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NATIONAL SECURITY LAWS AND HUMAN RIGHTS: STORY OF CONFLICTING VIEWS

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ABSTRACT

It has been a long fight, the fight between human rights and security laws. Nearly all the nations have violated the most basic of human rights when it came to national security concerns. Set up of Guantanamo Bay by America and the expose of the CIA by the Senate showed the ugly side of the west to the east. Similarly, the multiple cases of human rights abuse in the areas where there is a high military presence in India are a matter of grave concern. But these human rights violations don't mean that the laws relating to national securities be removed completely. The union government must ensure the safety of the nation and also ensuring an individual's human rights. This article is an attempt to understand the abuse of such laws in India.

INTRODUCTION

Adm Jabalpur v. Shivkant Shukla is one of the most famous cases in the history of India. It is one of the cases where we can see how the government uses its power to curtail the rights of the people. It was in this case that the court said "*Liberty is itself the gift of the law and maybe the law [be] forfeited or abridged.*"² The court emphasized the point that liberty is guaranteed by the constitution. But in the dissenting judgment of Justice Khanna, lies the true interpretation of what liberty is for the people. He states that liberty is not a gift given by the constitution. It is something that is the corollary to life. It had existed before the constitution was formed and will exist even in the future. Hence, every person deserves liberty. But that doesn't mean that we may give them complete freedom to do everything they want to do. There have to be some checks and balances on the lives. One needs to remember that these checks and balances must not become hindrances or tools for oppression. We can divide control and liberty into three situations. The first one is where everyone has absolute freedom. People can do anything. Everything they want to do, they

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² ADM Jabalpur v. Shivkant Shukla 1976 1 S.C.R. 172

can do. Government or any form of control is missing. This is an absolute mess. This is what one calls anarchy. The second situation is where everything is under the control of some power. There is no freedom for anyone. This is a situation of tyranny. This can be seen in a country like North Korea. Now the third situation is the place where there exists a certain degree of freedom and a certain permissible amount of control. This is the most preferable form of government that people want to live in. It is in this situation where the main tussle between control and liberty. Liberty is usually the biggest challenge for any government in its endless stay in power. Hence, the government always tries to control liberty. The best way to do so is by controlling the laws. The most common struggle in the history of an independent and free country is the National Security laws. Here, we try to study the fight from the Indian perspective.

EVOLUTION OF INDIAN NATIONAL SECURITY LAWS

In India, there are three different arms of the government; legislations, executives, and the judiciary. Meanwhile, all the three are expected to work independently we cannot segregate them into water-tight boxes. It is the function of the legislation to create laws, meanwhile, it is the executive which ensures the implementation of laws. Judiciary act as the necessary check on the power of the first two parts. Hence, to suppress the dissent and to keep themselves in power, every government tries to control all the three bodies in their check. Hence, the three must work together to keep the government in power.

The basic laws regarding what action will be considered as a crime in India are contained in the Indian penal code. Here we find the law of 'sedition'. Sedition as a law was introduced by the British colonizers to suppress the voice of freedom fighters. Sadly, the independent Indian nation adopted this law along with other laws of British origin. The current IPC in its section 124A criminalized the act of sedition in India. It also provides the punishment for the same. The main elements that make an act seditious in nature are bringing or attempting to bring contempt, hatred, or disaffection towards the government.³ This is one of the most used sections by any government whenever they try to suppress the liberty of the people.

After this, the next law was the Preventive Detention Act, 1950⁴. This law authorized the government to lock up people in jail without telling them the charges against them for a year. The

³ Aditi Richa Tiwary, "*THE CRIME OF SEDITION IN INDIA: AN ARCHAIC COLONIAL REPRESSION– IS STRINGENCY ENSLAVING THE RIGHT TO FREE SPEECH?*", ILI Law Review, Summer Issue 2020.

⁴ The Preventive Detention Act, Act No. 4 of 1950 (India)

law was introduced as a temporary measure and was only planned to be applied for 12 months. The law existed till 1969 with the help of regular extensions provided by the government. But the void did not exist for a long time and the Indira Gandhi-led government introduced the MISA act⁵. This act bought back most of the provisions of the PDA act. This new act was the main source of the government during the national emergency to jail the opposition leaders. This act was removed by the newly elected Janta party-led government. Though the government tried to introduce most of the provisions of PDA as part of ordinary law, nothing happened. Then the government passed another act. This was the National Security Act. The act is still in force and has been in news a lot because of the misuse being done by the government. In Uttar Pradesh, it is mainly being used to tackle the complaints of cow slaughter. In 1967, the national government increased its power of preventive detention bypassing the Unlawful Activities (Prevention) Act⁶. This government enabled the state to declare any organization as “unlawful”. The act has been amended multiple times. The current version of UAPA is often considered one of the most tyrannical laws. The current UAPA goes against the basic presumption of law.

