



## NATIONAL SECURITY LAWS: A TOOL FOR ABUSE?

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### Introduction

The age-old conflict over civil liberties and national security continues to rage in the midst of the arguments between these two titans of jurisprudence. The barbarities and devastation achieved by the English nationwide conflict and the authoritative rule of the Rump Parliament persuaded Thomas Hobbes of the need for areas of strength for an administration which is the main instrument equipped for protecting the interests and prosperity of individuals. 'Leviathan', which was published in 1561, is still the most influential justification for the state's absolute power. He asserts that, unless it is subordinated by a supreme political authority, an individual's will is perpetually at odds. The Treatises of Government were in opposition to Hobbes's absolutist theory. According to Locke, the sovereign must be given power with the assurance that it will govern in a way that lessens suffering and agony. "The trust must necessarily be forfeited, and power devolves into the hands of those who gave it, who may place it anew where they shall think best for their safety and security" in the event that the state violates it. There have been numerous instances around the world where one has outweighed the other, despite the fact that the majority of Constitutional democracies in the world have adopted the Lockean approach to the existence of this dichotomy between civil liberties and national security. In many nations, individual liberty has been sacrificed

on the altar of national security in the form of oppressive laws. India's situation on this issue has seen significant outlook changes throughout the course of recent many years. Through a number of provisions, the Indian Constitution makes a promise to protect society's interests. The framers of the Constitution were aware that freedom cannot exist in a vacuum and that a state of social chaos could result from unchecked freedom. As a result, they included restrictions on the rights to freedom in order to provide checks and balances in the event of disorder. Legislators realized that the Constitution's restrictions would not be sufficient, and that internal security was more important than frontier protection due to the country's geographical conditions and historical bloodbath. As a result, special laws pertaining to national security developed.

The main goal of the national security laws is to keep the country safe from threats. Even though they are said to be there to protect national security, the national security laws give the investigating agencies a lot of unchecked power to get around the rules made to protect citizens' fundamental rights. Armed Forces (Special Powers) Act (AFSPA), which was passed in 1958 to deal with Nagaland's separatist movements. It grants the government the authority to designate any area as a "disturbed area" where armed forces and police can collaborate PDA and MISA, which have since been repealed, are reflected in the National Security Act (NSA), which was enacted in 1980. The accused does not have access to even fundamental rights under this Act, such as the right to be informed and the right to legal assistance. As a result, the phrase "no vakeel, no appeal, no daleel" (no lawyer, no appeal, no argument) is widely used to describe this law. The Unlawful



Activities (Prevention) Act (from now onwards UAPA) was authorized in 1967 to protect the uprightness of India. However, following the repeal of TADA and POTA, the government amended the UAPA in 2004 to control and prevent terrorism by including chapters dealing with terrorist activities. Individuals who do not belong to any of the declared terrorist organizations can also be detained and prosecuted under the UAPA after the 2019 amendment. The government has the ability to control, monitor, and quell any dissent by misusing the power it is given. In violation of natural justice, these laws place the onus of proof on the accused to demonstrate his innocence. A person's inability to exercise his rights to a fair trial, to be informed, and to legal aid after being detained under these security laws results in the person's civil death. Although heinous laws like TADA and POTA have been repealed, their ghastly provisions—like those that make jail the norm and bail the exception before guilt is even proven—continue to exist in acts like NSA and UAPA. The anti-terrorism legislation in India has long been the subject of heated debate. The fact that these regulations violate citizens' fundamental freedoms, which are guaranteed by Part III of the Constitution, is one of the primary grounds for contention. The judiciary has, albeit reluctantly, upheld anti-terrorist legislation that has been passed by the legislature. The intention was for these laws to be enacted until the situation gets improved. The objective was not to make these shocking actions permanent provisions of the law. However, as a result of ongoing terrorist activity, the laws have been reinstated with the necessary modifications.

