are no longer alive, as witness testimonies. The intention behind insertion of such a provision in the legislation is that even if a person who has agreed to provide testimony against an accused or a person who is complicit in a crime and has turned an approver is killed by the people who support the accused, then the statement given by him earlier can be used against him in the court for conviction. From the use of this provision, it can be gathered that the British government intended the provision to be used against people with revolutionary spirits.

Another grave violation of the principles of natural justice under the Defence of India Act is the deprivation of the convicted party from the right to appeal or the right to judicial

[37] Emily Rook Koepsel, "India's Public Order Acts: Dissent and Democracy' (*London School of Economics Blogs*, 11 June 2019) <https://blogs.lse.ac.uk/southasia/2019/06/11/indias-public-order-acts-dissent-and-democracy/> accessed 05 July 2022

[38] Ibid

[39] Ibid

[40] Section 137, Indian Evidence Act, 1872

review.[41] In other words, the verdict pronounced by the court of judicial commissioners is final and binding upon the convicted party and he does not have the right to challenge it in a higher forum of appeal.[42] It can be strongly argued that right to appeal or right to judicial review of a judgement or verdict forms an essential element of right to be heard and it is one of the cardinal principles of natural justice is. Absolutely depriving a person of judicial review is not permitted today in constitutional democracies.[43]

2.2.3. ANALYSIS

Here, an analogy can be drawn with the judicial debate on the necessity and emergence of tribunals in India. In a catena of cases culminating in *L Chandra Kumar v. Union of India*[44], there were two sets of opposing views, Both the sets of views had concurred on the fact that the tribunals were set up in India to lessen the burden of the already over-burdened courts as well as introduce an aspect of technical expertise in the areas in which they were needed. These areas included environment, finance, electricity etc.[45] However, they differed on the point of the right to appeal and finality of the decisions of the tribunals. One set of views held that tribunals were to be introduced as substitutes[46] for courts and hence there cannot be any right to appeal from the decisions of the tribunals.[47] The other set of views held that even if we have tribunals, they cannot be a substitute to the already existing courts and the right to appeal cannot be taken away even after the orders have been issued by the tribunals. The second set of view was given judicial recognition in the case of *L. Chandra Kumar v. UOI*[48]. In this case, the SC held that tribunals can never be a substitute to the High Courts of the country and hence decisions provided by the tribunals can be appealed to a division bench of the respective High Court. Moreover, right to move to the SC under Articles 32[49], right to special leave under

[41] Pradeep Kumar Tripathi and Varalika Nigam, 'Revisiting National Security Laws in India & Reconciling Differences with Civil Liberty' (2021) International Journal of Law, Management and Humanities 499
[42] Ibid
[43] Ibid
[44] *1995 AIR 1151*
[45] RC Saksena, 'Adjudication By Tribunals in India: Landmark in the Field of Natural Justice' (1995) Journal of Indian Law Institute 225
[46] *Sampath Kumar v. UOI, (1987), 1 SCR 435*
[47] *JB Chopra v. UOI (1987) S.C.C. 122*
[48] *1995 AIR 1151*
[49] Article 32, Constitution of India

Article 136 and right to move to the High Courts under Article 226 [50]cannot be taken away. The tribunals in modern day India do not have power to impose serious penalties like death penalty or life imprisonment. Even then, the right to appeal was preserved by the SC. The Defence of India Act took away the right to appeal from the decisions of the judicial commissioners even in case where they could even impose the death penalty.

The Defence of India Act initially met with some support from the major leaders of the independence movement who did not advocate for revolutionary or extremist means as they thought it to be necessary to maintain stability in time of war.[51] However, the application of the legislation did not get limited to crackdown on wartime activities against the government of British India. [52]It was rampantly used for cracking down upon any activity which had the tendency of protest or opposition against the policy of the British government in India. Slowly, it became the primary tool in the hands of the government of British India to throttle the independence movement in India.[53] Under the legislation, many independence activists and freedom fighters were arrested, put on quick trial and then sentenced to death or faced life imprisonment or transportation.[54]It is argued that many of them did not get an adequate opportunity to properly defend themselves due to the summary nature of the proceedings and evidence weighing under the legislation.[55] Thus, when the people of India saw the actual utilization of the legislation, then they started protesting against it.

2.3. ANARCHICAL AND REVOLUTIONARY CRIMES ACT, 1919

2.3.1. ORIGIN

The Anarchical and Revolutionary Crimes Act, 1919 (hereinafter the Rowlatt Act) is one of the most dreaded and criticized legislations made in the history of British India. The Governor General of India constituted a committee under the chairmanship of Sir Sydney

[50] Article 226, Constitution of India

[51]Niloufer Bhagwat, 'Institutionalizing Trial without Detention' (1978) Economic and Political Weekly 510

[52] Ibid

[53] Ibid

[54] Pradeep Kumar Tripathi and Varalika Nigam, 'Revisiting National Security Laws in India & Reconciling Differences with Civil Liberty' (2021) International Journal of Law, Management and Humanities 499

[55] Ibid

Rowlatt, in order to assess the situation posed by the revolutionary activities in the Indian sub-continent. As discussed above, the Defence of India Act, which was enacted during the First World War, was used by the British government to arrest, prosecute, punish and even execute a large number of fighters for the independence of our country. However, after the end of the war, the Defence Act came to an end in accordance with the purpose of the legislation.

After the legislation came to an end, the British government in India felt a vacuum in the area.[56] They felt that in the absence of a law as harsh and as strong as the Defence Act, the revolutionary activities will again rise and this will again threaten the existence of the British in India.[57] Thus, to secure their rule in India and maintain the so called stability which was brought about by the harsh Defence of India Act, the government decided to constitute the Rowlatt committee.[58] The Rowlatt committee examined the scenario and proposed legislation in the line of the Defence of India Act,.[59] Thus, the Imperial legislative council passed the Rowlatt Act and it came into force from the year 1919 and was in effect till it was repealed in 1922. [60]Many sections of the Indian society who supported the British during the World War I did not expect this legislation after the war.

2.3.2. SALIENT FEATURES

The long title of the legislation reflects the purpose of the legislation to an extent. The long title mentions that it is necessary to complement the powers provided to the government under normal criminal statutes with certain extra ordinary and special powers to deal with anarchical and revolutionary activities. The duration of the date as mentioned in the legislation is three years from the end of the war.

Part I of the Rowlatt Act deals with the trial of persons who are accused of committing a crime in any of the areas which are declared under the provisions of the law. Under section 3 of Rowlatt Act[61], if the Governor General in council is satisfied that the

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[56] Sridhar Naik, 'Crawling Street: Forgotten in History' (*Sunday Guardian Live*, 23 April 2022) <https://www.sundayguardianlive.com/culture/crawling-street-forgotten-history> accessed 05 July 2022

[57] Ibid

[58] Ibid

[59] Carol Lobo, 'Rowlatt Act: The Black Act and how it backfired' (*Livehistory India*, 30 August 2021) <https://www.livehistoryindia.com/story/eras/the-rowlatt-black-act> accessed 05 July 2022

[60] Ibid

[61] Section 3, Anarchical and Revolutionary Crimes Act, 1919

anarchical and revolutionary activates have increased to a huge extent in the entire territory of India or certain parts of the territory and it has led to an increase in the commission of the crimes mentioned in the schedule of the legislation to such an extent as to jeopardize public safety and order, then the governor general in council, in the interests of public safety and order, can declare the provisions of the part I of the Rowlatt Act to be applicable to those places in which the commission of the offences have led to breach of public safety and peace.[62] The offences which are referred to in the section are mentioned in the schedule to the legislation. [63]

The offences mentioned in the schedule consist of several classes of offences enumerated in the Indian Penal code, 1860 as well as other special penal statutes. The offences from the Indian Penal code, `1860 includes offences against the state such as waging, abetting or attempting to wage war against the government established by law in India,[64] conspiracy for waging, abetting or attempting to wage war against the government established by law in India,[65] collecting ammunitions and arms for abetting or attempting to wage war against the government established by law in India[66] and assaulting higher dignitaries and functionaries in India.[67] In addition this, certain offences to human body including hurt[68] and grievous hurt[69] are also included when in the opinion of the government they have the tendency to incite any revolutionary or anarchical activity.

If a person who is accused of any of the offences mentioned in the schedule is to be tried in accordance with the provisions of the Rowlatt Act, then the local government has to provide a request to the chief justice to allow the case to be tried in accordance with the provisions of the Rowlatt Act.[70] The chief justice will then constitute a court of judges by nominating high court judges and these judges will start the trial of the case based on the information.[71] The procedure for trial will be based on the then code of criminal procedure unless a different procedure for a certain aspect of the trial is provided under

[62] Ibid
[63] Schedule, Anarchical and Revolutionary Crimes Act, 2019
[64] Section 121, Indian Penal Code, 1860
[65] Section 121 A, Indian Penal Code, 1860
[66] Section 122, Indian Penal Code, 1860
[67] Section 124, Indian Penal Code, 1860
[68] Section 319, Indian Penal Code, 1860
[69] Section 320, Indian Penal Code, 1860
[70] Section 4 (1), Anarchical and Revolutionary Crimes Act, 1919
[71] Section 5, Anarchical and Revolutionary Crimes Act, 1919

the Rowlatt Act.[72] However, the order passed in the trial mentioned above can never be appealed or reviewed under any circumstance whatsoever[73] and the high courts shall not have the power to revise the orders. Thus, the order of the court shall be final and binding. [74]

The deprivation of the right to appeal to the parties who are to be tried and sentenced under the special procedure provided under the Rowlatt Act is in violation of the principles of natural justice which includes right to be heard. Moreover, no order or sentence passed by the special court shall require any confirmation or approval from a higher court or authority before its final execution. This also includes death sentence in cases where there is unanimous opinion. To put this in perspective, if there is a unanimous opinion of the court to provide death sentence to the person convicted, then it does not need any confirmation or approval from any higher authority or court. Such a sentence cannot be appealed before any court of law and there is no provision for review. A high court is also not empowered to revise the order of death sentence passed by the court. This means that the death row convict has no recourse anywhere within the justice system. This is outrageous because if there are any lacunae in the trial of the convict, intentional or unintentional, then it might lead to the death of an innocent man.

Under Part II of the Rowlatt Act, the local government is authorized to undertake certain measures in order to control revolutionary and anarchical activities. In an area where a declaration has been made, there is a reasonable suspicion that any person is or might be involved in any activity which is provided in the schedule and which has tendency to fuel revolutionary and anarchical activities, the local government can put the material in front of a judge who is qualified to become a judge of a high court.[75] The judge will look at the materials provided to him and give an opinion on the weather according to him the case is fit to be brought under the ambit of the legislation.[76] After reviewing the report of the judge, if the local government is of the opinion that the case is fit to be brought within the ambit of the legislation, then it does so and it can pass certain orders with respect to the

[72] Section 7, Anarchical and Revolutionary Crimes Act, 1919
[73] Section 17, Anarchical and Revolutionary Crimes Act, 1919
[74] Ibid
[75] Section 22 (1), Anarchical and Revolutionary Crimes Act, 1919
[76] Ibid

person.[77] The orders include abstention from performance of certain acts which acts which are detrimental to public peace, executing a bond with surety or without a surety for a certain period of time that the person specified will not commit, attempt to commit, abet the commission of or undertake a criminal conspiracy with respect to an offence as specified in the schedule to the legislation.[78] The order may also specify that the person concerned shall not leave the territory of British India without prior permission of the government and whenever he wishes to change his residence he needs to give prior notice of the government. The order can also specify that the person shall not undertake any activity which the local government deems to be detrimental to public safety, peace and order.[79]

If we make a comparison with the legislations of the present day, we can see that similar provisions exist in the Criminal Procedure Code, 1973, which is India's primary criminal legislation. Under section 356[80] of the Code of Criminal Procedure Code, 1973, when a person has been convicted of an offence under the under certain sections of the Indian Penal Code, 1860 such as sections 489 A to 489 D[81], 506[82] or offences punishable under chapters XVII or XVIII of the Indian Penal Code, 1860 and has been penalized for three years and he has been again convicted of one of those offences and again penalized for three years or more, the court which had tried the offence and awarded punishment, if deems fit, can order that the residence of the convicted person or change of residence of the convicted person be notified for any term which may not exceed five years.[83] Similarly, Chapter VIII of the Code of Criminal Procedure, 1973 deals with the power of the instances where certain people need to provide security for maintaining peace and ensuring good behavior. For example, under section 108[84] of the Code of Criminal Procedure, 1973, if and when an executive magistrate receives information that a person who is residing within his territorial jurisdiction is engaging any activity of publishing or distributing any matter which has the potential to invoke seditious tendencies among the

[77] Ibid
[78] Ibid
[79] Ibid
[80] Section 356, Code of Criminal Procedure, 1973
[81] Section 489 A- 489 D, Indian Penal Code, 1860
[82] Section 506, Indian Penal Code, 1860
[83] Supra 69
[84] Section 108, Code of Criminal Procedure, 1973

public or which has the tendency to increase feelings of hatred, enmity and distrust between various groups on grounds of language, place of birth, religion race etc. whether within his territorial jurisdiction or without his territorial jurisdiction and he believes that he has sufficient reasons to act, the executive magistrate can summon the concerned person and ask why he should not be asked to execute a bond for maintaining good behavior for a period of one year. After the person has been given a reasonable opportunity of being heard, the magistrate will decide whether the person should execute a bond of security or not.

Any order which has been made by the local authority with respect to the person concerned shall be forwarded to an investigating authority constituted for the purpose of investigating the facts and circumstances of the case.[85] The investigating authority shall make due investigation into the case and file a report to the local government on whether according to the authority the order needs to be continued. [86]

Normally, the order that has been passed by the local government remains in force only for one month from the date of its passing. [87]However, if the investigation has not been completed within the period of one month, and the investigating authority has been able to submit the report within the stipulated period, then the investigating authority can advise the local government to extend the period of the order.[88] The local government, if it deems fit, can extend the order. Here, no fixed time frame has been provided within which the investigation has been completed. Also, there is no maximum time limit provided for which the local government can extend the order. This effectively gives the local government indefinite power to extend the order passed by it by citing non-completion of the investigation. This was an indirect method of curtailing the personal liberty of the person without due process being followed.

Under Part III of the Rowlatt Act, in an area where a declaration has been made, there is a reasonable suspicion that any person is or might be involved in any activity which is provided in the schedule and which has tendency to fuel revolutionary and anarchical activities, the local government can put the material in front of a judge who is qualified to

[85] Section 26, Anarchical and Revolutionary Crimes Act, 1919
[86] Ibid
[87] Ibid
[88] Ibid

become a judge of the high Court.[89] The judge will look at the materials provided to him and give an opinion on the weather according to him the case is fit to be brought under the ambit of the legislation.[90] After reviewing the report of the judge, if the local government is of the opinion that the case is fit to be brought within the ambit of the legislation, then it does so and it can pass certain orders with respect to the person.[91] The nature of the orders was described in section 22 of the legislation.[92] Apart from the orders prescribed in that section, the local government is also eligible to undertake certain actions under the legislation. First, the concerned person can be arrested without warrant by the police officials. Second, the person can be kept in confinement by local administration except in places which are earmarked for convicted criminals. Third, local administration can search places which in their opinion are hiding places of people associated with revolutionary activities or places for safe custody of articles which have the tendency to expose people to anarchical pr revolutionary activities.[93] The order issued for the confinement of a person or the search of a place can be carried out by any person associated or connected with the government activities to whom the order has been issued and the person can use all means necessary to enforce the order.