It would be impossible to study the laws regarding national security without reading about AFSPA⁷. The act was passed in the September of 1958. This act increased the power of the army against civilians. The act was initially implemented in Nagaland but was soon applied to many different states. Jammu Kashmir is one such university.

Our country also had its very own anti-terrorism laws. Our first anti-terrorism law was the Terrorist Affected Areas (Special Courts) Act, 1984. The act was made to designate specific areas as the terrorist affected. Once an area was declared as a terrorist-affected area, the central government could establish special courts there. Within a year, a new law was incorporated with this act, Terrorist and Disruptive Activities (Prevention) Act, 1985⁸. This act was created with the intent to create more and more acts of criminal activity. This act increased the power of government drastically. Also, this was the act where one could see the number of procedural protections for defendants was drastically reduced now. There was a very interesting ‘sunset clause’ introduced in the act. As per this, the government had to check and renew the act every 2 years. It was with

⁵ Maintenance of Internal Security Act, Act No. 26 of 1971

⁶ Unlawful Activities (Prevention) Act, Act No. 37 of 1967

⁷ Armed Forces (Special Powers) Act, Act No. 28 of 1958

⁸ Terrorist and Disruptive Activities (Prevention) Act, Act. No. 28 of 1987

the advent of this act that the concerns of national security laws wrongly depriving people of their basic human rights.

In the aftermath of the 2001 USA terrorist attacks, the government introduced another act. The act was the Prevention of Terrorism Act, 2001. This act had many provisions of the TADA act such as the limits on the rights of the defense, enhanced power of the authorities, etc. Along with this, POTA increased the powers of the government to detain individuals. As in TADA, the government needed to declare the area a terrorist affected, no such proclamation was needed in this act. The TADA and POTA acts were struck down by the judiciary. Judiciary had raised concerns regarding the illegal use of these acts by the government.

This was also the time when we saw a lawyer go against the complete system of the anti-terrorism law. Shahid Azmi, a Mumbai-based lawyer took cases related to TADA and POTA. He was quite successful in getting a not guilty verdict for those who were arrested under these acts. Sadly, Hashmi was assassinated by unidentified gunmen in his Mumbai office.

After the attack of 2008 on Mumbai, it was thought that the country had a serious lack of anti-terrorism law. Hence, the government decided to revive the UAPA act of 1967. Amendments were made in the UAPA act and it was revived. Along with this, a National Investigation Agency Act was passed. This act was created to establish a federal agency that had the power and responsibility of investigating terror-related crimes across the nation. Recently there have been some amendments in the UAPA. Now, the government can declare individuals as terrorists under this act. It has also increased the power of police regarding arrests.

SIDE EFFECTS OF THESE LAWS

There are many stories that are just a Google search away for people to read about the violation of these laws. And many more such stories are locked in jail with the under-trial prisoners. Few of these stories are buried under the unmarked graves of Kashmir. As the famous quote goes “power tends to corrupt, absolute power corrupts absolutely”, it is quite true about the way these laws are implemented. Constant abuse of power by the authority has caused numerous human rights abuses. India’s National Human Rights Commission has reported over 31 thousand cases of custodial deaths between 1993 and 2016⁹. This means that over 1000 people have died in police and judicial

⁹ Press Trust of India, “*NHRC recorded 31,845 custodial-death cases between 1993 and 2016: Report*”, The Business Standard (December 11,2019), https://www.business-standard.com/article/pti-stories/nhrc-recorded-31-845-cases-of-custodial-death-between-1993-2016-report-119121001554_1.html

custody inside the Indian jails. This issue still has not been able to attract the attention of the judiciary. The human rights commission was clearly against the POTA. It even said that there was no need of implementing something like POTA in 2000¹⁰.