### 1. Armed Forces (Special Powers) Act (AFSPA), 1958<sup>1</sup>

The Armed Forces (Special Powers) Bill was initiated and passed by the two houses of Parliament in response to the growing number of violent incidents in India's North-East states. On September 11, 1958, the president gave his approval to the bill. In North-East India, the Armed Forces (Special Powers) Act of 1958 went into effect in 1958, and in Jammu and Kashmir in 1990. Officials of the Armed Forces are exempt from working in any way in the designated "disturbed areas" under this Act. Human rights activists have voiced their disapproval of this act which they believe poses a threat to the Indian people it is meant to protect and has been the subject of numerous debates. This Act, on the other hand, permits officials of the Armed Forces to shoot anyone on the eve of a mere suspicion of the commission of an offense, in contrast to our Indian legal system, which holds that an offender is presumed innocent until proven guilty. The hatred of India's citizens has resulted from the act's unconditional protection of illegal acts by the armed and paramilitary forces. Although it was intended to improve the management of uprising rebel movements in certain states, the act's ineffective implementation has deviated from its intended goals, and little progress has been made since. The ruthless and illegal actions of the armed forces cannot be ignored, even if they have been successful in fooling the adversaries and risking their lives for the country.

In 1972, the State Government was given a new authority to declare a region disturbed,

<sup>1</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958).



and the central government was also included in the definition. The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990<sup>2</sup>, which applied to areas within 20 kilometers of the Line of Control, was enacted after a few years by the parliament. Rajouri, Poonch, Baramulla, Budgam, Pulwama, and other locations were identified as disturbed. Since 1990, AFSPA has been in charge of nearly 20 districts in Jammu and Kashmir. In addition to the North-Eastern states and Jammu and Kashmir, it was also used in Punjab. However, in 2008, Punjab became the first state to get rid of the AFSPA.

The use of AFSPA to an area would possibly occur assuming the system of law and order of that area has gone a lot of past the control of the state government upsetting the tranquility of the general public. When a state requests the deployment of the armed forces and the AFSPA is implemented, the state's governance does not change and remains under civil administration. The North-Eastern States of Assam, Manipur, Meghalaya, Nagaland, Tripura, Arunachal Pradesh, and Mizoram are included in the act's scope of application, as stated in Section 1(2).<sup>3</sup>

### AFSPA in Nagaland

The world has been made aware of instances of human rights violations, particularly by law enforcement agencies, as a result of the act's implementation in Nagaland. The Village Panchayat of Khuivi, which is in the Zunobetuo district, provided a report on the process by which the families of national

workers were transported to the army concentration at Atukuzu, which is in the Zunobetuo district. For eight months, they were punished and tortured. In a 1960 report, the Naga Hills Rehabilitation Committees noted that the armed forces had damaged and destroyed several christian churches in various parts of Nagaland.

“The 16th Punjab Regiment of Indian armies had been seen by a local newspaper reporter separating the men from the villagers of the Kanjang village and beating them mercilessly. Women and children were sent to the forests during the remaining half of the day, while the village men were beheaded and burned. The reporter's father was one of the men. The officials of the Contingents of the 1st Maratha Regiment coerced four minor girls into going to the Yankeli Baptist Church. The most sacred area of the church was where the girls were raped. This was considered the action against the Naga uprisings, despite being completely deviant from the actual goal of controlling the uprising. Such an inhumane act in a holy place was ruthless. Over the years, a number of such incidents have been reported, but neither justice nor a solution has been found.<sup>4</sup> However, the AFSPA has remained in place for a considerable amount of time even after the ceasefire agreement in 2015, contrary to popular belief. The Central Government reported in December 2019 that as the number of murders, extortions, and other acts of cowardice grew in several parts of the state, it became necessary for the security forces to operate there. According to Section 3 of the Armed Forces (Special Powers) Act,

<sup>2</sup> The Armed Forces (Jammu and Kashmir) Special Powers Act, 1990 (Act 21 of 1990).

<sup>3</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s.1(2).

<sup>4</sup> Medolenuo Ambrocia, “AFSPA to remain till Naga issue is resolved: Nagaland CM Rio” *available at*: <https://www.eastmojo.com/news/2020/02/13/afspa-to-remain-till-naga-issue-is-resolved-nagaland-cm-rio/> (last visited on November 18, 2022).



1958<sup>5</sup>, the Central Government announced that the state would fall under the category of the "disturbed area" for six months beginning on December 30, 2019. This went on to the chief minister of Nagaland, Neiphiu Rio who notified in February 2020 that the state would stay as a 'disturbed area' under the AFSPA till the Naga policy centered issue experienced an answer and the harmony accord was laid out. In the fifth session of the 13th Nagaland Legislative Assembly (NLA), the chief minister announced this. However, the Naga People's Front, the opposition, stated in the House that the State Government had been misinforming the public about the peace agreement between the Naga political parties and the Central Government.”