2.3.3. ANALYSIS

With the help of the provisions mentioned above, the Rowlatt Act was made to take the position of the Defence of India Act. It is to be kept in mind that the Defence of India Act was proclaimed to be a wartime measure. Although, it was later used for crushing independence struggle, the special powers provided to the authorities was justified on the basis that desperate times of war needed strong measures. However, the Rowlatt Act was the continuation of the same special powers to be used in emergency times to normal times. This is what angered the Indian population against the law. After the legislation came into force, there were widespread protests against the implementation of the

[89] Section 34, Anarchical and Revolutionary Crimes Act, 1919
[90] Ibid
[91] Ibid
[92] Section 22, Anarchical and Revolutionary Crimes Act, 1919
[93] Supra 78

law.[94]Many members of the imperial provincial legislature resigned in protest of the passage of the law. They saw the law as an act of cruelty by the British Government on Indians. Protests were not only limited to the leaders and activists.[95] Under the leadership of Mahatma Gandhi, common people came out in the streets and protested against the law and its use on freedom fighters.[96] One example was the protest held at Jalianwalabagh.[97] In that protest, many common people came to stage their objection against the draconian law.[98] However, the officer who was sent to control and manage the protest closed all the entrances of the protest space and ordered the subordinates to fire at the unarmed peaceful protesters.[99] This led to the death of many people on the spot and many were injured.[100] This incident was recorded was one of the most cruel acts of British in India.[101] Ultimately, the British government had to take back the law. [102]

2.4. ARMED FORCES (SPECIAL POWERS) ORDINANCE, 1942

2.4.1. ORIGIN

The Armed Forces Special Power Ordinance (hereinafter the Special Powers Ordinance) was promulgated by Viceroy Linlithgow to curb the quit India movement started by

[94] Hamad Habibullah, 'Who was Dr. SaifuddinKitchlew? The Forgotten Hero of Jallianwalabagh' (*Indiatimes*, 13 April 2022) <https://www.indiatimes.com/explainers/news/jallianwala-bagh-hero-dr-saifuddin-kitchlew-559413.html> accessed 05 July 2022

[95] Ibid

[96] Gopalkrishna Gandhi, '100 Years ago, a tale of Hindu-Muslim Oneness' *The Hindustan Times* (08 April 2022) <https://www.hindustantimes.com/opinion/100-years-ago-a-movement-of-hindu-muslim-oneness-101649429042592.html> accessed 05 July 2022

[97] Ibid

[98] Webdesk, 'Jallianwala BaghMassacre: Background, causes, aftermath and significance' *India Today* (New Delhi, 13 April 2022<https://www.indiatoday.in/education-today/gk-current-affairs/story/jallianwala-bagh-massacre-background-causes-aftermath-and-significance-1936914-2022-04-13> accessed 05 July 2022

[99] Ibid

[100] Ibid

[101] Agence France-Presse, 'Britain's shame: 1919 Amritsar Massacre' *The Deccan Herald* (13 April 2019) <https://www.deccanherald.com/national/north-and-central/britains-shame-the-1919-amritsar-massacre-728449.html> accessed 05 July 2022

[102] Ibid

Mahatma Gandhi.[103] It was promulgated on 15 August 1942.[104] Under the special powers provided to the armed forces under the Armed Forces Ordinance, the members of the armed forces killed and injured thousands of innocent protestors.[105] After independence, the Special Powers Ordinance was transformed into a law.[106] It was envisaged to be implemented for a single year[107] but it was implemented till 1957. [108]

The long title of the Armed Forces Ordinance states the occurrence of an emergency as a reason to bring out the ordinance. Looking at the historical context at that time, the emergency was nothing but the Quit India movement which had started under the leadership of Mahatma Gandhi. The quit India movement was the final struggle of India's independence against British colonialism. As discussed above, during World War I, the British government was supported by a substantial chunk of Indians within the government machinery as well as those belonging to the moderate camp of freedom fighters. However, after the war, the British did not accept any substantial Indian demand for independence, autonomy or self governance to the satisfaction of the majority. As a result, during World War II, there was a sharp division of opinion regarding supporting the British in the war efforts. Leaders like Mahatma Gandhi and his followers in the Indian National Congress were reluctant to support the British in the war. Whereas influential businessmen who could profit from the ongoing war as well as Indians who were placed in higher positions in the civil services and the police as well as armed forces supported the British. A committee under Sir Cripps was appointed to carry out a series of negotiations with the Indians regarding supporting British in their war efforts. However, the negotiations failed because the British did not accede to any of the demands of immediate independence or withdrawal of the British from India. After the failure of the Cripps Mission, Mahatma Gandhi delivered a lecture on 1 August 1942 to implore the Indians for final struggle till their death or the achievement of the

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[103] Utkarsh Anand, 'New controversy raises old questions around AFSPA' *The Hindustan Times* (08 December 2021) <https://www.hindustantimes.com/india-news/new-controversy-raises-old-legal-questions-around-afspa-101638903192084.html> accessed 05 July 2022

[104] Ibid

[105] Ibid

[106] Ayesha Jain, 'AFSPA and why it inspires Dissent?' *The Quint* (31 March 2022) <https://www.thequint.com/explainers/explained-afspa-or-armed-forces-special-powers-act-why-prompts-dissent> accessed 05 July 2022

[107] Ibid

[108] Ibid

objective.[109] Immediately after the lecture, many congress leaders were arrested and were not released until the war was over. [110] The Special Powers Ordinance was promulgated a few weeks after the lecture. [111]

2.4.2. SALIENT FEATURES

The Armed Forces Ordinance was promulgated on 15 August 1942. I.e. two weeks after the lecture of Mahatma Gandhi for the final struggle for independence. Thus, the governor general of India wanted to tackle the legitimate struggle for self-determination and independence of the people of India by giving special power to the armed forces. As discussed above, this was the emergency for which the ordinance was enacted. The ordinance was enacted under the powers conferred on the Governor General by section 35 of the Government of India Act, 1935.[112]

Section 1 of the Armed Forces Ordinance[113] states that it applies to the whole of British India and it shall come into force immediately. Section 2[114] is the most important provision of the ordinance. It states that any person serving in the military forces of the King or any allied military forces recognized by the king holding a position equivalent to or higher than the rank of a captain or holding such equivalent or higher position in the navy or air forces is eligible to use the powers provided in the Armed Forces Ordinance. Such officer of the armed forces can order his subordinate officers to use force even to the extent of causing death by general or special orders in writing when the officer believes that such order is imperative in the due discharge of his duties. Such force may be used by the subordinate officers who has been authorized by his superior against any person who fails to stop when he has been asked by an authorized law enforcement personnel to stop or when he attempts to do or appears to do any such act which would lead to destruction or damage or reduction in the value of any property which such

[109] Explainer, 'PM vows to remove from NE: A look back at the controversial law in the region' *Firstpos*t (28 April 2022)< https://www.firstpost.com/politics/pm-modi-vows-to-remove-afspa-from-northeast-a-look-back-at-the-controversial-law-in-the-region-and-what-its-removal-means-10609811.html> accessed 05 July 2022
[110] Ibid
[111] Ibid
[112] Section 35, Government of India Act, 1935
[113] Section 1, Armed Forces (Special Powers) Ordinance, 1942
[114] Section 2, Armed Forces (Special Powers) Ordinance, 1942

superior officer is duty bound to protect. And the Armed Forces Ordinance deems such use of force to be lawful.

The second sub-section of section 2[115] of the Armed Forces Ordinance makes an attempt to define the ambit of use of force as mentioned in first sub-section. Use of force in this context would include arresting the person concerned and taking him into the custody of the person who is arresting him. And the second sub-section goes on to state that in order to effect the arrest and/or taking into custody of the person concerned, the member of the armed forces may use any force at his disposal including causing the death of the person concerned. A close look at the sub-section leads to an inference regarding the lack of proportion between the power to take the action authorized and the goal sought to be achieved. The target of the section is any person who as disobeyed an order of a law enforcement personnel to stop or any person who has already caused or has the potential to cause any damage or reduction in the value of any property which the member of the armed forces is duty bound to protect. None of these categories of persons may have committed any crime. And yet, the section authorizes the members of the armed forces to use any force including causing the death of the person for effecting arrest and taking into custody. To speak in modern constitutional language, there is no rational nexus[116] of the power with the object sought to be achieved and the section violates the test of proportionality.[117]

Under section 3 of the Special Powers Ordinance[118], any person who has been arrested and taken into custody by members of the armed forces by using the power provided under section 2[119] of the legislation has to hand him over to the nearest police station within as short period of time as practically possible and also inform the official in the police station regarding the circumstances attending the arrest and taking into custody of the person concerned. This was the only procedural safeguard which was inserted into the legislation. However, this safeguard comes into the picture only after the member of the armed forces has arrested a person and taken him into custody. Moreover, there is no

[115] Ibid
[116] *State of WB v. Anwar Ali Sarkar, 1952 AIR 75*
[117] *Justice K.S Puttaswamy v. UOI, (2019) 1 SCC 1*
[118] Section 3, Armed Forces (Special Powers) Ordinance, 1942
[119] Section 2, Armed Forces (Special Powers) Ordinance, 1942

time frame within which a person has to be produced before the nearest police station after arrest by the members of the armed forces.

The last section of the Armed Forces Ordinance was made in complete disregard for rule of law and sanctity of human life.[120] It provides the members of the armed forces with immunity not only from prosecution without prior permission of the central government but also from the consequence or outcome even if any prosecution ensues with the approval of the central government.

2.4.3. ANALYSIS

The law provides immunity from prosecution without the previous approval of central government to two categories of people. First, the officers of the armed forces who have issued an order under section 2[121] of the legislation in writing. And second, the subordinates who have executed or carried out the order. Moreover, when these two classes of persons have purported to have acted in good faith, then irrespective of the consequence of the issuance of the order or execution of it, they cannot be held liable for their respective acts even if central government has given nod for prosecution. Thus, apart from qualified immunity from prosecution, there is also qualified immunity from outcome. In order to avail the immunity, the only pre-requisite is proof of good faith by the persons issuing the order or acting under it. To illustrate, even if a person dies due to a wrongful issuance of an order or execution of the order, then also the people responsible could not be held legally liable if they can prove that they have done it in good faith.

Thus, the law was made in complete disregard for the sanctity of life of Indians.[122] By implementing the law, the British wanted to maintain their empire in India. After independence, similar laws were legislated in order to control certain internal disturbances within the territory of India.[123]

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[120] Section 4, Armed Forces (Special Powers) Ordinance, 1942
[121] Section 2, Armed Forces (Special Powers) Ordinance, 1942
[122] Edit, 'AFSPA's removal marks a good beginning in NE' *Deccan chronicle* (01 April 2022) <https://www.deccanchronicle.com/opinion/dc-comment/010422/dc-edit-afspas-removal-marks-a-good-beginning-in-n-e.html > accessed 05 July 2022
[123] Ibid

From the above discussions on the national security legislations enacted in the pre-independence era by the British colonial rulers in the pre-independence era, it can be inferred that the harsh and draconian provisions used in the legislations could not prevent the Indians from successfully gaining their independence. Thus, any national security legislations used for ulterior motives cannot assist in achieving those motives in a permanent manner.

In the next chapter, an attempt is made to study the national security legislations enacted after independence and analyse their manner of implementation.

CHAPTER 3: NATIONAL SECURITY LEGISLATIONS IN INDEPENDENT INDIA (STILL IN FORCE)

3.1. UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

3.1.1. THE ORIGIN

The origin of the Unlawful Activities (Prevention) Act, 1967 (hereinafter the UAPA, 1967 or the Act) can be traced back to the National Integration Council (hereinafter the NIC) constituted by the first prime minister of India Jawaharlal Nehru. The NIC was constituted with eminent people from all walks of life and the purpose of the council was to reflect upon, discuss and come up with reforms in order to deal with problems such as communalism and regionalism which pose challenge to national integrity. [124] The NIC, in its initial meetings felt the need for a legislative instrument to deal with the challenges faced by the country and recommended the prime minister to enact a strong law aimed at protecting the integrity and sovereignty of India and identifying and curbing the organisational activities that affected the integrity of India.[125]

Parliament could make such laws which imposed restrictions on the fundamental rights provided under Article 19 (a), (b) and (c) of Part III of the Constitution of India. These sections entailed right to freedom of speech and expression, [126]freedom to gather[127] and freedom to form associations.[128] The suggestions led to the enactment of the UAPA, 1967. The original law was supposed to create a fact finding mechanism and the accused were to be tried under the procedure laid down in the Criminal Procedure Code, 1973.[129] The statement of objects and reasons of the original act states that it wants to prevent unlawful activities which may be committed either by individuals or by associations.

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[124] The Tribune Staff, 'No meeting of National Integration Council in 7 years' *The Tribune* (20 February 2021) <https://www.tribuneindia.com/news/nation/no-meeting-of-national-integration-council-in-7-yrs-214939> accessed 05 July 2022

[125] Anjana Prakash, 'Time for government to redeem itself and repeal UAPA' (*The Wire*, 25 July 2021) <https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa> accessed 05 July 2022

[126] Article 19 (1) (a), The Constitution of India, 1950

[127] Article 19 (1) (b), The Constitution of India, 1950

[128] Article 19 (1) (c), The Constitution of India, 1950

[129] Anjana Prakash, 'Time for government to redeem itself and repeal UAPA' (*The Wire*, 25 July 2021) <https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa> accessed 05 July 2022

The future development of the UAPA, 1967 as a legislation is influenced by significant national and international events. On 11 September 2001, the world faced one of the deadliest terrorist attacks in the history of mankind when Al Qaeda, a terrorist organisation hijacked four commercial planes in order to hit several prominent buildings.[130] As a response to this attack, the United States of America declared war against terrorism and launched worldwide military covert and overt operations.[131] The United Nations Organisation requested the member nations to take stringent legislative measures against terrorism. In response to this, India decided to use UAPA, 1967 as her primary anti-terrorism law. This marks the transformation of UAPA, 1967 from a law designed to curb activities prejudicial to national integration to a harsh anti-terrorist law.

3.1.2. THE SCHEME OF THE ACT

The UAPA, 1967 its present form is divided into seven chapters. The first chapter deals with the basic provisions such as extent, scope and applicability. The second chapter deals with unlawful associations. It deals with the mechanism to declare an association as an unlawful association by the Central Government[132] as well as the adjudication of the reasonableness of such a decision by a tribunal.[133] The third chapter deals with offences created by the Act and penalties for the same. The offences include being member[134] of an association declared as unlawful by the government under section 3 of the UAPA, 1967 and dealing with funds of such association.[135] The fourth chapter deals with punishment for engaging in terrorist activities and defines terrorist act. It creates offences related to terrorism such as conspiring, advocating, collecting money, organising camps and conducting recruitment drives[136]. The fifth chapter deals with forfeiture of proceeds of terrorism or any property intended to be used for terrorism. The sixth chapter deals with terrorist organisations and individuals. The last chapter deals with miscellaneous provisions including the most draconian provisions such as the bail provisions, presumption and procedure of arrest etc.

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[130]David H Bayley, 'India's Experience with Preventive Detention' (1962) Pacific Affairs 100
[131] Ibid
[132] Section 3, Unlawful Activities (Prevention) Act, 1967
[133] Section 4, Unlawful Activities (Prevention) Act, 1967
[134] Section 10, Unlawful Activities (Prevention) Act, 1967
[135] [135] Section 11, Unlawful Activities (Prevention) Act, 1967
[136] Sections 16, 17, 18, 18 A, 18 B, Unlawful Activities (Prevention) Act, 1967

3.1.3. THE UNLAWFUL ACTIVITIES PREVENTIONS (AMENDMENT) ACT, 2004

The intention of the amendment to UAPA, 1967 in 2004 (hereinafter the 2004 Amendment) becomes clear from the insertion of the words 'for prevention of terrorist activities'[137] in the long title of UAPA, 1967. This was the first time UAPA, 1967 was amended in order to use it as India's primary anti-terror law. It was done under the prime minister ship of Dr. Manmohan Singh. Taking into account the tectonic shift in the primary purpose of the law, sections 1 and 2 were substituted in order to insert new definitions. Section 1(3) of UAPA, 1967 extends the jurisdiction of the Act to commissions which are not within the territory but are made punishable by the Act. This is line with the recommendation of the United Nation Organisation to take action against cross border terrorism.

The definition section includes a range of new definitions related to terrorism such as terrorist activity in section 2 (k), terrorist organisation in section 2 (m), terrorist gang in section 2 (l). Section 2 (k) directs to section 15 which defines terrorist act. Terrorist act is defined in terms of using dangerous substances to cause harm to person or property and being done with the intention of threatening the sovereignty, integrity and unity of our country or to strike fear in the minds of people. This was the time when international consciousness regarding terrorism has started to be built.

Another significant definition i.e. the definition of unlawful activity is provided in Section 2(o). It defines an unlawful activity in terms of secessions or incitement of secession of a part of our country, acting against national integrity and causing disaffecting against the nation. A close looks at the definition helps us to understand that it has similarities with the definition of sedition provided in Section 124 A of the Indian Penal Code, 1860 [138] Chapter IV of the amended Act, along with defining terrorist act, inserted certain new offences and penalties for them such as raising fund for terrorists (section 17), conspiracy (section 18), harbouring (section 19), member of terrorist gang or organisation (section 20), holding proceeds of terrorism (section 21) and threatening witness (section 22). The intention behind insertion of the above-mentioned sections was to ensure that the terrorist organisations do not get any financial and logistical help from the supporters of the terrorist ideology.

[137] Section 2, Unlawful Activities Prevention (Amendment) Act, 2004
[138] Section 124 A, Indian Penal Code, 1860

3.1.4. THE UNLAWFUL ACTIVITIES PREVENTION (AMENDMENT) ACT, 2008

The amendment to the UAPA, 1967 in 2008 (hereinafter the 2008 Amendment) inserted a preamble in the Act. The preamble[139] enumerated the Security Council resolutions of the United Nations Organisation undertaken in order to require the member states to take strong measure against cross-border terrorism. Though, the aim of the 2004 Amendment was identical, it finds explicit mention in the preamble vide the 2008 Amendment. Along with this, the 2008 Amendment had a second aim. It was to prevent the territory and resources of India to be used for facilitating terrorism in foreign countries. This required power to prevent entry into and exit of suspicious persons, stop terrorism financing by freezing assets and to cut supply chains of terrorist organisations.

Towards this, certain substantive changes were made. Section 15 was substituted to include a few more elements in the definition of terrorist act. This included committing or attempting to commit the death of a public functionary to overawe Government of India; and abducting or kidnapping any person or attempting to do so to force government of India do or abstain from doing any such acts which it would not have otherwise done or abstained from doing. In order to address the prevalent fear of the ever growing nuclear arsenal falling in the hands of terrorist organisations and being used for indiscriminate killing, section 16 A was inserted which made demands of radioactive material, radiological, biological substance or nuclear device in order to commit or help committing a terrorist attack a punishable offence.[140] Two new sections 18 A and 18 B were inserted which aimed to target the handlers and agents who acted in covert manner and recruited[141], brainwashed young people to join terrorist organisations and provided them training[142] to make them ready for attacks.