One of the most abused laws is the AFSPA. It is often said that the AFSPA gifts the military ‘shoot-to-kill in the areas where it has been applied¹¹. As per reports of the US Department of the state report, there was the death of 63 civilians, 89 security force members, and 284 insurgents in Kashmir in 2020. Kashmir tops the list of abuse of AFSPA. In 2016, there were 92 complaints made against the abuse of AFSPA in Jammu and Kashmir. Meanwhile, in Manipur 58 such complaints were made. Out of these complaints, over 74 were made against the Indian Army. However, it is not clear whether any action has been taken against these complaints. In July 2017, the Supreme Court had taken cognizance of 1528 fake encounters that had to happen in Manipur by the use of AFSPA¹². Meanwhile, TADA and POTA did not prove to be good for the citizens. Multiple cases have existed in the country where someone charged under these acts was kept in jail for years but no evidence was given against them. People are released from jail after years of the court fight.

The people who abuse the power given under these special acts are rarely punished. It is as if they have been given some sort of insulation from accountability. One such reason behind this is that the people who investigate these complaints are usually the colleagues of the accused person. Also, the Indian army and other para-military forces are often portrayed as the cleanest organization of India. Hence, investigating these complaints is considered a threat to the image of the army.

In recent times the abuse of such acts has increased a lot. In UP, most of the cases filed under the National Security Act are related to cow smuggling and slaughter¹³. In a recent case, a journalist

¹⁰ SOUTH ASIA HUMAN RIGHTS DOCUMENTATION CENTRE, GOVERNMENT DECIDES TO PLAY JUDGE AND JURY 98 (2001)

¹¹ HUMAN RIGHTS WATCH, GETTING AWAY WITH MURDER 50 YEARS OF THE ARMED FORCES (SPECIAL POWERS) ACT 13 (2008)

¹² Extra-judicial Execution Victim Families Association (EEVFAM) v India, 2013 (2) SCC (India); Extra-judicial Execution Victim Families Association (EEVFAM) v India, Writ Petition (Crim) No. 129 of 2012 [on file with author]; Meenakshi Ganguly, Extrajudicial Killings Corrode Democracy in India, N. Y. TIMES, July 15, 2013, available at

<http://india.blogs.nytimes.com/2013/07/15/extrajudicial-killings-corrode-democracy-in-india/>; Sandeep Joshi, Court-appointed panel highlights misuse of AFSPA in Manipur, THE HINDU, July 17, 2013, available at <http://www.thehindu.com/news/national/other-states/courtappointed-panel-highlightsmisuse-of-afspa-in-manipur/article4921637.ece>

¹³ “In 2020, More Than Half of NSA Arrests Made in UP Were for Cow Slaughter: Report”, News18, <https://www.news18.com/news/india/in-2020-more-than-half-of-nsa-arrests-in-up-were-for-cow-slaughter-report-2867727.html>

was booked under NSA for mocking the claim that covid could be cured of cow dung¹⁴. UAPA has been used as a tool for suppressing the voice of dissent. The use of sedition against 21-year-old Disha Ravi is another example of abuse¹⁵. The death of father Stan Swamy and Bhima Koregaon's case¹⁶ is another such example.

CONCLUSION

It is not to be disputed that national security is very important. To ensure the rights given by the constitution to the citizens, we must ensure their safety also. But that doesn't mean that we give a callous approach whenever a complaint against the abuse of these laws is made. It is really important to maintain the balance between these two. We should neither live in anarchy nor tyranny. In the present time, one must think if a colonial law like sedition is required? If the laws are required for ensuring the safety of the public, we must also have a body where one could freely file a complaint against the abuse of power.

¹⁴ “*Can't Be Kept in Jail for Even a Day': SC Orders Immediate Release of Manipuri Activist*”, The Wire (19th July 2021), <https://thewire.in/law/cant-be-kept-in-jail-for-even-a-day-sc-orders-immediate-release-of-manipuri-activist>

¹⁵ Priya Lalwani, “*Sedition in India: Case of Disha Ravi and many others over the decades*”, Times Now (26th February 2021), <https://www.timesnownews.com/india/article/sedition-in-india-case-of-disha-ravi-and-many-others-over-the-decades/725421>

¹⁶ Apoorva Mandhani, “*2 years, 3 charge sheets & 16 arrests — Why Bhima Koregaon accused are still in jail*”, The Print (31st October 2020), <https://theprint.in/india/2-years-3-charge-sheets-16-arrests-why-bhima-koregaon-accused-are-still-in-jail/533945/>