#### AFSPA in Jammu and Kashmir

“Jammu and Kashmir, the war zone between India and Pakistan, saw its uprisings and separatist development movements around 1989. The state's condition was made worse by Pakistan's role in encouraging these militants and directing Islamist jihadists to reclaim the land by organizing more movements. With the creation of the Jammu and Kashmir Disturbed Areas Act in 1990, the AFSPA came into effect. This was supposed to come to an end in 1992, but it was re-enacted in the form of the President's Act, 1992, which was based on Article 356 of the Indian Constitution and gave the parliament the authority to legislate about Jammu and Kashmir. On September 10, 1990, the presidential assent was given to the Armed Forces (Jammu and Kashmir) Special Powers Act 1990, which was implemented in Jammu and Kashmir. It went into effect on

July 5, 1990. The deployment of land forces would be required for the implementation of this Act, which would apply to areas that have been declared "disturbed" by the state or the central government. As a result, the Governor's administration declared war on all six Kashmiri districts—Anantnag, Baramulla, Badgam, Kupwara, Pulwama, and Srinagar—as well as areas 20 kilometers from the Line of Control near Poonch and Rajouri. In the disturbed areas, officers are permitted by this act to fire or use force against those they believe are breaking the law. Anyone who is suspected of committing a cognizable offense under the act would not even need a warrant to be arrested. Even in the event of a legal violation, no further legal action could be taken against army personnel. These powers, given to the armed forces for a different purpose, have repeatedly been used to wreak havoc on the lives of innocent civilians and made it easier for officials to use brutality against them. Chief minister Omar Abdullah during his term had reliably requested the withdrawal of AFSPA from specific areas of Jammu and Kashmir which appropriately didn't require it. In the name of duty and protection, the army has committed atrocities against civilians in addition to fighting infiltrators.<sup>6</sup>”

For instance, three civilians had been killed when the armed forces opened fire in the Shopian district of Jammu and Kashmir to protect army officers and their weapons from a violent mob. An FIR was recorded against the military under sections 302 and 307 of the Indian penal code for an endeavor to kill

<sup>5</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 3.

<sup>6</sup> Jean Dreze, “A Never-Ending Nightmare in Kashmir” *available at*:

<https://thewire.in/politics/torture-testimonies-detained-youth-kashmir> (last visited on November 18, 2022).



unendingly.<sup>7</sup> However, it was determined that the AFSPA allowed the army to use its special powers, and the state police department could not have filed an FIR against army personnel. Then, a child in Kashmir's Anantnag was tortured and questioned because he was thought to be a militant, according to a report. In order to inquire about her neighbor's whereabouts, a Palhalan minor girl was brought in, stripped naked, and almost beaten to death. There is a never-ending list of such atrocities that go unchecked to this day. More than 90% of such atrocities go unreported and are ignored.<sup>8</sup>

### Suggestions

- “Section 4(a) which is completely against the scope of international human rights that protects the right to live should be repealed or amended.<sup>9</sup> It also violates the principles upheld by criminal justice, that is the assumption of innocence until one is proven to be the offender. When the armed forces are called to take control of the disturbed areas, the power conferred upon them of using unconditional force as per Section 4<sup>10</sup>, validates the commission of extrajudicial killings which is inconsistent with Article 246 of the Indian Constitution<sup>11</sup> read with the 7th Schedule that places ‘Law and order’

under the State’s list. Therefore, it is Ultra vires.

- Section 5<sup>12</sup> of the Act should be consistent with Article 22<sup>13</sup> of the constitution under which it is compulsory to present an arrested person in front of the Magistrate within 24 hours.
- The scope of Section 6<sup>14</sup> should be increased to keep a close check on the armed forces and stop them from committing inhumane and heinous crimes against innocent civilians. The sanction of the Central Government shouldn’t be waited for, maybe a special committee could be formed to begin enquiries straight away without any delays or prejudices against anyone.

The suggestion put forth by the Sarkaria Commission of the states to develop their system of maintaining and dealing with public order and also as per the recommendations of the National Police Commission of deploying the Central Reserve Police force for day-to-day policing instead of engaging the army and paramilitary forces should be looked into and so on.<sup>15</sup>”

### 2. Unlawful Activities (Prevention) Act (UAPA), 1967

“In order to protect India’s sovereignty and integrity, the Constitution (Sixteenth Amendment) Act, 1963 was passed, giving

<sup>7</sup> The Indian Penal Code, 1860 (Act 45 of 1860), ss. 302, 307.