The most striking feature of the 2008 Amendment is the insertion of new sections 43 A to 43 F. Section 43 A provides authority to officers of designated authority to arrest or authorise arrest of persons based on personal knowledge or other information. Section 43 C affirms the overriding affect of the Act over the Code of Criminal Procedure 1973. Section 43 D of the Act deals with bail provisions. Section 43 D (a) states that all the

[139] Section 2, Unlawful Activities Prevention (Amendment) Act, 2008
[140] Section 5, Unlawful Activities Prevention (Amendment) Act, 2008
[141] Section 18 A, Unlawful Activities Prevention Amendment Act, 2008
[142] Section 18 B, Unlawful Activities Prevention Amendment Act, 2008

offences under the act shall be cognizable. Section 43 D (2) (b) extends the time periods provided under section 167 of the Code of Criminal Procedure, 1973[143] by two times. Further, there is an additional provision where the court can increase the time of police custody up to one hundred and eighty days upon hearing the public prosecutor. Section 43 D (4) removes the provision of anticipatory bail for persons who are accused under the Act. Section 43 (5) provides that a person accused under chapters IV and VI of the Act are not to be granted bail if the court, on a easing of the case diary, arrives at the opinion that there exists reasonable basis for a prima facie case against the accused. Section 43 D (5) makes special provision for aliens who have entered the borders in an illegal way. They can be granted bail only under exceptional circumstances for reasons to be recorded in writing. Section 51 of the 2008 Amendment act provides the power to the Ccentral Government to prevent the movement of persons or freeze the economic resources of persons on mere suspicion.

It is clear that these provisions violate the basic liberty of a person and defeats the fundamental rights provided in part III of the Constitution of India. Even if a person is a mere suspect of terrorism, his right to freely move across the territory of India, guaranteed under article 19 (1) (d) of the Constitution of India can be encroached upon. Moreover, economic resources of a person can also be freezed under section 51 A (a) of the Act. A person, deprived of his economic resources, cannot sustain even for a day in today's world. Hence, stripping a person of his economic resources in today's world is equivalent to violating the right to life and personal liberty guaranteed under Article 21 of the Constitution of India.

3.1.5. THE UNLAWFUL ACTIVITIES PREVENTION (AMENDMENT) ACT, 2013

The amendment to UAPA, 1967 in 2013 (hereinafter the 2013 Amendment) was brought in order to address the issue of threat to the economic security of India posed by massive counterfeiting and smuggling of such currency notes. A huge chunk of these counterfeit coins was smuggled out and used for terrorism financing. This problem of economic terrorism became a huge national security concern. The amendment inserted a definition of economic security under Section 2 (ea) in a broad manner to include environmental,

[143] Section 167, Criminal Procedure code, 1973

food, ecological, energy security within its ambit, apart from the primary concern of monetary and fiscal stability. Consequently, section 15 was amended to include threatening of economic security as an element of a terrorist act. Section 17 was substituted in order to modify the definition of raising funds to include raising fund through the production, smuggling and use of counterfeit coins. This was done in order to curb big scale terrorism financing. Moreover, raising fund with the intention of using it for terrorism funding was in itself made an offence irrespective of its final application. Sections 22 A and 22 B were inserted to make provisions for offences being done by companies or societies. These provisions were inserted in the backdrop of many terrorist organisations using the corporate veil to channel funds from one place to another and convert and collect donations from sympathisers.

3.1.6. THE UNLAWFUL ACTIVITIES PREVENTIONS (AMENDMENT) ACT, 2019

This is the most recent and most controversial amendment to the UAPA, 1967. Through this amendment in 2019 (hereinafter the 2019 Amendment), the Parliament of India grants power to the central government to designate as individuals as a terrorist. [144] A new fourth schedule[145] is added to the Act where the central government can add the names of individuals whom it deems as terrorists. Sections 35 and 36 of the Act are amended in order to reflect this change. Under section 35 of the Act, the central government can add or remove the name of an individual from the fourth schedule under Section 35 (1) (a) and 35 (1) (d) respectively. This provision which was earlier available only in case of organisations was extended to individuals. The objective provided under Section 25 (2) for the exercise of the above-mentioned power is that the government should believe that the individual is involved in terrorism. The criteria for the exercise of the above-mentioned power are provided under Section 35 (3) of the Act. The criteria include preparation, promotion and otherwise involvement in terrorism.

It can be noticed that the criteria for promotion and preparation are vague and provides widespread executive discretion. However, even if they are tried to be justified on grounds of national security, the provision of residuary power under sub-section (d) which provides almost unrestricted discretion is difficult to justify in a liberal democracy

[144] Section 5, Unlawful Activities Prevention (Amendment) Act, 2008
[145] Section 12, Unlawful Activities Prevention (Amendment) Act, 2008

like India. Such provisions providing such widespread executive discretion violate the concept of limited government.

By using Section 35 (a) (d), the Central Government can designate any individual as a terrorist without providing any concrete grounds. This is problematic on so many levels. First, extending the provisions originally meant for organisations to individuals is creating a false equivalence. An individual and an organisation cannot be treated equally under law. An individual has certain sacrosanct and inalienable rights under the Constitution of India which cannot be extended to an organisation. Second, designating a person as a terrorist without any formal prosecution and conviction in a court of law is akin to presuming a person as guilty without giving him a chance to prove his or her innocence. In this case, the central government even need not give an opportunity of hearing to the concerned person before taking the decision of designating as a terrorist. Third, designating an individual as a terrorist has very severe societal consequences for not only for that particular individual but also for his or her family. The person and his family is socially stigmatised forever and find it extremely difficult to return to the mainstream society even if the person is de-notified.

3.1.7. THE AKHIL GOGOI CASE (Special NIA Case No. 2/2020—Arising out of RC-13/2019/NIA/GUW)

3.1.7.1. BACKDROP

Akhil Gogoi is a peasant leader from Assam. He was instrumental in founding of Krishak Mukti Sangram Samiti (hereinafter KMSS), an organisation which works for the people who take agriculture as their livelihood. He is also one of the prominent voices in Assam against the implementation of Citizenship (Amendment) Act, 2019 (hereinafter the CAA) and the erstwhile Citizenship (Amendment) Bill (hereinafter the CAB), which made provisions for a fast track process for giving Indian citizenship to members of persecuted religious communities from certain neighbouring countries of India.[146] There was a widespread concern that allowing these people to settle in various Indian states including

[146] ET Online, 'Citizenship Amendment Act, 2019: What is it and why it is seen as a Problem' *The Economic Times* (31 December 2019) <https://economictimes.indiatimes.com/news/et-explains/citizenship-amendment-bill-what-does-it-do-and-why-is-it-seen-as-a-problem/articleshow/72436995.cms?from=mdr>, accessed 05 July 2022

Assam might lead to the alteration of the linguistic and cultural identities of these states in a permanent manner.[147] Akhil Gogoi also represented this concern and was actively involved in organising mass movement against the CAB.

3.1.7.2. FACTS OF THE CASE

In December 2019, Akhil Gogoi and a number of his associates were arrested in Jorhat, Assam as a measure of preventive detention in the backdrop of the ongoing protests against the CAA.[148] Later, a case was registered against him by the Assam Police. [149]The original first information report in the case states that Mr. Gogoi had hatched a secret plan and was successful in setting up organisational tie ups between the banned Communist Party of India (Maoist) and his organisation KMSS. The alleged purpose behind this alliance was to incite violence and hatred and ultimately destabilise the government established by law. The protests against the CAB were used as a veil to hide this sinister plan and execute it in a covert manner. The case was transferred to the National Investigation Agency (hereinafter the NIA). It filed a charge sheet against Akhil Gogoi and his associates.

3.1.7.3. THE NIA CHARGE SHEET

The charges mentioned in the charge sheet included sections 18/39 of the UAPA, 1967 read with Sections 120 B/124A/153A/153B of the Indian Penal Code, 1860. As discussed above Section 18 of the UAPA, 1967 deals with conspiracy or aiming to facilitate the commission of a terrorist act or any act which precedes a terrorist act and is preparatory in nature with respect to the former. Section 39 of the UAPA, 1967, deals with providing support to terrorist organisations with money, human resource and other logistical support. With respect to the Indian Penal Code, 1860, Section 120 B deals with punishment for criminal conspiracy. Section 124 A, Indian Penal Code, 1860 deals with sedition and 153 A and 153 B deals with comments which facilitate clashes between communities and which negatively affect the integrity of the nation.

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[147] Ibid

[148] Deccan Herald, 'CAA: Peasents leader Akhil Gogoi arrested under UAPA' *Deccan Herald* (Guwahati, 17 December 2019) <https://www.deccanherald.com/national/national-politics/caa-peasants-leader-akhil-gogoi-arrested-under-uapa-786332.html> accessed 05 July 2022

[149] Ibid

The charge sheet specified various findings. First, Akhil Gogoi has secret alliance with the banned Communist Party of India (Maoist) and had sent members of his organisation to get trained by the Maoist leaders in arms and ideology. Second, he had given speeches and comments at various places which had elements of provoking enmity between various groups of people and also elements of breaking the national integrity. Third, he used the CAA protest as an excuse to execute mass road blockades which led to the disruption of transportation, essential supply chains and strategic lines of supply. This had ultimately led to threatening the economic security of the nation

3.1.7.4. LAW ON FRAMING CHARGES

Since the matter was at the stage of framing charges, the court dealt with seminal case laws and principles on framing of charges before delving into the individual charges and evidence offered by both sides for and against those charges. The court mentioned judgements of *Sajjan Kumar v. Central Bureau of Investigation*[150], *Asim Sharrif v. NIA*[151], *State of Orissa v. Debendra Nath Padhi*[152] , *State v. Selvi*[153] and *ME Shiuvalingamurthy v. CBI*[154] in order to cull out the essential principles for framing charges.

After the discussing relevant portions of these judgements, the court arrived at the principles which are to be applied in the present case.

First, at the stage of framing a charge, a court has to weigh the evidence provided by prosecutions as well as defence in order to arrive at a conclusion with respect to the existence or otherwise of a prima facie case against the accused. If the evidence which has been adduced by the prosecution, deemed to the accepted by the court and deemed to be unchallenged by the defence fails to prove the commission of the offence, then the court ought to discharge the accused. Second, the court cannot allow the prosecution to commence the trial on the ground of mere suspicion and if the evidence adduced by both side present two views and one of them provides grounds for mere suspicion, then the Court can discharge the accused.

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[150] *(2010) 9 SCC 358*
[151] *(2019) 7 SCC 148*
[152] (*2005) 1 SCC 568*
[153] *(2018) 12 SCC 455*
[154] *(2020) 2 SCC 768*

3.1.7.5. EVIDENCE ADDUCED

The materials which were submitted by NIA included recorded statements of 19 prosecution witnesses and transcripts of public speeches of Akhil Gogoi as well as private conversations with several persons. The first two witnesses, termed as protected witnesses provided certain facts regarding the alleged connection of Akhil Gogoi with various Maoist leaders of West Bengal and Orissa and trainings organised by the Maoist leaders for the members of KMSS at the request of Mr. Gogoi. Other prosecution witnesses (3-19) provided details regarding the involvement of Mr. Gogoi in the anti-CAB protest in Assam and the various directions that he gave to his associates to organise mass protests and blockades in different parts of the state. The court also evaluated the transcripts of various speeches of Mr. Gogoi and his conversations with a number of persons. In most of them, there have been requests for severe forms of protest including half-naked and naked protests, tyre burns and economic blocks. But he has also requested people to protest in a peaceful manner and not engage in violent activities.

3.1.7.6. LAW ON THE ISSUES AND ANALYSIS

The court referred to various case laws on the provisions of UAPA, 1967 and the Indian Penal Code, 1860 under which Akhil Gogoi has been booked. On the point of meaning of terrorist act and conspiracy to abet a terrorist act, the court referred to the case laws of *Union of India v. Yasmeen Mohammad*[155] and *Mahalakshmi v. NIA*[156].

The cumulative finding of both the cases are that in order in successfully convict a person under section 39 of the UAPA, 1967, the act of the person has to strictly fall within any one of the three sub-sections and that act has to be done with the precise intention of advancing the activities of a terrorist organisation. The court then discussed the meaning of terrorist act under cection 15 because it was necessary to ascertain the meaning of terrorist act in order to evaluate the charges against Mr . Gogoi. The court infers that section 15 is an offence based on *mens rea* and in order to fulfil the requirements of section 15, it is imperative that the acts described in sub-sections (a), (b) and (c) of

[155] *(2019) 7 SCC 79*
[156] *(2014) 1 Gau LR 409*

section 15 are done with the precise intention of threatening the sovereignty and integrity of our country or fill terror in the minds of people.

While analysing the material in light of the various principles that have emerged from the above-mentioned cases, the court found that the speeches and telephonic conversations of Mr. Gogoi does not indicate any call for a direct incitement to violence or compromise the integrity of the nation. The vandalism and destruction of physical property that happened during the violence cannot be attributed to direct effect of speeches and exhortations of Mr. Gogoi. Even though Mr. Gogoi advocated for road blockades and bandhs which might lead to disturbances in the flow of economic activity, such acts *ipso facto* cannot be said to threaten the economic security of the country if not done with one of the intentions specifically mentioned in section 15 of the UAPA, 1967.

The court stated that an act to come within the ambit of UAPA, 1967 should be specifically targeted towards the sovereignty, unity and integrity of the nation and ordinary bandhs and blockades with no such intention behind them cannot be brought within the ambit of the law. On the issue of supporting terrorist organisation punishable under section 39 of UAPA, 1967, the court stated that the provisions of a penal statute like UAPA, 1967 have to be construed in a strict manner and utmost care should be taken to ascertain that accused should not be punished for crimes that the legislature did not intend to punish. The court did not find any coherent evidence that satisfies the two primary requirements of section 39, i.e. act falling under any one of the three sub-sections and done in order to further the interests of a terrorist organisation. The court found no coherent evidence to suggest that Mr. Gogoi had links or allegiance with Communist Party of India (Maoist) after it was declared a banned organisation in 2009 and had worked for advancing its activities.

The court also analysed the charges against Mr. Gogoi under sections 120 B, 124 A and 153 A and 153 B of the Indian Penal Code, 1860 in light of the materials advanced and found no incriminating element. Thus, the Court held that the materials adduced by the prosecution are inadequate to sustain any of the charges mentioned in the charge sheet and hence the Mr. Gogoi along with his associates was discharged.

3.2. NATIONAL SECURITY ACT, 1980

3.2.1. THE ORIGIN

The National Security Act, 1980 (hereinafter the NSA, 1980 or the Act) is a much shorter piece of legislation as compared to the UAPA, 1967. It consists of 18 sections and was substantively amended only twice, i.e. in 1984 and 1987. It provides power of detention to both the central government as well as the state government. It makes separate provision for detention of Indian citizens as well as foreigners.

It was originally conceived in order to fight against the menace of black-marketing and was brought under the regime of Indira Gandhi[157]. Section 2 of the Act provides power to the central or the state government to detain an Indian citizen to prevent him from executing any act which may be contravening the security, defence and foreign relations of India.[158] Similarly, a foreigner can be detained if his continued presence in the country presents a threat to the unity and integrity.[159] The powers of the central or the state government may also be delegated to a district magistrate or commissioner of police by the state government in writing. [160]

Under sections 9 and 10 of the Act, every detention order shall be placed before the Advisory board constituted by the central government within three weeks of detention. The advisory board will follow a particular procedure and submit its opinion on the genuineness or otherwise of the detention order within seven weeks of detention. Moreover, if the advisory board opines against the reasonableness of the detention of the person, the appropriate government is bound to release the detainee with immediate effect.

Though, there seems to be a procedural safeguard in terms of the restriction of three months, these three months can be extended indefinitely. This means that practically there is no limit on the power of state government to delegate powers. However, the decision made by the officer is subject to the approval of state government within twelve

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[157] Ravi Nair, 'Obscuring the flaw in India's criminal justice system' (*The Wire*, 05 March 2018) <https://thewire.in/caste/national-security-act-obscuring-flaws-indias-criminal-justice-system> accessed 05 July 2022

[158] Section 3 (1) (a), National Security Act, 1980

[159] Section 3 (1) (b), National Security Act, 1980

[160] Section 3 (3), National Security Act, 1980

days. [161]When an order is made or approved by the state government, it shall be sent to the central government for approval within seven days with the reasons attached. Section 6 makes the detention orders applicable even if persons detained or the place of detention is outside the jurisdiction of the concerned authority. One of the most widely criticised provisions is enumerated in Section 8 of the Act.

This section states that as a general rule, when a person is detained is accordance with a detention order, the detaining authority has the obligations to furnish him the grounds of detention within a period of fifteen days and provide a right to be heard. But, sub-section 2 of the same section carves out an exception in favour of public interest. Thus, the detaining authority can refuse to provide reasons citing public interest. And this makes the right to be heard ineffective because a person will be unable effectively present his case when he will not be provided with the grounds of detection.