<sup>8</sup> Scroll Staff, “25 years of AFSPA in J&K demonstrates a failure of accountability, claims Amnesty” *available at*: <https://scroll.in/article/737667/25-years-of-afspa-in-j-k-demonstrates-a-failure-of-accountability-claims-amnesty> (last visited on November 18, 2022).

<sup>9</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 4(a).

<sup>10</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 4.

<sup>11</sup> The Constitution of India, art. 246.

<sup>12</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 5.

<sup>13</sup> The Constitution of India, art. 22.

<sup>14</sup> The Armed Forces (Special Powers) Act, 1958 (Act 28 of 1958), s. 6.

<sup>15</sup> “Commission on Centre-State Relations” *available at*:

<https://www.mha.gov.in/sites/default/files/CCSRelati on120508.pdf> (last visited on November 18, 2022).



Parliament the authority to set reasonable restrictions on the-

- freedom of speech and expression;
- right to assemble peaceably and without arms; and
- right to form associations or unions.

The UAPA, an upgrade on the Terrorist and Disruptive Activities (Prevention) Act (TADA)<sup>16</sup> (lapsed in 1995) and the Prevention of Terrorism Act – POTA (repealed in 2004)<sup>17</sup> was passed in the year 1967. The Unlawful Activities (Prevention) Act (UAPA)<sup>18</sup>, 1967 was created to prevent organizations in India from engaging in unlawful activities. This act is also referred to as the Anti-Terror Law. However, in 2019 most recent amendment was made to the act (The Unlawful Activities (Prevention) Amendment Act, 2019)<sup>19</sup> which now empowers the Union Government to designate an individual as a terrorist after following the proper legal procedures. Till 2004, “unlawful” activities referred to actions related to secession and cession of territory. The 2004 amendment added “terrorist act” to the list of offences. Under the act, the investigating agency can file a charge sheet in maximum 180 days after the arrests and the duration can be extended further after intimating the court. If Centre deems an activity as unlawful then it may, by way of an Official Gazette, declare it so. It has death penalty and life imprisonment as highest punishments.”

<sup>16</sup> Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 18 of 1987).

<sup>17</sup> The Prevention of Terrorism Act, 2002 (Act 15 of 2002).

<sup>18</sup> Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

### Issues with UAPA and NIA

“It is an undeniable fact that anti-terror laws have a history of tyrannical use. But what facilitates this tyranny is a question that is less asked. Surprisingly the answer is not as enigmatic as it is considered. It is clearly because of amorphous definitions that the provisions of such amending bills lay down. Indefinite phrases such as ‘if the government believes’, ‘urgency’, and ‘security threat’ have given inexhaustible powers to the government. They fade away the limits of the state and in turn, enable flexible use of these laws. Finally, it results in, the government using anti-terror laws in ordinary incidents which ‘it believes’ to be against the public order and integrity of the country. Indian courts taking cognizance of such gross misuse have also objected against using special anti-terror laws in ordinary matters where even the normal penal laws can be efficient. In *Kartar Singh v. State of Punjab*<sup>20</sup>, the Supreme Court held that until the alleged acts of an accused could be classified as a “terrorist act” in “letter and spirit”, he should not be charged under anti-terror acts but be tried under ordinary penal laws by the regular courts.”

“A person becomes a terrorist or is guilty of terrorist activity when his intention, action, and consequence all the three ingredients are found to exist together.” “But the statistics of the UAPA act show that the government has been using it as per its whims and fancies. The number of pending cases under this act in 2014 was 1,144, trial was completed in

<sup>19</sup> The Unlawful Activities (Prevention) Amendment Act, 2019 (Act 28 of 2019).

<sup>20</sup> *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.



barely 33 cases out of which only 9 were convicted and 24 were being acquitted. In 2015 total pending cases were 1209, trial got completed in only 76 cases, out of which only 11 people were convicted and 65 were acquitted. In 2016, 1256 cases were pending, in only 33 cases trial got completed and out of which only 11 were convicted and 22 were acquitted. The incompleteness of trials in the majority of cases indicates that the arrested persons had to spend long years behind bars merely because the government has suspicion over them. Poor conviction rates of 27.3%, 14.5% and 33% respectively, and on the other hand surging acquittal rates evidently emphasize the vast abuse of anti-terror laws. And how the government misapplies such laws under the garb of security threat. However, the government goes deaf ears to such statistics, and to put the icing on the cake it introduces bills such as UAPA 2019. That further lowers the probability of the government to distinguish between law and order, public order, and security of the state. Which the courts have considered being the most important step towards curbing the menace of misuse.<sup>21</sup>

#### **“What will be the consequences of naming a person as a terrorist?”**

When a person will be tagged as a terrorist by the government, he will be considered to be so in the society even before a court convicts him, a permanent blot on the reputation of the person would be fixed. “Right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution.”<sup>22</sup> But this right would become only an inconsequential

<sup>21</sup> Scroll Staff, “Less than 3% arrests under UAPA led to conviction between 2015 and 2020, shows PUCI draft report” *available at*: <https://scroll.in/latest/1033009/less-than-3-arrests-under-uapa-resulted-in-conviction-between-2015->

text for the victim of the ploy of naming and shaming by the government. Also, if later this individual proves to be innocent, how will the government repay or compensate for that? His family has already been ostracized from society. What will be the recourse for the lifelong stigma which gets attached to a person notified as a terrorist? Media the so-called fourth pillar of Indian democracy, without thorough investigation and due process will convict them in their courts of law. Watching the media acting such inconsiderately, it is an essential question that what sort of pillars the Indian democracy rests on, it will not be an unprecedented event if this democracy topples one day. Moreover, there are serious legal consequences to it. Absence of bail or anticipatory bail provisions directly challenges the guidelines of the Supreme Court that “jail is an exception and bail is a norm.” The presumption shifts and it is presumed by the courts that the charges are true. An overarching maxim that goes across the entire criminal system that a person is “innocent until proven guilty” is turned upside down i.e., “you are guilty unless and until you prove yourself innocent.”

#### **“Power of seizure without permission of the state police**

Section 25 of the UAPA act is amended and the Bill adds that if the investigation is conducted by an officer of the National Investigation Agency (NIA), the approval of the Director-General of NIA would be required for seizure of such property.<sup>23</sup> This is antithetic to the foundations of democracy

and-2020-shows-report (last visited by November 18, 2022).

<sup>22</sup> The Constitution of India, art. 21.

<sup>23</sup> Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), s.25.



in our country because it directly violates the principle of cooperative federalism. It centralizes the power of policing. For example, if even an inspector of NIA wants to seize any property in the state of Assam, then without even coordinating with the state police it can go further and seize it. This exclusion of the state authorities especially from their own domain is anti-federalism. Rather than making policies separately and those which only gives the Centre an upper hand, cooperative federalism asks for a more collaborative approach by the Central government.

Section 8<sup>24</sup> of the UAPA amendment bill alters section 43<sup>25</sup> of the principal act. It states that in the case of the national investigation agency, now an officer of an inspector rank and the above can investigate offenses under this act. Herein lies the problem, that the government has lowered the bar especially for the officers of the NIA when on the other hand no police officer of the state police below the rank of deputy superintendent can investigate in such cases. Previously it only allowed an officer of the rank of DSP to investigate, which acted as a bar so that only meritorious investigation takes place because the National investigation agency is for investigation only special cases. But now the government through amending UAPA in such a manner has insidiously tried to maximize its limits and bandwidth to investigate, as now it can direct even an inspector of NIA for investigation.”

#### “Extraterritorial jurisdiction of the NIA

The bill by amending sections 1(2), 3(2) and 6 grants the central government the power to order the officers of the NIA to investigate and register scheduled offenses committed even outside India. Prima facie this seeks to strengthen the powers of the NIA but is not of much substance and end up granting wide powers to the government. The bill aims to alter section 1 by inserting sub-clause (d) to clause 2 which states that this act also extends- (d) “to persons who commit a Scheduled Offence beyond India against the Indian citizens or affecting the interest of India.” Giving extraterritorial jurisdiction to this agency is not a matter of concern but adding phrases like “affecting the interest of India” is not only a vague proposition but also opens a Pandora box of ambiguities. We have other well-constructed paradigms that are used in these types of legislations e.g., “affecting the national security of India”, “affecting the sovereignty of the country” or “against the integrity of India.” The problem is that this expression is not focused or well-defined. What does “affecting the interest of India” really suggest? Hence, if not altered this phrase will open an ocean of unrestricted powers in the hands of the government which will have hazardous repercussions such as blatant misuse.”