Moreover, section 11 (4) specifically states that detainee has no right to be represented by a legal practitioner in front of the advisory board. Also, the detainee will not get access to the report on his detention except the part in which the opinion of the advisory board is provided.[162] From the timeline of the Act, it becomes amply clear that the person who has been detained can be kept in detention for seven weeks without the intervention of any judicial authority and more often than not, without even knowing the reasons for his detention. And if the advisory board affirms the detention, the concerned detainee can be detained for one complete year without even knowing the reasons for his detention because he will not have access to the parts of the report where the advisory board had provided reasoning for its justification.

3.2.2. THE NATIONAL SECURITY (FIRST & SECOND AMENDMENT) ACT, 1984

Section 5 A and section 14 A were inserted through the amendment acts of 1984. The intention behind the amendment was to implement a stricter version of the law in the disturbed areas of Punjab.[163] Punjab was unstable and several secessionist tendencies were fuming in the state. Thus, the state wanted to use this law to normalise the situation. Towards this, Section 14 A made certain changes regarding the timelines of detention

[161] Section 3 (4), National Security Act, 1980
[162] Section 11 (4), National Security Act, 1980
[163] Long title, the National Security (First Amendment Act), 1984

under the Act. The person can be detained. However, the provision was specifically made applicable to orders which were made before 8 June 1989. It increased the time period for which a person can be detained without referring his case to the advisory board up to three months. Additionally, the period for which a person can be detained in total under the Act was increased to two years.

Section 5 A states that the grounds of detention can be separated and should not be comprehended in totality In other words, if there are multiple grounds of detentions, the detention order cannot be set aside ,merely on the ground that one or more of the grounds are irrelevant, invalid, vague or could not establish causation with the detainee.[164] If there is at least one valid ground for detention, then the detention order should be judged on the merits of that ground. This section seems to reduce the sanctity of the fundamental rights guaranteed to the citizens under the Constitution of India. Any act of preventive detention should be used as a last resort; and when using this tool, strict procedural safeguard should be provided to avoid its misuse. This provision makes the law prone to misuse and reduces the strict burden on executive which should be placed while exercising such executive discretion.

3.2.3. NAUZHAT PARVEEN V STATE OF UP AND ANOTHER- HABEAS CORPUS WRIT PETITION NUMBER 264 OF 2020 (DR. KAFEEL KHAN CASE)

3.2.3.1. FACTS OF THE CASE

Dr. Kafeel Khan, a medical practitioner from the state of Uttar Pradesh was an active participant in the protests organised against the CAB. In December 2019, when the bill was tabled in the Parliament for passage, protests were organised in various educational institutions across the country including the Aligarh Muslim University (hereinafter the AMU). Dr. Khan addressed such a gathering on 12 December 2019.[165] A criminal case under sections 153 B, 109 and 505 (2) of the Indian Panel Code, 1860 were registered

[164] Section 2, the National Security (Second Amendment Act), 1984

[165] Kanishka Sarkar, 'Hindustan Times, Kafeel Khan's speech did not promote Hatred: HC orders his release, says invoking NSA illegal' *The Hindustan Times* (Prayagraj, 01 September 2020) www.hindustantimes.com/india-news/allahabad-high-court-orders-release-of-up-doctor-kafeel-khan-detained-under-nsa/story-UTEZKhovqJKHBTGVtbB5CI.html> accessed 05 July 2022

against Dr. Khan and he was subsequently arrested on 29 January 2020.[166] His bail application was accepted by the Chief Judicial Magistrate who issued two orders on 10 February and 13 February 2021 for release of Dr. Khan. However, the accused was not released by the authorities citing procedural intricacies. On 13 February 2021, on the recommendations of the Circle Officer, Aligarh and Superintendent of Police, Aligarh, the District Magistrate of Aligarh issued a detention order under section 3 (2) of the NSA, 1980, which stated that Dr. Khan was detained in order to prevent him from engaging in activities that contravened public interest. [167]

3.2.3.2. GROUNDS OF THE DETENTION ORDER

The order mentions that Dr. Khan delivered a provocative speech on 12 December 2019. Through the speech, Kafeel Khan tried to instil fear in the minds of the students of a particular community studying in the AMU that after the passage of the CAB, they will be treated as second class citizens in their own country and their existence will be in crisis. The order also alleged that Dr. Kahn tried to instil hatred in the minds of the students against other communities which will have the consequences of creating communal tension. The order mentions that as a result of the speech of Dr. Khan, several violent protests were held by the students of Aligarh Muslim University in the entire Aligarh city and these protests have led to the destruction of public property and disturbance in public tranquillity. If Dr. Khan is released on bail, there is likelihood that he will re-instigate the students of Aligarh Muslim University for such violent activities.

3.2.3.3. TIMELINE

The detention order, albeit without date and time was submitted to the detainee on 14 February 2020. The state government approved the order on 24 February and the detainee was apprised of this approval on the next day. The detainee utilised his right of representation and sent his application to the District Magistrate, the state government of Uttar Pradesh, the Central Government and the state advisory Board. Both the state and

[166] Ibid

[167] Akshita Saxena, 'NSA charges against Dr. Kafeel Khan dropped' (*Livelaw*, 1 September 2020) <https://www.livelaw.in/top-stories/breaking-nsa-charges-against-dr-kafeel-khan-dropped-allahabad-hc-directs-immediate-release-read-judgment-162223> accessed 05 July 2022

central government rejected the applications and the state advisory board opined in favour of the order of detention after giving an opportunity of being heard to the detainee. Consequently, the Central Government confirmed the order on 1 April 2020. The state government, by utilising its power under section 12 (1) of the NSA, 1980 extended the detention of the detainee for a total period of nine months from the date of detention, i.e. initially for six months and then again for three months.

3.2.3.4. LAW ON THE ISSUE AND ANALYSIS

The court here conducted a purposive interpretation of preventive detention statute. The Court stated that the basic purpose of the mechanism of preventive detention is to prevent an individual from committing an offence and the individual is detained so that he is cannot act in such manner. However, in the present case, the reason shown for detention of Dr. Khan was a speech which was delivered two months before the detention order and he has not visited that place since the day of the speech. If at all the authorities perceived a danger in Dr. Khan's speech, he should have been detained immediately after the speech. However, no such action was taken and officials initiated a request for preventive detention only after two months when Dr. Khan was already incarcerated.

Next, the Court delved into issue of subjective satisfaction of the detaining authority and scope of review of such subjective satisfaction. With regard to the law on the point, the court referred to four seminal cases, namely *Ram Bali Rajbhar v. State of WB*[168], *Magan Gope v. State of WB*[169], *Asha Keshavrao Bhosale, v. UOI* [170]and *Khudi Ram Das v. state of West Bengal*[171].

The Court opined that the subjective satisfaction of the detaining authority is not something for the Court to sit and decide upon. However, in a writ of a nature as the one being discussed here, the Court has the duty to look into two things.

First, if the subject satisfaction arrived at by the detaining authority satisfies the test of reasonableness. Second, whether the satisfaction of the authority is based on concrete material and whether there is a nexus between the material and the conclusion arrived at by the authority. Thus, a court may an hold a detention order invalid if the subjective

[168] *(1975) 4 SCC 47*
[169] *1975 1 SCC 415*
[170] *(1985) 4 SCC 361*
[171] *1975 2 SCC 81*

satisfaction arises out of factors such as irrelevant consideration, non application of mind, dishonest exercise of power, wrong interpretation of a statute and reliance if such materials which are in no way rationally connected with the facts of the case.

Applying the principles in the facts of the present case, the court stated that the speech of Dr. Khan in Aligarh Muslim University does not contain any call for violence or communal disharmony and hence there was no threat from Dr. Khan. In addition to this, even if the case of the government is accepted that there was threat from Dr. Khan due to his speech at the University, he should have been detained at that time only. The government had failed to establish the causal nexus between the order of detention in February 2021 and the speech delivered in December 2020. There was no continuing threat in these two months as Dr. Khan was in jail and there were no continuing actions as a consequence of his speech.

3.3. ARMED FORCES (SPECIAL POWERS) ACT, 1958

3.3.1. ORIGIN

It is a draconian piece of legislation which provides unrestricted power to the members of the Armed forces of the Union of India. A special feature of the Armed Forces Special Powers Act, 1958 (hereinafter the Special Powers Act) is that at present it is only made applicable to certain states of the North-eastern part of India.[172] The apparent reasoning behind it is that the Special Powers Act was brought into force in order to counter insurgency and separatist sentiments in this part of the country.[173] The law was enacted less than a decade after the independence. Initially, the legislation was sought to be operative only for a period of one year.[174] However, the law is in existence even today and it has been extended to several other north-eastern states. A similar legislation was enacted in the state of Punjab to counter the insurgency and secessionist forces.[175]

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[172] Ayesha Jain, 'AFSPA and why it inspires Dissent?' *The Quint* (31 March 2022) <https://www.thequint.com/explainers/explained-afspa-or-armed-forces-special-powers-act-why-prompts-dissent> accessed 05 July 2022

[173] Ibid

[174] Ibid

[175] Bhamatai Sivpaalan & Vidyut Sabhaney, 'In Illustrations: A Brief history of India's National Security National Laws' (*The Wire*, 20 July 2019) <https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws> accessed 05 July 2022

However, the law was repealed after its purpose has been deemed to be fulfilled by the Central Government. [176]Such legislation also exists for the state of Jammu and Kashmir. The legislation came into force in the year 1990.[177] The scheme and provisions of the legislation are almost identical to the Special Powers Act and there are ample reports of faulty implementations of that legislation too, leading to violations of rights by the armed forces.[178] There is an urgent need to repeal the legislation or at least amend the most draconian or harsh provisions of the legislation. [179]

3.3.2. SALIENT FEATURE

At present, the Special Powers Act is applicable to all the seven sisters of North-east India. The Special Powers Act provides a very wide definition of the term armed forces to include any armed force acting under the authorization of the Union of India.[180] The most important element of the Special Powers Act is disturbed area.[181] Any area within the states to which the Special Powers Act applies can be termed as a disturbed area.[182] The power to declare an area as a disturbed area lies with the Governor or the Administrator of the State or Union Territory to which the Special Powers Act applies or the Central Government.[183] The relevant authority can make a declaration in the official gazette.[184] It is to be taken note of that simultaneous power is provided to the Central government to notify an area as a disturbed area.[185] Such power should ordinarily be conferred on the constitutional head of the state on the advice of the state government who is well acquainted with the situation of law and order in the state.

However, giving such a power to the central government can lead to a plethora of problems including the intentional misuse of the power. First, the central government may not be aware of the ground realities of the problem. Second, in many cases, when the

[176] Ibid
[177] Ibid
[178] Press Trust of India, 'AFSPA now applicable fully only in 31 districts of 4 Northeast states' *Business Standard* (New Delhi, 01 April 2022) <https://www.business-standard.com/article/politics/afspa-now-applicable-fully-only-in-31-districts-of-4-northeast-states-122040100307_1.html> accessed 05 July 2022
[179] Ibid
[180] Section 2 (a) , Armed Forces (Special Powers) Act, 1958
[181] Section 2 (b) , Armed Forces (Special Powers) Act, 1958
[182] Ibid
[183] Section 3 , Armed Forces (Special Powers) Act, 1958
[184] Ibid
[185] Ibid

party in power in the state is not the same as the party in power in the centre, then the central government can use the power to the detriment of the ruling party. Even when the same party is in power in the central as well as the state level, there can be situations when the power is used to curb opposition.

The threshold provided in the Special Powers Act for invoking the power to declare an area as a disturbed area is that the relevant authority should be of the opinion that the assistance of the armed forces to the civil administration is indispensable in order to mitigate the dangerous situation or disturbance prevalent in the concerned area.[186] The threshold provided in the Special Powers Act is diluted and does not need the relevant authority to provide any substantial reason for holding a particular opinion. There is widespread discretion provided to the relevant authority in invoking its power.

The Special Powers Act enumerates or lays down the powers that it is going to provide to the members of the armed forces. [187]It is to be noted that the special powers enumerated in the Special Powers Act can not only be exercised by a commissioned officer of the armed forces but also by a non- commissioned officer, warrant officer or any member who holds an equivalent rank in the armed forces.[188] According to the basic principles of rule of law, the people who can exercise powers with wide discretion should be regulated by law and should hold responsible positions. However, under the Special Powers Act, even a non-commissioned officer or a warrant officer can exercise wide discretionary powers. This is against the fundamental tenets of rule of law as well as the principles on which the Constitution of India is founded upon. The special powers provided to the members of the armed forces are as follows.

First, the Special Powers Act gives power to the members of armed forces to use force upon any person or fire upon any person to the consequence of even causing his death after giving such warning as is thought appropriate by the person concerned.[189] Such use of force can be used if certain prerequisites are there. The prerequisites are that the person on whom force is used should be violating any law enacted prohibiting unlawful assembly of

[186] Ibid
[187] Section 4 , Armed Forces (Special Powers) Act, 1958
[188] Ibid
[189] Section 4 (a) , Armed Forces (Special Powers) Act, 1958

five or more persons or carrying arms and the member of the armed forces consider it fit to use force for the maintenance of public order. [190]

Second, the Special Powers Act provides power to the Act to the members of the armed forces to completely destroy any dump of arms, any position which is being used to launch attacks on the armed forces or which is being attempted to be used or likely to be used to launch attacks on the armed forces, shelter which has been used as camps for imparting arms training or which has been used as a hiding place for people receiving arms training and committing offence. [191]

Third, the members of the armed forces has the power to carry out the arrest of any person who has committed a cognizable offence or there is presence of reasonable suspicion regarding commission of attempt of commission of cognizable offence with respect to the person against whom arrest is carried out,.[192] The members of the armed forces are provided with power to use such force as is necessary to effectively carry out the arrest.[193]

Fourth, the law authorizes the members of the armed forces to carry out search in a place without warrant where according to the member of the armed forces, person(s) have been held captivated by wrongful restraint or where the property which is stolen and ammunitions, arms and other explosive substances which has been illegally obtained has been kept in possession.[194] The Special Powers Act authorizes the use of force as and when necessary in order to carry out the search and obtain possession of the items as mentioned above.[195]

As mentioned above, the members of the armed forces are authorized to arrest people in the disturbed areas. When persons are arrested after fulfilling the conditions provided in the Special Powers Act, they have to be handed over to the police i.e. the officer in charge of the police station within whose jurisdiction arrests have been made, with least possible delay.[196] The member should also submit a detailed report enumerating the circumstances under which the arrest was made.[197] The threshold for time frame for handing over the

[190] Ibid
[191] Section 4 (b) , Armed Forces (Special Powers) Act, 1958
[192] Section 4 (c) , Armed Forces (Special Powers) Act, 1958
[193] Ibid
[194] Section 4 (d) , Armed Forces (Special Powers) Act, 1958
[195] Ibid
[196] Section 5, Armed Forces (Special Powers) Act, 1958
[197] Ibid

arrested person to the police officer is 'least possible delay'. The threshold of least possible delay is a threshold of subjective satisfaction of the member of armed forces and there are no guidelines laid down whatsoever for exercising this power. This seems to be a violation of the rights of the arrested person provided under Article 22[198] of the Constitution of India. From the language of the Special Powers Act, it may be inferred that the decision of the member of armed forces on the time frame for handing over to the police is not judicially reviewable. This is also substantiated by the last section of the Special Powers Act.

The last provision of the Special Powers Act prohibits the institution of any prosecution, legal proceeding or suit against any member of the armed forces for any act that he has done or any act that he has purported to be done under the powers conferred to him under the Special Powers Act if no prior permission is obtained from the Central Government.[199] Thus, the judicial redressal of violation of any constitutionally protected rights by the member of the armed forces has been made contingent on the approval of the Central Government.

There is an important issue to be taken note of. One of the relevant authorities who have been given power under the Special Powers Act to declare an area as a disturbed area is the Central Government.[200] And once an area is declared as a disturbed area, the special powers conferred on the members of armed forces come into effect. And the suits or legal proceedings that might arise out of the implementation of the declaration can be moved only with the permission of the central government. This provides power to the Central Government at two stages of the same course of action and nearly makes it the judge in its own cause.

The Special Powers Act has been supposedly used by the Central Government to support the state government in carrying out the anti-incumbency operations. The Special Powers Act has many draconian provisions and the people of the states where the legislation is applicable are victims of excesses of the armed forces. And all these extra-judicial actions have gone unaccounted for.

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[198] Article 22, Constitution of India, 1950
[199] Section 6, Armed Forces (Special Powers) Act, 1958
[200] Section 3, Armed Forces (Special Powers) Act, 1958

There are alleged instances of murders, rape, use of human shield and other atrocities which are being committed by the members of armed forces in the areas where the Special Powers Act has been applicable.[201] The Ministry of Home Affairs in specific and the Central government has in general has initiated a number of investigations into the violations of the human rights by members of armed forces.[202] However, not many of the complaints have been investigated in a transparent and fair manner and there are incidents of bias in favor of members of the armed forces.[203] There are around 70 convictions till now after all the investigations into the complaints. [204]

3.3.3. COMMITTEES ON SPECIAL POWERS ACT

There are two committees which have extensively reviewed the scheme of the Special Powers Act and the implementation of the legislation at the ground by the members of the armed forces. There two committees are Justice Verma committee and Hedge Commission.[205] It is interesting to note that the both the committees, in their reports, detailed the manner in which the implementation of the Special Powers Act has led to sexual violence as well as extra-judicial killings as well as tortures.[206]

Justice Verma committee was established after the gruesome rape and murder of a paramedical student in the capital of India. It was chaired by JS Verma, a retired judge of the SC. The incident was widely reported across media outlets and ultimately it led to a national outrage against the lack of safety of woman in the country. The mandate of the Verma committee was reviewing the criminal law framework in India and suggesting suitable amendments to the framework to make it more effective to deal with crimes against woman. The Committee suggested several reforms in the criminal laws in India including but not limited to the Indian Penal Code, 1860 and the Criminal Procedure Code, 1973.

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[201] Jade Lyngdoh, 'AFSPA, the Law that Allows Incidents like Nagaland Killings to Occur' (*The Wire*, 06 December 2021) <https://thewire.in/rights/afspa-nagaland-civilian-killings> accessed 05 July 2022
[202] Ibid
[203] Ibid
[204] *Extra-Judicial Execution Victim Families Association v UOI, WP (Crim) 129 of 2012*
[205] Amnesty International India Briefing, *Armed Forces Special Powers Act: Time for a Renewed Debate in India on Human Rights and National Security* (2013), <https://www.amnestyusa.org/reports/the-armed-forces-special-powers-act-a-renewed-debate-in-india-on-human-rights-and-national-security/ > accessed 05 July 2022
[206] Ibid

This included removing the need for previous sanction of the Central Government in matters relating to initiation of prosecution for offences committed by public servants when the public servant commits a crime against woman enumerated in the Indian Penal code, 1860. The Verma Committee, also laid emphasis on the aspect o the safety and dignity of woman in the conflict or war zones and it suggested that the need for previous approval or sanction of the central government for initiation of prosecution under legislations like the Special Provisions Act be removed when it comes to crimes committed against women because such acts have no reasonable nexus with the duties to be performed by the members of the armed forces.[207] Moreover, the committee also suggested that that the cases of sexual violence against woman in the conflict zones can be brought within the purview of ordinary criminal justice system and there was no rationale behind providing special immunity to the members of the armed forces for such crimes as they do not any connection with the duties to performed by the members of the armed forces.[208] The suggestions regarding removal of necessity of previous for initiation of prosecution against public servants were added in the Code of Criminal Procedure, 1973. However, it is interesting to note that such removal was not done for the Special Powers Act and even today when a crime against woman is committed by a member of the armed forces in a place where the Special Powers Act is in place, there can be no prosecution against that member unless previous approval is obtained from the central government.

Justice Hedge Commission was formed in order to inquire into the legality of the killings of certain persons by the members of the armed forces in Manipur under the Special Powers Act and was chaired by Justice Santosh Hedge, a retired judge of the SC.[209] The commission had to inquire whether the shots fired at the persons killed by the members of the armed forces were to defend themselves or there were no initial provocations.[210] After due inquiry, the committee came to a conclusion that none of the persons who were killed had any criminal history or history of violence and they did not attack the members

[207] Ibid
[208] Ibid
[209] J. Venkatesan, 'Panel identifies six fake encounter cases in Manipur' *The Hindu* (04 April, 2013) <https://www.thehindu.com/news/national/other-states//article60444501.ece> accessed 05 July 2022
[210] Ibid

of the armed forces.[211] These finding points to the fact that the powers provided under the Special Powers Act which was to be used under rare circumstances were rampantly misused by the members of the armed forces. Justice Hedge committee also expressed displeasure at the absence of procedural safeguards under the Special Powers Act which has led to the rampant misuse of the power provided under the legislation. The Commission recorded that the force used by the members of the armed forces in the cases that it has examined cannot be termed as minimum by any definition and in many cases the force used was heavily disproportionate in comparison to the threat faced or apprehended.

The concerns raised by the Justice Hedge committee were also previously raised by the Justice J. Reddy committee which said that Special Powers Act lacks procedural safeguards. The committee went to the extent of saying that the Special Powers Act has become a tool in the hand of the state for exploitation, discrimination and can be used by those in power to fulfill their vested interests without any form of accountability or responsibility.

It is to be noted that in spite of such repeated revelations regarding the flaws of the legislation and exhortations to amend it in a suitable manner or repeal it, the Central Government did not attempt to amend the legislation.

There were objections to the implementation of the Special Powers Act in its present form and shape not only from the civil society, activist groups and committees and commissions formed by the Central Government itself but also from several significant international organizations and bodies. There were several special rapporteurs from the United Nations Organization who visited India to study the effect of the Special Provisions Act in the conflict zones earmarked as the disturbed areas by the central or the state government. All of these eminent human rights experts stated that the implementation of the law have led to mass scale human rights violations that are unbecoming of a democratic country like India. One of the rapporteurs have stated that the implementation of the law has led to widespread violation of several fundamental freedoms like right to association,[212] right to assembly,[213] right to speech and free

[211] Ibid
[212] Article 19(1) (c), The Constitution of India, 1950
[213] Article 19(1) (b), The Constitution of India, 1950

expression[214] and not to mention the most sacred right to life and individual liberty[215] and called for the repeal of the law. She brought out a very important point of distinction between the peaceful protests and violent incidents in the disturbed areas. The declaration of an area as a disturbed area does not give the armed forces the authority to treat every situation in the same manner. It should be acknowledged that there can be peaceful protests within the declared areas with respect to constitutionally permitted goals. The armed forces cannot deal with these protestors by using force. The members of the armed forces are trained to operate in nearly black and white situations. The members that are deployed in such areas are not made aware or not sensitized to such distinctions and to act accordingly. Another special rapporteur on extra-judicial and arbitrary killings has mentioned that the special powers which are conferred on the members of the armed forces under the legislation are too broad to be provided even during the extremely rare situations of emergency. The third rapporteur expressed her utter shock and disbelief at the impunity with which the members of the armed forces are operating in the so called disturbed areas under the law.[216]

The Special Powers Act is alleged to be in violation of national as well as international legal instruments. First and foremost, it is held to be in violation of Article 21[217] of the Constitution of India which guarantees right to life and personal liberty to every person. The provisions of the law allow shoot to kill by the armed forces personnel when there is an assembly of five or more persons for unlawful purposes even when there is no threat to life. Moreover, the provisions of the law allowing for arrest without warrant and absence of procedural safeguards also lead to the violation of the same article. Section 6 of the law which mandates previous sanction of the central government leads to violation of the right to speedy and effective disposal of matters by an impartial court of law. This is because when the sanction is not granted by the central government with respect to matters where actual violation of human rights has been committed, the victim has effectively lost all his paths to receiving justice. From the standpoint of the state, it is a

[214] Article 19(1) (a), The Constitution of India, 1950
[215] Article 21, The Constitution of India, 1950
[216] Amnesty International India Briefing, *Armed Forces Special Powers Act: Time for a Renewed Debate in India on Human Rights and National Security* (2013), <https://www.amnestyusa.org/reports/the-armed-forces-special-powers-act-a-renewed-debate-in-india-on-human-rights-and-national-security/ > accessed 05 July 2022
[217] Ibid

failure of justice. As mentioned above by a special rapporteur of the United Nations Organization, there is also a violation of the freedoms provided under Article 19 of the Constitution of India such as right to move, right to form association, right to assemble etc.

The law also contravenes provisions of international legal instruments like Universal declaration of Human Rights, International Convention on Civil and Political Rights, United Nations Basic Principles on Use of Force and United Nations Basic Principles on conduct of law enforcement personnel. Article 2(3)[218] of International Covenant on Civil and Political Rights (hereinafter the ICCPR) states that any person whose rights are violated should have an effective remedy against the violation of such rights notwithstanding the fact that the violation of rights have been done under official capacity. Article 4[219] of the ICCPR states the fundamental freedoms are sacred and cannot be unreasonable taken away even in times of grave emergency. The United Nation Basic Principles on use of force and conduct of law enforcement personnel state that there should be use of minimum force by the members of law enforcement agencies and lethal force should be used under rare circumstances, only when there is a threat to life. However, under the Special Provisions Act, use of maximum and lethal force has become the norm and such force is being used irrespective of the actual necessity.

In Spite of the repeated requests to the government, the Special Provisions Act has not been repealed. There are many reasons offered for it. One of the most cited reasons is the opposition from the armed forces. There are discussions between the government and top leadership of the armed forces but there is no consensus between both the parties. The top leadership of the armed forces have maintained that special powers provided to the members of the armed forces under the Special Provisions Act is a special measure which is being taken under special circumstances and hence they are the need of the hour. They say that the insurgents in the disturbed areas are well organized and well-trained in arms, guerilla as well as intelligence tactics. Due to this, it is nearly impossible for the army to control the situations if they operate under the usual legal framework. Operating under the usual legal framework carries with it the constant fear of prosecution even for acts

[218] Article 2(3), International Covenant on Civil and Political Rights
[219] Article 4, International Covenant on Civil and Political Rights

done in good faith under the necessities of the situation. This view is also shared by military experts who believe that if the army is deployed to control a situation which is beyond the tactical capabilities of the police force, then they have to be provided with some form of immunity. In addition to this, the question of morale has played an important role in this entire discussion. Armed forces leadership has pointed out that prosecutions in civil cases and constant dragging to the court leads to a dip in the morale of the armed forces and hence they are not able to operate with full efficiency. Hence, to help them operate with efficiency and take control of the situation, the immunities guaranteed under the Special Provisions Act are indispensable. However, these justifications offered seem to miss the point that the objections raised are not on the *bona fide* and legal utilization of the powers but the extra-judicial killings and crimes committed against woman under the veil of the immunity provided by the law. No one questions the necessity of controlling the insurgency situations which is leading to political and economic instability and gross violations of human rights and loss of lives. However, the countering insurgency should not mean commission of equivalent violations of human rights by the counter-insurgency forces[220]. This makes the concept of rule of law redundant.

Another reasoning which is being cited by the government is that the purpose of the legislation is not yet over as the threats posed to the integrity and sovereignty of India by the insurgent forces in the disturbed areas still persists. To support this proposition, the example of the identical law passed for Punjab is being cited which was being repealed after the government decided the purpose of enacting the law has been fulfilled.

Another issue with respect to the implementation of the law is the issue of federalism. Before delving deeper into the issue, it is to be kept in mind that the Special Provisions Act is a central legislation enacted by the Union Parliament and hence it can be repealed only by the Union Parliament. Moreover, the states to which the law is to be applied are decided and inserted by the centre and the concerned states have no role to play in it. Thus, a state has no role in deciding whether the Special Powers Act will be applicable in

[220] Sneha Rao, 'Does AFSPA give total immunity to Armed Forces for Killing Civilians' (*LiveLaw*, 06 December 2021) < https://www.livelaw.in/know-the-law/explained-does-afspa-give-total-immunity-to-armed-forces-for-killing-civilians-187014> accessed 05 July 2022

it apart from any internal consultation process that may be undertaken between the Union and the concerned state. In the second stage, the state government of the states where the law has been made applicable has the power to declare areas within its territorial jurisdiction as disturbed areas. There is a potential problem here. When there are two different parties in power in the centre and the state, the centre might want to impose the application of the law without the consultation of the state government and even without knowing or knowingly ignoring the ground realities of the situation. In such a case, as mentioned above, there are chances of many democratic protests falsely being portrayed as undemocratic and violent and using them as a reason to declare disturbed areas. Many state governments have in fact, stated that they want the law to be repealed or at least amended to remove their states but their hands are tied as it falls within the exclusive jurisdiction of the Parliament of India. If the Central Government engages in usurping the power of the state government by creating false reports violent situations, it can be termed as a violation of the principles of federalism which is one of the basic structures of the constitution of India.

The government of the states in which the law is operative has taken varying stances with respect to its necessity and implementation. Some dispensations have expressed their views in support and others have objected to its use.

3.3.4. JUDICIAL INTERVENTIONS

We also need to take a look at the judicial interventions with respect to the Special Provisions Act. In the case of *Naga Peoples' Movement v. UOI*[221], the SC had the chance to delve upon the constitutionality of the Special Provisions Act. The SC held the legislation to be in consonance with the fundamental tenets of the Constitution of India. However, the SC laid down several other important guidelines which lessen the arbitrariness of the legislation. The court held that the declaration of disturbed areas has to be reviewed every six months so as to ascertain whether the need of exercising such special powers still persists in the concerned area. This ensures that the special powers cannot be exercised indefinitely by the armed forces indefinitely irrespective of the need. This guideline is in consonance of the spirit of the legislation which was envisaged as a

[221] *AIR 1998 SC 431*

temporary measure to deal with extra-ordinary measures. As mentioned earlier, the legislation was originally intended be operative only for a year but has since then been in force.

In addition to this, the court also held that the central government, while denying prosecution under section 6 of the Special Powers Act, has to give cogent reasons. However, this practice has not been consistently followed. Next, the court ordered the armed forces issue to a set of Dos and Donts to the members which are to be strictly followed on the ground. These include use of minimum force and use of lethal force only when extremely necessary. These Dos and Donts were intended to be legally enforceable, violation of which could attract criminal prosecution. However, reports from the ground show that these directives are being violated by the members and no legal proceedings were taken against these members.

Another important case with respect to the law is *CBI v. General Officer Commanding*[222]. This particular case pertained to the legality of section 6 of the Special Powers Act. As discussed in an earlier section, section 6 of the Special Powers Act makes the prior approval of the central government mandatory for initiation of any prosecution for members of the armed forces for any act done or purporting to be done by them under the law in the disturbed areas. Here, the court gave the option to the army to try the accused under army tribunals instead of normal courts. Although, the court clearly took a stand that when a member commits a serious crime in a disturbed area, there should be no reason why he cannot be tried and punished under ordinary law of the land under ordinary courts. However, the court also held that the it is up to the Central Government to decide whether to give consent to the prosecution or not as that prerogative has been provided to solely to the Central Government under the law. Critics have pointed out that trying the members of armed forces in separate military tribunals for crimes that have no relation to their official duty under the Special Provisions Act will send a wrong signal to the public that the members of the armed forces are a special class and they are not subject to the ordinary law of the land. Moreover, this might also send a wrong signal to the members of the armed forces who might loosen the degree of caution that they need to exercise while performing their duty.

[222] *Criminal Appeal No. 257 of 2011*

In the case of *Extrajudicial Execution Victim Families Association v. Union of India*[223], the SC held that the killing of people by the members of the armed forces in Manipur is not acceptable. The top court emphasized on the concept of rule of law. It said that the concept of rule of law is equally applicable to civilians, militants as well as insurgents. Thus, no one can be treated beyond the means and bounds of rule of law. Rule of law is the foundation of the concept of democracy. Thus if a member of the armed forces kills a person without first aggression and without use of force which leads to the reasonable apprehension of death and the member of the armed forces has not fired and killed in self- defence, then this cannot be stated to be acceptable under the foundational values of the Constitution of our country. The court had ordered that there needs to be meticulous examination of each and every so called encounter that has taken place under the aegis of the armed forces in the disturbed areas under the Special Provisions Act. The results of those investigations can go both ways. The member of the armed force can be either acquitted or found guilty. But such an investigation is indispensable in the interests of rule of law. The armed forces of a democratic country like India have to work under democratic ethos and maintain highest standards of integrity and respect for human rights. The conduct of the members of the armed forces has to be in consonance with the code of conduct reflected in the international legal instruments as well as cardinal principles of international humanitarian law.

Moreover, the court analyzed the issue of existence of the war like situation in the states where the Special Provisions Act has been made applicable. The Court held that there cannot be held to be existence of a war like situation in these states irrespective of the level of insurgency and armed movements. It reflects poorly on the capability of a highly trained and professional army like the Indian armed forces if they have not been able to tackle such a situation for the last seventy odd years. Hence, these situations are internal disturbances and have to be treated like that. While dealing with such situations, it cannot be permitted to assume every person carrying a weapon as an enemy and thus they cannot be treated as such by using maximum lethal force. The question of morale of the armed forces is important but the morale of the armed forces cannot be kept high at the cost of the rule of law and democratic ethos under which the armed forces are operating. The

[223] *Extra-Judicial Execution Victim Families Association v. UOI, WP (Crim) 129 of 2012*

armed forces are not above rule of law but on the contrary they have a sacred duty to uphold the rule of law. Killing a person should be last resort and it cannot be made the norm even when dealing with armed insurgents. The directives issued to the armed forces to act as internal guidelines are enforceable and they display the commitment of the forces towards upholding respect for human rights and rule of law. They cannot be broken or contravened at will.

3.3.5. ANALYSIS

The concerning part of the Special Provisions Act is that there are serious procedural discrepancies and loopholes even in the implementation of the law in its present form. As stated earlier, section 6 mandates prior permission of the Central Government for initiation of prosecution of members of the armed forces. However, in reality, it is seen that the Central Government has given sanction for very few prosecutions and refused sanction for majority of the prosecutions.