#### Suggestions for rectification

- “To repeal the amendment to the UAPA Act which confer power to the government in naming a person as a terrorist since there are already numerous provisions for prosecuting individual members of an unlawful organization.
- Amend the phrase such as “affecting the interests of India” since ‘interests’ of India is

<sup>24</sup> The Unlawful Activities (Prevention) Amendment Act, 2019 (Act 28 of 2019), s.8.

<sup>25</sup> Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), s.43.



not properly defined and can lead to gross misuse. There are many well defined phrases to be used such as “affecting the national security of India” or “affecting the sovereignty of the country”.

- Refrain from using phrases such as ‘if the government believes’ because it does not have a determined focus and end up giving unbounded powers to the government. The government can prosecute even a silent protest or dissent only if it ‘believes’ it to be against the ‘interests’ of India. Not to delegate sessions courts as special courts as they are already clogged up with arrears of pending cases. But to constitute additional special courts with fresh judicial appointments.
- Not to empower an officer of an ‘inspector’ rank of the NIA to prosecute scheduled offences since such offences need to be prosecuted only by specific rank of officers such as DSP (as in the case of the state police).
- A scheme of compensation should be constituted for those who are wrongly incarcerated.
- The central government should initiate mechanisms that provide for better administrative and judicial oversight to scrutinize investigations and prosecution of terror related cases.
- Establish a relevant committee to oversee the human rights violations during the prosecution of an accused in terror cases.
- The government should take an active step towards empowering NCTC-National Counter Terrorism Centre and NATGRID-National Intelligence Grid, that are the other two limbs of the tripod on which anti-terrorism rests upon.”

### 3. The National Security Act, 1980

“NSA is a special law instituted in 1980, and is popularly known as the law of “no vakil, no appeal, no daleel” (no lawyer, no appeal, no argument).<sup>26</sup> It is similar to PDA<sup>27</sup> and MISA<sup>28</sup> in its preventive detention powers and closer to UAPA in not requiring a periodic review, despite grave human rights concerns. The law gives power to the Central and State government to detain individuals for a maximum period of 12 months. Under the Act, a person can be detained for up to 10 days without even being informed about the reasons for the detention. The government is allowed to withhold information supporting the detention in “public interest” and a detained person is not allowed a lawyer during this period. NSA is one of the most draconian laws operating in the country, and is easily prone to misuse.”

#### Criticism of the act

“There have been instances where the government has used the preventive detention route to suppress dissent and even imprison journalists. Activists claim that the provisions under this law violate almost all due process rights.

- It is an administrative order passed either by the Divisional Commissioner or the District Magistrate (DM) and not detention ordered by police based on specific allegations or for a specific violation of the law.
- Conditions when NSA can be evoked:
  - ⊠ Even if a person is in police custody, the DM can invoke NSA against him.

<sup>26</sup> The National Security Act, 1980 (Act 65 of 1980).

<sup>27</sup> Preventive Detention Act, 1950 (Act 4 of 1950).

<sup>28</sup> Maintenance of Indian Security Act, 1971 (Act 26 of 1971).



- ❑ If a person has been granted bail by a trial court, he can be immediately detained under the NSA.
- ❑ If the person has been acquitted by the court, the same person can be detained under the NSA.
- The detainee under the NSA is not given basic rights and safeguards that are accorded by Article 22 of the Constitution<sup>29</sup> and the Criminal Procedure Code (CrPC)<sup>30</sup> such as:
  - ❑ Arrested person should be informed of the grounds for arrest.
  - ❑ Arrested person has the right to consult and be represented by a lawyer.
  - ❑ Arrested person should be produced before a magistrate within 24 hours.
- The DM who passed the detention order is protected under the act, no prosecution or any legal proceeding can be initiated against the official who carried out the orders.
- Many people argue that there should be no place for preventive detention in a democracy even after seventy years of freedom. Normally, such laws are invoked during wartime or under extraordinary circumstances. But in India, the law is invoked during normal times and in normal circumstances.
- The police are often accused of using the NSA to circumvent the safeguards under the CrPC. Activists claim that they use this law when they cannot or are unwilling to make a charge.
- The NSA is often used as a response to normal law and order cases, and not necessarily to prevent future crimes.
- The grounds for detention also use vague language which can be misused by those in power.”