In the procedure provided under section, two ministries of the Union government are involved. The first one is the Ministry of Defence which is the controlling authority for the armed forces of our country and the second one is the ministry of Home Affairs which is the controlling authority for the paramilitary forces. It has been observed that both the ministries are reluctant to give sanction to initiate prosecution even against serious crimes outside the ambit of duty of the armed forces. The fact that the central government does not maintain transparency regarding the entire issue of granting prosecutions adds more trouble to the issue. First of all, there are is no central depository from where the data regarding the application for initiation of prosecution and action taken upon it can be obtained. The same is true in the state level. Most of the states where the Special Provisions Act has been in place do not have properly collated data regarding the investigations done in case of alleged human rights violations by the members of the armed forces and the resultant investigation and application to the central government for initiation of prosecution. Also, with respect to whatever data is available, there are glaring discrepancies between the data available at the state level and at the union level. Apart from the mismanagement of data, this discrepancy also points towards another possible major problem, intentional concealment of material facts to provide immunity

from action to people who would have been adjudged as guilty if approval for prosecution was provided by the Central Government.

Another problem is related to disbursal of the information under the Right to Information Act, 2005. Under the Right to Information Act, 2005, violations of human rights is not excluded from the purview of the right to information of the citizens even if the matter concerns national security.[224] However, many times, people who have sought information on this respect have been refused citing national security. The SC has expressly stated that the granting or otherwise of sanction under the Special Provisions Act by the Central Government is subject to judicial review by the court. However, when the entire process is so opaque, victims do not have the opportunity to knock the doors of justice. The Central Information Commission refused to provide details of the files regarding applications for sanction for initiation of prosecutions against members of the armed forces. The application was filed seeking the memorandum of procedure followed by the ministry of Home Affairs in case of application asking for sanction, methods used by the ministry in weighing evidence to arrive the conclusion regarding the absence or presence of a *prima facie* case and the authority on which the final power to take the decision regarding the approval or rejection of sanction for initiation of prosecution rests. But, all these content were denied by the Central Information commission. This means that we still do not have a clear idea regarding the exact procedure, if any, followed by the ministries of the Union government in approving or denying sanction. The central Information commission should have allowed the ministry to divulge this crucial information as this also helps the victims in effectively exercising their right to judicial review against the decision of the central government.

There is evidence of many fake encounters being committed in all the states where the Special Powers Act has been in place. From whatever data is publicly available, it has been observed that there are no sanctions that were accorded by the Central Government from 1990 to 2011 for initiation of prosecution for alleged violations of rights that were

[224] Section 24, Right to Information Act, 2005

conducted in the erstwhile state of Jammu and Kashmir under the Special Provisions Act.[225]

There are certain flaws which are found in the entire process from of sanction from investigation to granting of sanction. In many cases of human rights violations by the members of the armed forces, the concerned state government is not willing to initiate investigation into the matter. Even when investigations are initiated, the process becomes slow, cumbersome and results in a failure. This can be because of the non-cooperation of the armed forces in the police investigation. The members of the armed forces do not provide the requisite support to the police officials conducting investigation as a result of which the police official face a very hostile situation. This drags the investigation for a very long period of time. Moreover, in such cases, there are no fixed time periods within which investigations are to be completed as a result of which they get trapped in a never ending loop. Sometime, the same investigation is overseen by multiple investigation officers over a long period of time which dilutes the rigor of the investigation process.

From the above discussions, it becomes clear that the implementation of the law has become at a very high and according to some critics unacceptable cost of gross human rights violations. However, a closer look at the effect of the law reveals that it has not been actually be able to control the situation at the ground level. The insurgency has not come down and on the contrary some critics claim that due to the excesses conducted by the members of the armed forces at the ground level, the people in the disturbed areas has developed a feeling of antagonism against the armed forces and the authority that controls them. This has actually helped the insurgents. They have taken advantage of the situation and instigated the local population against the armed forces and the authorities. Thus, the measures taken by the armed forces went against the entire object and purpose of the Special Powers Act. Thus, the human rights violations allegedly conducted under the Special Powers Act as well as the refusal of the central government in most cases to provide an opportunity to the victims to achieve justice has ultimately defeated the very purpose for which the law was formulated, restoring normalcy and stability in the areas

[225] Amnesty International India Briefing, *Armed Forces Special Powers Act: Time for a Renewed Debate in India on Human Rights and National Security* (2013), <https://www.amnestyusa.org/reports/the-armed-forces-special-powers-act-a-renewed-debate-in-india-on-human-rights-and-national-security/ > accessed 05 July 2022

affected by insurgency. Thus, there were inherent as well instrumental consequences in the violation of the human rights by the members of the armed forces.

Thus, there needs to be a way forward and there is a need of urgent legislative as well as executive intervention. As discussed above, many critics as well as human rights experts have been demanding for the repeal of the law. However, others want to go through a more moderate path and want the law to be suitably amended in order to plug the existing loopholes and drawbacks. National security legislations are always about balancing between the fundamental freedoms guaranteed by the Constitution of India and preserving the unity and integrity of the nation and the Special Provisions Act has not been an exception to this. But, the Special Provisions Act has seemed to be fail in this attempt and hence suitable corrective actions need to be taken.

Thus, the Central Government should either repeal the law or at least suitably amend it. Some of the plausible amendments to the law, as collated and analyzed from the reports of various committees and commissions are as follows.

First, section 6 of the law needs to be amended to exclude previous sanction of the central government for the initiation of prosecution for sexual crimes against woman. The argument that since sexual crimes do not fall within the purview of the official duties of the members of the armed forces and hence are anyway excluded from requirement of previous sanction by the central government does not hold water because that is not the scenario in the grass root level. An express exclusion in the statute to this effect will go a long way to help the victims of sexual crimes to get justice.

Second, the law needs to be amended to include that under section 6, central government should give reasons in writing while declining sanction for initiation of prosecution. There should be specific time-frame for responding to the application and if there is no response from the government during the time period, then prosecution would be deemed to be sanctioned by default.

Third, the law should be amended to ensure that a timely review happens of the activities of the armed forces within the disturbed areas. Moreover, after the review, the cases in which prosecutions have been initiated should be tried in special fast track courts which should be specifically established for the effective and speedy disposal of these cases.

In this chapter, we have seen that the national security legislations in existence are prone to misuse and the judicial interventions have helped to a certain extent in protecting the rights of the individuals. In the next chapter, an attempt is made to examine the security laws that of independent India that are no longer in existence.

CHAPTER 4: NATIONAL SECURITY LEGISLATIONS IN INDEPENDENT INDIA (REPEALED\LAPSED)

4.1. PREVENTIVE DETENTION ACT, 1950

The Preventive detention Act, 1950 (Preventive Detention Act) was enacted only three years after India gained independence.[226] It was brought about in order to restrain any activities that hampered national interest and unity and integrity of our country. Though the Preventive Detention Act was initially supposed to have an operating period of two years year, it was extended till 1969. It was applicable to the entire country except the erstwhile state of Jammu and Kashmir. [227]

Section 3[228] of the Preventive Detention Act provides power to the Central Government as well the state government to issue orders of detention. According to the section, the Central Government or a state government should be satisfied that a person is making an attempt to act in a manner which is inconsistent or detrimental to the interests of the unity and integrity of India, capability of the county to defend itself, the relations of India with other countries, continuous availability of services and goods which are essential in nature and maintenance of public order and it is imperative to prevent that person from doing so. In addition to this, the appropriate government should be satisfied that there is a foreigner in India whose presence within the territory of India needs to be controlled or he needs to be deported back from India. Once these satisfactions are arrived at, the Central Government or the state government can pass an order for detaining the concerned person.

The powers provided to the Central or the state government to issue an order of preventive detention is also provided to certain responsible functionaries of the state government which include the District Magistrates, Additional District Magistrates, Commissioner of Police of Hyderabad, Madras, Calcutta or Bombay and collectors of

[226] Pradyumna K Tripathi, 'Preventive Detention: The Indian Experience' (1960) The Americal Journal of Comparative Law 291
[227] Ibid
[228] Section 3, Preventive Detention Act, 1950

territories which earlier comprised certain states which were later merged with India.[229] But, these power provided to the functionaries are regulated. Once any of the public officials mentioned above issues an order of detention, it has to forward the order to the state government to which he is subordinate along with an explanatory note where it addresses the facts and circumstances attending the detention order issued by it. The detention order issued by a public official will not remain valid for more than a period of twelve days unless it is sanctioned by the state government within that period of time.[230] This is can be termed as a procedural safeguard which is inserted in the legislation to ensure that the special powers granted to public functionaries like collectors are not misused by them. Moreover, when an order under this law is originally issued by the state government or an order already issued by the public functionaries like collectors have been approved by the state government, it has to convey the fact to the Central Government and also attach an explanatory note laying down the facts and circumstances under which the detention was made and the grounds on the basis of which the detaining authority acted.

When a person against whom an order has been made has absconded or there is a reasonable doubt that he might be absconding in order to avoid relieving the service of the order, the appropriate authority shall send intimation to the judicial magistrate first class within whose territorial jurisdiction the person concerned resides or last resided. On receipt of that intimation, it would be deemed that sections the then prevalant code of criminal procedure, applies to this person and the judicial magistrate would act accordingly. After that, there would be a notification in the official gazette that the person absconding would be given a certain amount of time to appear before the judicial magistrate. If the person concerned fails to appear before the judicial magistrate within the period specified, then he will be prosecuted under the then prevalent code of criminal procedure and he can be sent to imprisonment for a maximum period of one year. However, the person concerned can be excused from the implementation of the order only when he can show to the satisfaction of the magistrate concerned that he was not aware of the service of the detention order or that he was not voluntarily avoiding

[229] Section 3 (2), Preventive Detention Act, 1950
[230] Section 3 (3), Preventive Detention Act, 1950

appearance before the magistrate but was forced by some circumstances which were beyond his control.

Section 7[231] of the Preventive Detention Act, deals with disclosure of the reasons for detaining the persons concerned. The section states that the grounds on the basis of which the person has been detained have to be communicated to him not later than five days from the date of detention. Here, there is a problem. The disclosure of the grounds of detention of the person can be communicated to the person till the fifth day of the detention order being issued to him. Thus, he can be detained without knowing the reason for detention for five days. This is a violation of the right of the person.

If we look at the criminal procedure code prevalent today, i.e. the Code of Criminal Procedure, 1973, a person who is arrested is to be given the reasons for arrest at the time of arrest.[232] Moreover, the detaining authority has the power to withhold the facts or grounds of arrest from the person being detained in the public interest. There are no standards that are laid down in the legislation regarding what constitutes public interest. Thus, it depends on the discretion of the executive on what it describes as falling within the ambit of public interest. Public interest is a very broad term and giving a broad discretion the executive can make it prone to executive misuse.

As discussed before, the Preventive Detention Act is one of the first national security legislation in India. It introduced the system of constituting advisory boards which has been later followed in other national security legislations. Under this legislation, an advisory board can be constituted by the Central Government as well as the state government whenever they deem it necessary. The Board will constitute three persons who are qualified to be high court judges and these persons shall be appointed by the appropriate government. Out of those people, one can be a chairperson of the advisory board. The appropriate government has to send the matters of persons concerned where it has issued preventive detention orders, to the advisory board within thirty days of the issuance of the detention order. The advisory board will evaluate the matters of detention based on the materials submitted to it by the appropriate government. In addition to this, it may call for other information which it determines necessary for the purpose of

[231] Section 7, Preventive Detention Act, 1950
[232] Section 50, Code of Criminal Procedure, 1973

evaluating the matter in a reasonable manner. The detainees will have the right of representation in front of the advisory board. However, the right of representation will not be in the form of practicing pleaders or advocates. \

After the advisory board has heard the side of both parties, it will take a decision and forward the same to the appropriate government. If the advisory board opines for the detention of the detainee, then the appropriate government may, at its own discretion continue the detention of the detainee. However, if the advisory board advises against the detention of the detainee, then the appropriate government has to cancel the detention at once and release the detainee.

It is hereby to be noted that the report that the advisory board will submit to the appropriate government will remain confidential except the part of the report where the advisory board states its opinion on whether the detention of the detainee shall be continued or not. This is problematic since if the advisory board opines for the continued detention of the detainee and then the appropriate government does not disclose the reasons of detention in public interest, then the detainee can be restrained for a long period of time without even knowing the reason for which he is being detained. This is against the basic human rights of the detainee. Such a feature can also be seen in the modern national security legislations in India such as the UAPA, 1967.

The maximum period for which the appropriate government can continue the detention of a person is twelve months.[233] Before the maximum period for detention has passed, the detention of a person can be revoked. However, for a person whose detention has been revoked, fresh detention orders can be issued by the government where certain novel facts have surfaced which requires issuance of fresh orders for the person. Also, during the detention of a person he can be released in a temporary manner at the discretion of the appropriate government. When the person is released, he can be released on the issuance of a bond. If there is a breach of the condition of the bond, then the person can be apprehended. The legislation provides immunity to any person who acts in good faith under the provisions of the legislation.

[233] Section 11, Preventive Detention Act, 1950

The validity of the Preventive Detention Act was directly put into question in the case *AK Gopalan v. State of Madras*[234]. AK Gopalan was a leader of the communist party and was active in party politics. He was charged with several offences and was undergoing trial. In the meanwhile the State of Madras also issued orders of preventive detention against AK Gopalan under the Preventive Detention Act. AK Gopalan was acquitted of the charges in the trial held in the court of law. But his personal liberty was still sought to be restrained under the Preventive Detention Act by issuing detention orders. AK Gopalan challenged the detention orders to be illegal as he contended that the legislation under which these orders were issued, i.e. the Preventive Detention Act is in itself violation of the fundamental principles of the Constitution of India. AK Gopalan [235]contended that the Preventive Detention Act violates article 19, 21 and 22[236] of the Constitution of India. It violates Article 19 because it restrains the right to free movement and other freedoms guaranteed under Article 19[237] of the Constitution of India. The state of Madras, on the other hand, contended that the Preventive Detention Act is not in violation of the Constitution of India. It argued that under the constitutional scheme of India, the state can curtail the right and personal liberty of a citizen through a law which has been enacted under a valid procedure. The Preventive Detention Act has been brought into effect under a valid procedure and hence there is no question of invalidity. And Article 19[238] of the Constitution of India is applicable to only citizens who are free and whose freedom has not been validly restricted by any law validly made by a legislature.

The majority judgement of the SC supported the contentions offered by the State of Madras. It upheld the validity of the Preventive detention Act. It upheld the logic that the Preventive detention is made under a valid procedure which is prescribed by the Constitution of India. And hence, it fulfills the requirement of Article 21[239] of the Constitution of India. Hence, the legislation is not invalid. However, the court held that section 14 of the Legislation to be invalid. Section 14 of the legislation put a bar on the court to ask a statement of the grounds of detention of the appropriate government,

[234] *AIR 1950 SC 27*
[235] Ibid
[236] Articles 19, 21, 22, Constitution of India, 1950
[237] Article 19, Constitution of India, 1950
[238] Ibid
[239] Article 21, Constitution of India, 1950

representation made by the detainee before the advisory board and the proceedings of the advisory boards. The court stated that this provision creates a bar on the court to decide the validity of the grounds on which the appropriate government has detained a person. However, the court used the doctrine of severability and held that this provision can be separated from the rest of the legislation without hampering the essence of the legislation and hence the rest of legislation remains valid. Moreover, it took a restricted view of the fundamental rights. It held that all the fundamental rights are to be viewed within their own scope and ambit and cannot be viewed in consonance with other fundamental rights. Violation of one fundamental right does not automatically lead to violation of another fundamental right. Right to freedom is only applicable to free citizens and a person restrained under a valid law cannot claim violation of that right under the Constitution of India.

4.2. MAINTENANCE OF INTERNAL SECURITY ACT, 1971

The Maintenance of Internal security Act (MISA) was enacted by the Indian Parliament in the year 1971.[240] It was envisaged as a substitute for the Preventive Detention Act the effect of which ended in the year 1969. It was originally intended to counter the terrorist activities that have been going on the territory of India.[241] It also tried to prohibit the foreign assistances in the terrorist activities happening within the territory of India. However, the MISA was later utilized by the political dispensation not to curb terrorist activities but to bring curb constitutionally permitted legitimate political dissent within the country. [242]

The legislation was widely utilized during the emergency era to execute mass arrests and put people in detention without trial for a long time. As a result of this, the law was widely criticized by civil right activists, human rights activists within the country as well as intentional community. The political parties who were at the opposition at that time, had to bear the brunt of the law. In the next general elections, the misuse of the law was a

[240] Ravi Nair, 'the Emergency of 1975-77 and the long shadow it casts today' (*Newsclick*, 27 June 2022) <https://www.newsclick.in/the-emergency-1975-77-llong-shadow-casts-today> accessed 05 July 2022
[241] Ibid
[242] Ibid

major political issue. When the party in power which brought the law lost the election and a new party came to power, then it repealed the MISA. However, an economic twin of MISA known as the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 is still in operation.

The first few sections of the MISA replicate the Preventive Detention Act. Both the Central government as well as the state government is given power to detain people if a satisfaction is arrived the concerned person might pose a threat to the unity and integrity of the nation, security of the nation, essential supplies etc.[243] The person needs to be furnished the grounds of his detention within a particular time frame.[244] However, the grounds can be rejected by the appropriate government in public interest. An advisory board can be formed by the appropriate government for the evaluation of the preventive detention orders, consisting of persons who are qualified to be judges of high courts[245]. The advisory board needs to be follow a particular procedure for evaluating the detention matters and the decision needs to be conveyed to the appropriate government who shall then act on that decision.