The Supreme Court has held that the preventive detention under NSA has to be strictly maintained with the delicate balance between social security and citizen freedom. It also held that to prevent “misuse of this potentially dangerous power, the law of preventive detention has to be strictly construed” and “meticulous compliance with the procedural safeguards” has to be ensured.

### Way forward

“The Indian parliament and judiciary must reconsider the NSA in order to close any discrepancies that allow law enforcement to violate constitutional and statutory rights. They must restrict the police of this convenient tool for punishing alleged criminals without having to maintain the basic rights of the accused. They must also compel the criminal justice system to address its flaws directly and appropriately. It is past time for India to catch up with the rest of the world and recognize that preventive detention should not be used as a routine law and order measure. In case of *Vijay Narain Singh v. State of Bihar and others*<sup>31</sup>, Justice A.P Sen has well quoted that: The detention of individuals without trial for any length of time, however short, is wholly inconsistent with the basic ideas of our government and the gravity of the evil to the community resulting from anti-social activities can never furnish an adequate reason for invading the personal liberty of the citizens except in accordance with the procedure established by law.”

<sup>29</sup> The Constitution of India, art. 22.

<sup>30</sup> The Code of Criminal Procedure, 1973 (Act 2 of 1974).

<sup>31</sup> *Vijay Narain Singh v. State of Bihar and others* (1984) 3 SCC 14.



#### 4. Sedition (Section-124A IPC)<sup>32</sup>

Sedition as per Section 124-A of the Indian Penal Code (IPC) is a non-bailable offence and reads as, “whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in [India], shall be punished with [imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.”

“The law of sedition was rooted in India as early as 1837 in one of the clauses of Macaulay’s draft of Indian Penal Code. Yet, due to its contentious nature, it was not adapted into the IPC until 1870. This addition was initiated by the colonist regime of the British in an attempt to curb the nationalist fervor that was stirring in India at the time, as a tool of oppression. This can be showcased in the famous case of *Queen-Empress v. Bal Gangadhar Tilak*.<sup>33</sup> In this draconian judgement, the scope of sedition was enhanced: the judge was quoted saying” “the intensity of the disaffection is absolutely immaterial... if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section”, conveying that any disloyalty towards the British was capable of being held culpable under sedition. This gives rise to the contention that sedition law in India finds root in dubious circumstances, largely as a weapon for the suppressive colonist regime, rather than a

bulwark to support the current democratic structure of India.

#### Issues with sedition laws

According to the 1962 Kedar Nath decision, the sedition law was only supposed to be used when the country's security and sovereignty were in danger.<sup>34</sup> However, there are increasingly evidences that this law has been used to suppress dissent and free speech against political opponents. According to the most recent data provided by Article 14<sup>35</sup>, as many as 25 cases of sedition were brought after the protests against the Citizenship Amendment Act<sup>36</sup>, 22 after the Hathras gang rape, and 7 after the Pulwama incident. In total, cases of sedition against 405 Indians were registered after 2014 for 96% of the cases. In addition, the National Crime Records Bureau's data show that sedition cases have increased by 163 percent, going from 47 in 2014 to 93 in 2019.<sup>37</sup> However, the percentage of cases that result in convictions is only 3%. This demonstrates that the police and other state agencies are employing the sedition laws indiscriminately to create fear amongst citizens and silence any opposition to the regime.

“Legally speaking, one of the main problems with the sedition law is that it is poorly defined. The terms “bring into hatred or contempt” or “attempt to excite disaffection” can be interpreted in many ways and this empowers the police and government to harass innocent citizens who are across the fence from them. Due to its poor definition, sedition law can be used spuriously by the

<sup>32</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 124A.

<sup>33</sup> *Emperor v. Bal Gangadhar Tilak*, (1917) 19 BOMLR 211.

<sup>34</sup> *Kedar Nath Singh v. State of Bihar*, 1962 AIR 955.

<sup>35</sup> The Constitution of India, art. 14.

<sup>36</sup> Citizenship (Amendment) Act, 2019 (Act 47 of 2019).