However, certain new provisions which were not present in the Preventive Detention Act were added in the MISA. The MISA was mended several times before and during the emergency period to suit the political need of the ruling dispensation.

In 1975, an amendment was made to section 15[246] of the MISA which dealt with the temporary release of the person detained on conditions with or without sureties. The amendment added a last sub-section which states that a person who has been detained under the preventive detention order issued under MISA shall not be released on bail or bond under any law for the time being in force except the section.

Section 16 A[247] was inserted to deal with situations during emergency. This section contained more stringent provisions to deal with the unrest that happened during the emergency period. The section made an attempt to override the principles of natural justice to state that notwithstanding natural justice, the section shall have effect during emergency under Article 352 of the Constitution of India either in December 1971 or

[243] Section 3, Maintenance of Internal Security Act, 1971
[244] Section 8, Maintenance of Internal Security Act, 1971
[245] Section 9, Maintenance of Internal Security Act, 1971
[246] Section 15 (6), Maintenance of Internal Security Act, 1971
[247] Section 16 A, Maintenance of Internal Security Act, 1971

1975. Under the section, the appropriate government has been authorized to review the detention of the persons who have been detained before the commencement of the section on the basis of the object and purpose of emergency. If the government finds that the detention is necessary in order to fulfill the purpose of emergency, then the government can confirm it through an order. While dealing with fresh cases of detention, the criteria to be looked into by the appropriate government or the public officials who have the capability to make detention have been altered for the period of emergency.

During the emergency, the authorities have to decide whether the detention is necessary for effectively carrying out the emergency. The review of the detention order of a person who is in the custody of the appropriate government has to be done at an interval of four months and after the review if the appropriate government finds that the detention is no longer necessary to fulfill the purpose of emergency, then the person can be released. Sub-section 4 of the section has certain concerning elements within it. The sub-section effectively takes away from the detainees the right to representation and right to appeal and review. According to the sub-section, while making a review of the detention order by the appropriate government, it may choose to not give to the detainee any material in his possession on the basis of which it will decide on the further necessity of detention. In addition this, the appropriate government may choose not to give a right to representation to the detainee against the continuation order, confirmation order or the review order.

Under section 17 A of the MISA, duration of preventive detention permitted under normal circumstances has been changed for emergency period.[248] During the period of emergency, any person who has been detained under an order issued under MISA can be detained for two years without the approval of the advisory board. Such a detention can be done when the person is detained in order to prevent him from engaging in any act which perilous to the security and integrity of the nation as well as maintenance of public order and safety. If we look at the provision we can infer the manner in which individual liberty is being curtailed under the legislation. Here, a person is detained if satisfaction is arrived at by the appropriate authority that the detention can prevent the person from committing certain acts which the legislation wants to prevent. However, under the prevent provision; a detained person can be kept in that state for years without taking the

[248] Ibid

case to the advisory Board. This means that there will be no judicial application of mind in the matter for an unreasonably long time. Moreover, citing public interest, the appropriate authorities nay refuse to disclose the grounds of detention. This special provision takes the total amount of detention permitted by the legislation to three years from the initial twelve months. Such long period of detention go against the basic tenets of personal liberty which is being followed by democracies like India.

The legislation clearly states that the detention of a person cannot be validly challenged on the grounds of natural justice and common law. The presumption is that principles of natural justice and common law are not implied within the constitutional scheme of India and the legislations made under it. Going by the expositions of various constitutional law scholars, this is a wrong presumption and cannot be accepted. Principles of natural justice are inherent in the constitutional scheme of India[249] and the legislations which are in the constitutional scheme of India cannot override these principles.[250]

A landmark case pertaining to MISA is *ADM Jabalpur v. Shivkant Shukla*[251]. In this particular case, section 16 A (9)[252] of MISA was called into question. The case lies in the context of the emergency declared in 1975. After the emergency was declared under Article 352[253] of the Constitution of India, the President issued a notification under Article 359 (1)[254] of the Constitution of India. Article 359 of the Constitution of India deals with the issue of suspension of the rights granted by Part III of the Constitution of India during the period of emergency. According to the article, when emergency is in operation, the President of India has authority to issue a notification stating that the enforcement of certain fundamental rights shall be suspended during the period emergency. Using this provision, the President of India released a notification stating that rights granted under Articles 14, 21 and 22[255] cannot be enforced during the operation of emergency. Numerous people were arrested under MISA. There were petitions in the SC of India for release of the detainees.

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[249] Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (5th ed. Oxford University Press 1999) 324
[250] Ibid
[251] *1976 AIR 1207*
[252] Section 16 A (9), Maintenance of Internal Security Act, 1971
[253] Article 353, Constitution of India, 1950
[254] Article 359 (1), Constitution of India, 1950
[255] Articles 14, 21, 22

The petitioners had argued that section 16A (9)[256] of the MISA was unconstitutional. Section 16A (9)[257] explicitly prohibited the disclosure of grounds of detention to the detainees or sharing with the detainees any material which might be associated with the grounds of detention. The Court held that Article 16 A (9) is just a rule of evidence not unconstitutional. And due to the application of Article 359 (1), there can be no enforcement against the violation of Article 21. Thus, the court effectively held that there is no right to habeas corpus. The minority opinion of the judgement however said that right to life and personal liberty does not emanate from the Constitution and hence the Constitution cannot absolutely take it away from the citizens, even during the time of emergency. The minority opinion emphasized on the fact that right to life and liberty are so fundamental and inherent to human existence that any law that tries to take it away in an unreasonable cannot be accepted in a modern democratic state.

4.3. TERRORIST AND DISRUPTIVE ACTIVITIES (PREVENTION) ACT, 1987

The Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter TADA) was a legislation which was brought into effect in order to primarily control terrorism, secessionist and separatist tendencies, especially in Punjab. [258] But like most other national security legislations, it was later used to harass certain minority communities and activists. This can be termed as the first anti-terrorism law of independent India[259]. The legislation had a provision under which it would automatically lapse after the completion of two years from the date of coming into force. However, the law was renewed many times after which it finally lapsed in the year 1995.[260]

The legislation made an attempt to provide a comprehensive definition of the term terrorism. According to section 3[261] of TADA, a person is said to be engaged in terrorist activities when he tries to overawe the government established by law by force, create

[256] [256] Section 9, Maintenance of Internal Security Act, 1971
[257] Section 16 A (9), Maintenance of Internal Security Act, 1971
[258] Rahul Tripathi, 'TADA to UAPA, What Does India's terror law says' *The Indian Express* (New Delhi, 30 August 2018) <https://indianexpress.com/article/explained/tada-to-uapa-what-indias-terror-laws-say-elgaar-parishad-probe-5331777/> accessed 05 July 2022
[259] Ibid
[260] Ibid
[261]Section 3, Terrorist and Disruptive Activities (Prevention) Act, 1987

fear in the mind of people or certain group of people, does any act to affect the trust and harmony among people or alienate one group of people from another or does any act with the help of weapons or explosive substances which has the potential to cause loss of human life and destruction of property or halt in the essential supply. The legislation also defines disruptive activities as activities which has the potential to lead to the threat of the unity and integrity of India or facilitate the secession from the territory of India. Compared to the definition of terrorism which had very specific connotations, the definition of disruptive activities was very vast and has the potential to bring within its ambit legitimate protests without any secessionist tendencies or violent or provoking elements.

Section 1[262]5 of TADA creates a rule under which the confessions made to a police officer in the absence of a magistrate will be admissible as evidence in a court of law when the confession is recorded in writing or recorded in a mechanical device which has the capability to accurately replicate the sound, by a police officer equivalent to or above the rank of Superintendent of Police. However, the condition or pre-requisite is that caution needs to be provided by the police officer to the accused before recording the conversation. This is contrary to the norm laid down in the Indian Evidence Act, 1872[263]. This has led to an increase in torture and forced confessions in police custody during the implementation of the legislation.

The validity of TADA was questioned in the case of *Kartar Singh v. State of Punjab*. [264]In that particular case, the petitioners argued that TADA violates the fundamental rights guaranteed under Part III of the Constitution of India. The SC held that TADA is within the permissible limits of the Constitution of India. It emphasized upon the need to take into account the prevailing societal circumstances in order to analyze the constitutionality and necessity of security legislations. The court stated that the entire world is facing the menace of terrorism and India is no exception. In such a situation, there arises the need of legislation with strict provisions so that peace and tranquility can prevail in the society.

[262] Section 15, Terrorist and Disruptive Activities (Prevention) Act, 1987
[263] Section 125, Indian Evidence Act, 1872
[264] *(1994) 3 SCC 569*

4.4. PREVENTION OF TERRORIST ACTIVITIES ACT, 2001

The Prevention of terrorist activities Act, 2001 (POTA) was enacted in the context of the terrorist attacks that happened in the United States of America in September 2011 as well as the attack on Indian Parliament. The provisions of the legislation were almost similar to that of the TADA. Due to such draconian provisions, the law faced widespread criticism from members of civil of human rights activist groups as well as civil liberties groups. Under the law, around four thousand three hundred cases were registered.[265] These registered cases led to around thousand arrests[266] and thirteen convictions.[267]

Like TADA, even under POTA, people could be detained for a long time without trial. Also, the confessions given to a police officer were admissible in a court of law. This was against the general rule laid down in section 25 of Indian Evidence Act, 1872. However, under section 34 of POTA[268], an appeal could be made to a High Court from the orders of a special court constituted under the legislation, on both fact as well as law.

The validity of POTA was challenged in the case of *People's Union for Civil Liberties v. UOI*[269]. In this case, the Apex court of India upheld the constitutionality of POTA. Apart from the independent reasoning provided for certain provisions, the court also relied on the fact that the majority of the provisions of POTA were borrowed from TADA and TADA was already held valid by in the case of *Kartar Singh v. State of Punjab*[270]

In the above discussion, we have seen that the many national security legislations which were used as tools of curbing political dissent and free voices were either allowed to be lapsed or were repealed due to pressure from civil society groups, human rights activists and common people. In the next chapter, the author aims to do a comparative analysis of the sets of legislations discussed above.

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[265] Bureau, 'Manish Tiwari: Because POTA was misused, Advani initiated its repeal' *Business Standard* (New Delhi, 23 July 2019) <https://www.thehindubusinessline.com/news/national/manish-tiwari-because-pota-was-misused-advani-initiated-its-repeal/article28691056.ece> accessed 05 July 2022

[266] Ibid

[267] Ibid

[268] Section 34, Prevention of Terrorism Act, 2002

[269] (2004) 9 SCC

[270] *(1994) 3 SCC 569*

CHAPTER 5: A COMPARATIVE ANALYSIS

5.1. HORIZONTAL COMPARATIVE ANALYSIS

In the previous sections, a detailed discussion was being done regarding the legislative history of the national security legislations in pre-independence as well as post-independence India. The changes introduced by the significant amendments to the laws as well as the background on which such amendments were introduced by the government were discussed and analysed in detail. After this, the seminal judicial pronouncements associated with the laws including challenge on their constitutionality and other aspects were discussed and salient points of the judgement were analysed. From the above mentioned discussion, several important points regarding these laws come to the forefront. They will be discussed below.

First, the laws have been enacted for a specific purpose, was claimed to be used for another purpose, but was ultimately used for a third common purpose. The UAPA, 1967 was enacted to curb communal, sectarian and regionalist elements which posed a threat to the integrity of India. But, after the attack on United States of America in 2001, it was amended several times to use it as anti-terror law of the country. However, it has being continuously used for a third purpose, i.e. stifling dissenting voices. Similarly, the NSA, 1980 was enacted to curb black-marketing. Later, it was claimed to use for curbing elements which posed threat the sovereignty of the country. The 1984 Amendment was made on these lines to use it in the state of Punjab which was facing secessionist movements. However, it has been continuously used for a third purpose, i.e. harassing people who dare to stand up against the ruling dispensation. The Special Powers Act was enforced with the apparent reason of curbing terrorism in the north-eastern region. But ultimately, it became a tool in the hands of the central as well as the state governments for mass human rights violations and abuses.

Second, the laws faced wider public criticism for their amendments rather than their enactment. As discussed earlier, at the time of its enactment, UAPA, 1967 created fact a finding mechanism which was used to detect the elements prejudicial to the interests of the nation. The law took its own course and the accused were tried under the normal trial

procedure of the then existent criminal procedure Code. However, the much criticised provisions of UAPA, 1967 such as the stringent bail provisions and designating individuals as terrorists were added later through amendments.

The NSA, 1980 also has a similar history. The Parliament, through the 1984 first and 1984 second amendments, added certain changes to the NSA, 1980 which made the law more draconian. Section 14 was amended to empower consecutive detention orders against an individual. From this, we can infer that the problem is not with a single piece of legislation or a number of legislations. This can be said because these legislations were not initially intended or used in the manner they have been infamous for. Rather, they have been twisted by the ruling dispensation through amendments and then misused for their interests.

Third, the laws provided wide executive discretion without providing for adequate procedural safeguards. As discussed earlier, under Section 3 of the UAPA, 1967 the central government has the authority to declare an association as unlawful if it is of the opinion regarding the same. The proviso to the same section enables the Central Government to withhold facts which the central government deemed to be in public interest. Although such an order becomes effective once confirmed by a tribunal, the Act also includes a proviso under which the Central Government can make an order with immediate effect. These same applies while designating an individual as a terrorist under the fourth schedule. The procedural safeguard for the same are loose and there are no judicial scrutiny. These provisions are being used by the successive regimes in an indiscriminate manner in order to harass individuals outside the scope of judicial scrutiny. Under the NSA, 1980, the appropriate authority is not bound to disclose the reasons for detention if it deems it appropriate to withhold them for public interest. Also, the report of the advisory board on the materials and basis for the decision are kept confidential. There are no right of the accused to represent through his or her lawyer before the advisory board. In addition to this, section 14 allows the central government to issue subsequent detention orders against the same person even if no new facts giving rise to threat have arisen. These provisions, when taken together form a sphere where the executive has unrestrained discretion and is almost beyond judicial reach.

Fourth, these laws had certain loopholes which could be used by the executive in their own favour. These loopholes were adequately discussed in the Kafeel Khan case. In this case, Dr. Khan provided the material on the basis of which the detention order was passed, in a compact disk. But, no device was provided through which Kafeel Khan could access the contents of the disk. This was actually a denial of Dr. Khan's right of effective representation. Moreover, the detention of Dr. Khan was extended twice without there being any substantive material of continued threat. On the top of it, the orders of extension were not served upon the detainee. Similar issues were seen the case of Akhil Gogoi too. Mr. Gogoi's bail was repeatedly resisted by the government authorities. The extended bail provisions resulted in the fact that Mr. Gogoi had to spend almost a year and a half in a case in which he was later acquitted.

Fifth, the judicial interventions in both the cases make an effort towards restoring individual personal liberties. But due to certain internal constraints in the judicial system, these efforts help the citizenry only to a certain extent. In the recent case of *Union of India v. KA Najeeb*, [271] the SC held that in spite of the stringent provision of bail contained in section 43 D of the UAPA, 1967, a constitutional court can provide bail to an accused if his right to speedy trial under Article 21[272] of the Constitution of India is being violated. Refusing to accept the argument advanced by the government based on the case of National Investigation Agency v Zahoor Ahmad Shah Watali[273] while deciding on such issues, the court stated that it has to consider the amount of time an accused has to face throughout the trial procedure before his case is adjudicated on merits. In another case of *Thaha Faisal v. UOI*[274], the SC harped on the principle of judicial interpretation that the penal statutes need to be construed strictly. The SC further stated that in order to attract section 39 of the UAPA, 1967, the mere proof of association with a terrorist organisation is not enough. The prosecution has to prove an overt act of the accused done in order to promote or advance the work of the organisation. Similar pronouncements are also available in light of the NSA, 1980. The SC had upheld the Allahabad High Court's order granting bail to Dr. Khan discussed in the present case. In

[271] *Crim. Appeal no. 98 of 2021*
[272] Article 21, Constitution of India
[273] *(2019) 5 SCC 1*
[274] *Crim. Appeal no. 1302 of 2021*

addition to this, in many recent cases, the SC affirmed the right of a detainee to receive timely communication from the government regarding the status if his representation orders. The top court said that delay in such a case would vitiate the detention order.

Sixth, the judiciary has played a crucial role in determining the defining the purpose and contours of the legislations. In the Akhil Gogoi case, the judge made some salient observations regarding the purpose of the UAPA, 1967. The judge observed that terrorism poses a real threat to the mankind and every country needs a strict anti-terrorism law in order to deal with this threat. In India, the UAPA, 1967 is being used as the principal anti-terror law. And it is nothing unusual for an anti-terror law to have provisions which facilitate the timely completion of the adjudication process so that the guilty can be punished. In case of India, the UAPA, 1967 is functioning as an anti-terror law and therefore contains stringent provisions pertaining to bail taking into account public safety. Thus, the obligation is on the executive and judiciary in order to implement and adjudicate the law with minimum harm to the sacrosanct personal liberties of individuals. The executive should be circumspect while using the law and should adhere to the limitations and procedural safeguards provided in the statute as well as held by various courts. The judiciary should aim to dispose of the cases within a reasonable time so that an under trial should not have to spend prolonged duration behind bars.