<sup>37</sup> <https://journalsofindia.com/national-crime-records-bureau-ncrb-report-on-sedition-cases/>



police to falsely accuse individuals as it does not clearly state which acts are seditious and provides a broad outline of what can be classified as seditious. This issue was recently highlighted by Justice D.Y. Chandrachud while restraining the Andhra Pradesh government from taking adverse action against two Telugu news channels booked under Section 124A (sedition) of the Indian Penal Code (IPC).” Justice Chandrachud remarked, “Everything cannot be seditious. It is time we define what is sedition and what is not.” In another important case (PIL filed against Farooq Abdullah, the former Chief Minister of Jammu and Kashmir), Justice Chandrachud stated, “Expression of views which is dissent and different from the opinion of the government cannot be termed seditious.” Similarly, Delhi High Court’s ruling in the Disha Ravi<sup>38</sup> case clearly stated that the government cannot put citizens “behind bars simply because they chose to disagree with the state policies” and “the offence of sedition cannot be invoked to minister to the wounded vanity of the government.” These rulings by the judiciary clearly diverge from the interpretation of the sedition law by the executive and show how the law is being indiscriminately misused by them.

- “Section 124A is a relic of colonial legacy and unsuited in a democracy. It is a constraint on the legitimate exercise of constitutionally guaranteed freedom of speech and expression.
- Dissent and criticism of the government are essential ingredients of robust public debate in a vibrant democracy. They should not be constructed as sedition. Right to question,

criticize and change rulers is very fundamental to the idea of democracy.

- The British, who introduced sedition to oppress Indians, have themselves abolished the law in their country. There is no reason, why should not India abolish this section.
- The terms used under Section 124A like 'disaffection' are vague and subject to different interpretation to the whims and fancies of the investigating officers.”

“IPC and Unlawful Activities Prevention Act have provisions that penalize "disrupting the public order" or "overthrowing the government with violence and illegal means". These are sufficient for protecting the national integrity. There is no need for Section 124A. The sedition law is being misused as a tool to persecute political dissent. A wide and concentrated executive discretion is inbuilt into it which permits the blatant abuse. In 1979, India ratified the International Covenant on Civil and Political Rights (ICCPR), which sets forth internationally recognized standards for the protection of freedom of expression.<sup>39</sup> However, misuse of sedition and arbitrary slapping of charges are inconsistent with India's international commitments.”

#### Contrary to freedom and democracy

“Freedom of speech and expression is the hallmark of a democracy that is being compromised due to the sedition law. A democracy requires citizens to actively participate in debates and express their constructive criticisms of government policies. However, the sedition laws have empowered the executive branch of the government to use the ambiguously defined

<sup>38</sup> *Disha A. Ravi v. State (NCT of Delhi)*, 2021 SCC OnLine Del 803.

<sup>39</sup> “International Covenant on Civil and Political Rights.” Treaty Series, vol. 999, Dec. 1966, p. 171.



provision as an instrument to regulate public opinion and indiscriminately wield power. The sedition law has become a tool to instill a sense of compliance towards government policies in the citizens. There have been many instances where the government has used the sedition law to suppress protesting voices to protect its interests. The arrests of the NDTV journalist Vinod Dua<sup>40</sup> for criticizing the government's response to COVID-19 and the 22-year-old Disha Ravi in the Greta Thunberg toolkit case for tweeting in solidarity with the farmer's agitation in India has raised many questions about freedom of speech and expression in India. When journalists are censored through the sedition law, it impacts democracy. The sedition laws reduce government accountability as the government is able to ignore its critics and in turn charge them with sedition. Yet, what is more concerning is once arrested under the sedition law, it is extremely difficult to get bails as the trial process can be stretched for long. This leads to harassment of innocent people and induces a fear in others to speak against the government. The cases of the Kashmiri students in Hubli are an example of the difficulty of getting bail in a sedition case as they got default bail after 100 days of police custody.

To conclude, sedition laws and their growing misuse by governments of all stripes (including opposition-ruled states) are a matter of serious concern. Personal liberty and the right to free speech are hallmarks of liberal democracy and sedition laws and their gross misuse attack the very foundation of these liberties enshrined in the Indian

Constitution. The need of the hour requires the judiciary to review this draconian law. Even if abolishing this law may not be feasible, toning it down and issuing strict guidelines to limit its indiscriminate use can definitely help India's democratic standing apart from safeguarding freedom of expression in the country."

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<sup>40</sup> Dhananjay Mahapatra, "Journalists can't be arrested just for criticizing govt: Supreme Court" available at: <https://timesofindia.indiatimes.com/india/journalists->

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