Thus, both the wings of the government have to strive to achieve a balance between individual liberty and security of the nation. Similarly, in the case of Dr. Kafeel Khan, the court demonstrated the relationship between the preventive detention and the fundamental rights of guaranteed under the Constitution of India. As discussed above, preventive detention is an exceptional measure and ought to be used as one. The use of preventive detention against one person can be justified only when it protects the fundamental rights of thousand others. But, if the fundamental right of liberty of a person is trampled upon through wrong application of a preventive detention law, it poses a threat to the liberal democratic fundamental values of our constitution.

5.2. VERTICAL COMPARATIVE ANALYSIS

An important aspect that was discussed earlier and is needed to be kept in mind is that in the cases of national security legislations, the apparent purpose of the legislation is different from the intended purpose in most of the cases. And this is true in case of national security legislations in the pre-independence India, those enacted by the British government. If we take the case of Defence of India Act 1915, the purpose which was stated by the government at the time of enacting the legislation was that through the legislation, the government wanted to curb any activity taking place in the soil of India through which the war efforts of British government might be hampered. Thus, the legislation apparently sought to prohibit and penalize any effort on the part of an individual or group to put Britain at a disadvantageous position in the war. But, actually, it was used to curb or restrain any form anti-imperialist activities and freedom movements. Most of the people who were arrested under the legislation and most of the people who were executed and penalized in other manner under the legislation either through life imprisonment, life transportation or imprisonment of a shorter term were those people who were associated with the struggle for independence and had nothing to with the war being fought by Britain with other nations. These people were just concerned with liberating their mother land from the shackles of slavery. As discussed earlier, the same problem applies to the national security legislations in the present day India. Most of them were presented in such a manner as if they are implemented to achieve a certain object which is portrayed by the government. But actually, they are used for certain ulterior purpose which the government is not able to reveal because it may not be one of the goals which can be permitted to be achieved in a constitutional manner.

A comparison between the pre-independence as well as post-independence national security legislations will lead us towards striking similarity between them. We need to recognize that before independence, India was ruled by a foreign power, i.e. the United Kingdom. For them, India was a colony like many other colonies that they possessed across the world. They came to India with the intention of economic profit and colonized the nation so that they could exploit the wealth of India without any obstruction. For them, Indian people were subjects and means to an end. They did not recognize the right

to self-determination and dignity of the people of India. And this attitude of the British was reflected in the legislations that were passed in the pre-independence era like the Bengal Regulation, Defence of India Act, Rowlatt Act and the Special Powers Ordinance. As discussed above, these legislations contained draconian provisions which were based on lack of respect for the rights of the Indian people. However, the situation was expected to change when India received independence from the British and India became a sovereign constitutional democracy governed by rule of law. The old legislations were supposed to be discarded any new legislation, even if based on preservation of national security were supposed to be based on rrespect for rights of citizens. However, this does not seem to be the case. Most of the national security legislations that are prevalent today retain the harsh provisions of the British-era legislations.

The Special Powers Act has the same language and spirit as that of the Armed forces Ordinance. In fact, in certain cases, it is more draconian. For example, in the Armed Forces Ordinance, certain form of procedural safeguard was sought to be achieved through the insertion of the eligibility criteria for the members of the armed forces who could utilize the power. For example, a member of the armed forces above the rank of captain or equivalent ranks in the navy and air force could only use the powers provided in the Armed Forces Ordinance. Whereas under the Special Powers Act, any officer of the armed forces, commissioned or non-commissioned could use the powers under his own authority. When a power is provided to a certain functionary which could affect the right to life of a citizen, it should be provided to a person holding a responsible position and/or there should be an oversight mechanism. However, under the Special Powers Act, there is no such oversight mechanism. In addition to this, Under the Armed Forces Ordinance, orders had to be given in writing to the subordinate officers in order to utilize the power provided under the law. The system of written orders ensures some form of accountability for the actions taken and also assists the courts to take decisions in case prosecutions are initiated for the actions. However, under the Special Powers Act, there are no such provisions for written orders. The people who are provided power under the law can act in their own authority and own satisfaction.

Under the Preventive Detention Act, the power provided to the lower level public functionaries like collector has been scrutinized by state government. The orders of

detention issued by these functionaries cannot remain valid for more than twelve days without sanction of the state government. However, in cases of legislations like Special Powers Act, even the non-commissioned army officers are allowed to take the life of a person on the basis of mere suspicion. The detention provisions provided under the NSA, 1980, are equally stringent, if not more stringent than the detention provisions under the British-era security legislations.

This reflects the collective attitude of the ruling dispensations of our nation. Cardinal human rights provided and recognized under the Constitution of India are still not taken seriously in the law-making process. This is unbecoming of the largest democracy in the world. This attitude can be changed through the usage of public reasoning, as explained and applied in the next chapter which will lay down the conclusion, findings as well as the suggestions that the researcher wants to humbly submit, after a detailed analysis of the national security legislations.

CHAPTER 6: CONCLUSION, FINDINGS AND SUGGESTIONS

In the first four chapters of this dissertation, the researcher undertook a comprehensive study of the national security legislations in pre-independence as well as post-independence India and tried to evaluate their impact on the constitutionally guaranteed rights of liberty and dignity of citizens. In the fifth chapter, the researcher undertook a comparative analysis of the legislations. Based on these, the researcher has arrived at the following conclusion, findings and suggestions.

6.1. CONCLUSION

Values of liberty and dignity are the foundations of the Constitution of India. When India emerged as an independent nation after years of struggle against the British Empire and after sacrifices of thousands of her sons and daughters, the people of India dreamt of a nation where individual would be free to create his own destiny form his own views and follow his own conscience.

In such an India, the liberty of individuals and his dignity would be subject only to the limitations imposed by the Constitution of India or permitted by the Constitution of India and not be subject to the whims and fancies of those in power. To help every individual realise this dream, the Constitution makers incorporated certain sacred rights in the form of fundamental rights under Part III. However, as discussed above, certain security legislations, which were intended to protect the sovereignty and integrity of the country, were used by the ruling class to protect their own interests. Using such legislations to trample liberties has two severe negative consequences. First, it leads to the violation of the freedom and dignity of individuals at the hands of the state and this erodes the faith of the public in the democratic credentials and commitments of the elected governments. Second, it also leads to the dilution of the laws as well as they no longer remain focused on their original purpose of protecting the sovereignty and integrity of our country. Thus, using a security law to harass its own citizens is counter-productive.

The discussion in the present paper leads to the inference that merely modifying or repealing a law will not help improve the situation. If one law is repealed today, another

law can be enacted by a successive regime or an existing law can be amended to suit its needs. Moreover, the necessity of certain strong laws cannot be denied in today's world where terrorism is taking new forms. Cases involving terrorism need to be dealt in a time bound manner without exposing the public to further risk.

The solution of this problem lies in political will. A constitutionally elected government and the holders of constitutional positions need to rise above petty party and electoral politics and dispense their duty of protecting the liberty and dignity of its citizens. Using the security laws to harass their own citizens does more harm than good. Governments should plug all the loopholes in the legislations that facilitate arbitrary exercise of power by the executive and bring suitable amendments towards that. The law enforcement authorities should be trained in order to implement the law within the permissible constitutional limits. Apart from this, the judiciary should lay down certain cardinal procedural safeguards which will be applicable to all security legislations which have higher threshold in favour of the prosecution. Laying down such a framework is as important as case to case based observations, which is being adopted as the primary mode of justice delivery in this sphere. All the three organs of the government, i.e. the legislature, executive and judiciary should work together to make the right to liberty and dignity a reality for all citizens, even those who have things to say against the existing dispensation.

The author would like to suggest that the government can adopt the methodology of public reasoning, as propounded by Amartya Sen,[275] in dealing with the issue of national security and national security legislations. According to Amartya Sen, in any democracy, public reasoning plays an indispensable part. The essential elements of public reasoning are that it has respect for diversity of thought and expression, encourages open and free debate and discussion on common issues that concern citizenry and also mandates robust participation of the public in governance.[276] All these three elements are very crucial in tacking the issue of national security and laws governing them.

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[275] Amartya Sen, The Argumentative Indian: Writings on Indian History, Culture and Identity, (3rd ed., Farrar, Straus and Giroux, New York 2005)

[276] Parth Sanyal, Indian Democracy and Public Reasoning, (*The Frontline*, 25 February 2005) < https://frontline.thehindu.com/cover-story/article30203731.ece> accessed 05 July 2022

National security cannot mean throttling independent and diverse voices. While dealing with this issue, it is very crucial to understand that in a democracy, diverse ways of thinking and expressing is extremely essential to its survival. There may be certain ideas and opinions which might not be acceptable to certain or even majority of a society. This does not mean that the people who hold and express those ideas and opinion necessarily pose some threat to the integrity of the nation. There needs to be a line drawn between unfavourable opinions and real threat to the nation. Public reasoning requires respect for and engagement with diverse ideas. There needs to be debate and discussion on the common issues concerning the citizenry. The threat to national security is one such issue. Threat to the nation effectively means threat to the public or people living in the territory. There is necessity of awareness and discussion on this issue between the government and the citizens as well the citizens themselves. Government, to the extent it does not compromise the counter-security measures, should be willing to deliberate with the public and invite ideas to combat the menace. Such discussions reduce the sense of marginalisation and isolation between communities and foster cooperation in the area. Such discussions automatically lead to active participation which is crucial for effective formulation and implementation of national security legislations.

6.2. FINDINGS

The researcher has arrived at the following findings after a detailed and thorough investigation of the research questions.

1. **What were the objectives of the British colonial government behind the enactment of various security legislations**?

    - The first security legislation in pre-independence era was the Bengal Regulation. As mentioned in the preamble, the purpose of the law was to allow people being taken in custody of the government in the interests of public safety and defence of the state.

- The next important security legislation in the pre-independence era was the Defence of India Act. According to the British rulers, the purpose of the law was to prohibit and curb any activity that could have an adverse impact on the war efforts of the British.

- The most criticised security legislation in the pre-independence era was the Rowlatt Act. The law was in line with the Defence of India Act and replaced it. The purpose of the law, as reflected in its long title, was to give special powers to the government to deal with extra-ordinary situations.

- The Special Powers Ordinance was enacted by the British government towards the end of its rule in India. In this legislation, special powers were given to the members of armed forces to deal with emergency situations.

- As seen above, objectives like strengthening war efforts, ensuring public order and efficient dealing with emergency situations were used as justifications by the British government to enact security legislations. However, in almost all cases, the actual objective was to curb the freedom struggle and the right of Indian people to determine their own destiny. To give an example, the peaceful protest against the Rowlatt Act led to the Jallianwalabagh massacre.

2. **What were the objectives behind the enactment of various national security legislations in post-independence India by the Parliament of India**?

- The initial objective of UAPA, 1967 was to curb regionalist and communalist sentiments and maintain the unity and integrity of the country. But with successive amendments, it became an anti-terror law, which not only dealt with conventional terrorism but also with threat to economic security. The last few amendments gave wide power to the executive including capability to designate individuals as terrorists.

- The original objective behind enactment of NSA, 1960 was to curb smuggling and black-marketing. However, later it was amended to curb secessionist sentiments in certain specific areas of the country. These amendments also gave teeth to the legislation.

- The Special Powers Act was designed to tackle and address insurgency in specific parts of the country fuelled by separatist sentiments. Since these movements were led by armed and trained fighters, certain special powers were conferred on the members of the armed forces.

- Like the laws during the British rule, these laws are also used for fulfilling ulterior motives. UAPA. 1967 and NSA. 1980 are used to crush political opposition as well as independent democratic voices questioning the policies of the ruling dispensation. The implementation of these legislations by the successive political dispensations for their own interests has blurred the distinction between terrorism and activism and sedition and free expression of ideas.

3. **What is the approach of the Indian judiciary towards the implementation of the national security legislations**?

    - In spite of various shifts in the trajectory, the SC has always made an endeavour to act as the guardian of bill of rights provided in the Constitution of India. When it comes to national security legislations, the court has performed a careful balancing exercise.

    - The Court has always criticised individual cases of violation of human rights which were committed using the national security legislations as a shield. This can be aptly inferred from the judgements on Akhil Gogoi, Dr. Kafeel Khan and the association of families of victims of extra-judicial executions.

- When it comes to the provisions of the national security legislations or the national security legislations as a whole, the court has upheld them as necessary measures for the challenges posed. The court has upheld the validity of national security legislations like TADA, POTA and Special Powers Act.

- However, the SC can be seen to be taking a strict stance when it comes to the power of judicial review. The institution has displayed the propensity of strike down any provision which takes away the power of review from the courts,

4. **Do the national security legislations enacted in the post-independence era by the democratically elected governments reflect the draconian provisions of the national security legislations enacted in the British colonial era?**

- The national security legislations enacted in the post-independence era by the democratically elected governments replicate or mirror some of the harsh provisions of the security laws enacted by the British. For example, the Special Powers Act is modelled on the Special Powers Ordinance.

- It can be noted that in some cases, the security laws enacted after independence has much more draconian provisions than the laws enacted before independence. For example, under the Special Powers Ordinance, only an officer above the rank of or equivalent to captain could exercise the powers after an order in writing to his subordinates. However, both of these pre-requisites are absent in Special Powers Act. In addition to his, the Bengal Regulation contains certain procedural safeguards for ensuring the health and safety of detainees. None of such safeguards can be found in the post-independence security legislations.

- The security legislations by the British rulers were prepared for subjects with no constitutionally guaranteed fundamental rights. However, the security legislations prepared by the democratically elected governments are for citizens with rights and dignity. However, a comparative analysis of the pre-independence as well as post-independence legislations does not reflect this distinction.

6.3. SUGGESTIONS

After a careful consideration of the various issues pertaining to the national security legislations, the researcher would like to humbly submit the suggestions mentioned below. In the opinion of the researcher, they would be helpful in rectifying the problems created by the present national security laws and the manner of their implementation.

- **Access to justice:** Access to justice is one of the fundamental principles of a dignified life under the Constitution of India. With respect to national security legislations, access to justice obtains a more crucial position because the right to immediate personal liberty is at stake. Effective access to justice has an intrinsic as well as an instrumental implication. The intrinsic implication is that the person whose liberty is sought to be curtailed gets an opportunity to present his case before a competent court of law. The instrumental implication is that it creates pressure on the executive to avoid excess and utilize their discretion in consonance with the constitutional scheme.

- **Amendment of governmental sanction requirements:** In certain national security legislations such as the Special Powers Act, there is a necessity of the prior sanction of the Central Government for initiation of proceedings for acts committed under the law. Such provisions provide impunity to the executive and lead to violation of legal rights because in majority of the cases, the government is reluctant to provide sanctions. Such a scenario also leads to erosion of the faith of the common people on rule of law and the justice

delivery system. Thus, security laws should be amended to remove the sanction requirements in totality or at least for crimes such as sexual assault which have no reasonable nexus with the duty to be performed under the laws.

- **Tailor-made legislations and provisions:** National security legislations are envisaged as emergency measures which cannot be dealt under the ordinary criminal statutes. However, in India, the standard for the necessity of security legislation has been grossly diluted. The ruling dispensations have a propensity to come up with security legislations for every small and big threat concerning the nation. Moreover the security legislations that are enacted contain provisions giving wide and unrestrained power to the executive. Thus, two things need to be kept in mind in this context. First, national security legislations are to be enacted only to deal with issues of grave concern that cannot be effectively and adequately addressed under the prevalent criminal statutes of the country. Second, since a security legislation is enacted as a solution to a specific problem, the powers granted under the provisions of the legislation should be tailor-made to achieve that specific objective and nothing more.

- **Strict judicial review:** Judicial review is a fundamental right granted to every citizen of the country and is an important facet of the basic structure of the Constitution of India. Judicial review is also intricately connected with access to justice discussed above. It needs to be acknowledged that the Indian judiciary has taken an active stance to protect the power of judicial review which is the only means through which an ordinary citizen can fight against executive excess. However, protecting the power of judicial review becomes effective only when it is utilized to provide justice to the people. Thus, judiciary needs to not only protect the power of judicial review in case of security legislations but also to actively scrutinize executive actions.

- **Overcoming Judicial inertia:** As discussed above, judiciary has been active in protecting fundamental rights of individual citizens but there are concerns raised when it comes to scrutinizing the national security legislations or their individual provisions. No one can deny that separation of power is important for healthy democracy and the elected executive has to be given space to perform constitutionally mandated duties. But, judiciary also has a duty to test legislations on the touchstone of the Constitution of India. Sole reliance on the explanations and justifications provided by the executive based on the societal circumstances may lead to violations of rights. An active stance taken by the judiciary in this regard will go a long way to strengthen the democratic values of this country.

India is the largest democracy in the world. Every citizen of India has been guaranteed liberty and dignity by the Constitution of India. They are very crucial for realizing the full potential of an individual. Any attempt to curb them without any constitutionally permitted justification is antithetical to the collective aspirations of the people of India. These sacrosanct democratic values should be taken into account while enacting and implementing national security legislations.

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