BALANCING ACT: NAVIGATING NATIONAL SECURITY AND CIVIL LIBERTIES IN ANTI-TERRORISM LEGISLATION UNDER THE INDIAN CONSTITUTION

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ABSTRACT

In the modern era, the delicate balance between national security imperatives and safeguarding civil liberties has become increasingly significant. This paper delves into the intricate interplay between these two crucial aspects by examining anti-terrorism legislation within the framework of the Indian Constitution. In an age marked by transnational threats and evolving security dynamics, nations grapple with the challenge of upholding national security while respecting the fundamental rights of their citizens. This piece sheds light on the Indian context, where the delicate task of harmonizing national security concerns and civil liberties is navigated through the lens of anti-terrorism legislation.

The term 'harmonizing' encapsulates the essence of this study, as it encapsulates the aspiration to strike an equilibrium between safeguarding national security interests and upholding the cherished civil liberties enshrined in the Indian Constitution. Inherent in this balance is the need to ensure that counterterrorism measures are not disproportionately restrictive and that they operate within the parameters of the Constitution. The concept of 'national security' signifies the safeguarding of a nation's sovereignty, territorial integrity, and the protection of its citizens from threats posed by terrorism.

Striking a balance between anti-terrorism efforts and civil liberties involves crafting legislation that empowers law enforcement agencies to act decisively against terror elements without infringing upon the rights of innocent individuals.

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INTRODUCTION

In an increasingly interconnected and complex world, the pursuit of national security and the protection of civil liberties often find themselves at odds. The quest to maintain a safe and secure environment must be balanced against the imperative of upholding the fundamental rights and freedoms of individuals. This delicate equilibrium becomes particularly pronounced in the context of anti-terrorism legislation, where states seek to counteract threats to their security while ensuring the preservation of the democratic values they hold dear. Nowhere is this intricate balance more evident than in the Indian legal landscape, where anti-terrorism measures are intricately interwoven with the principles enshrined in the nation's Constitution.

The term 'harmonizing' aptly captures the essence of this discourse – the aspiration to synchronize the imperatives of safeguarding national security and preserving civil liberties. The postulate that these two objectives are not mutually exclusive, but rather mutually reinforcing, lies at the heart of a democratic society. Striking the right equilibrium is not only a legal necessity but a moral imperative, for an excess of either, could compromise the very essence of a just and free society. The modern concept of 'national security' extends beyond the traditional realms of territorial defence to encompass protection against a spectrum of threats. Among these, terrorism looms large as a transnational menace that transcends borders, ideologies, and cultures. The very nature of terrorism challenges the foundations of civil society, targeting innocent lives and the values that underpin democratic governance. Consequently, nations have sought to respond with legal frameworks that empower law enforcement agencies to prevent, investigate, and prosecute acts of terror. However, this pursuit of security cannot come at the cost of the very rights and liberties that such acts seek to undermine.

The 'civil liberties' discourse, deeply embedded within the fabric of democratic governance, highlights the inviolable rights that every individual is

entitled to. These rights include personal freedom, equality, privacy, and protection against arbitrary actions. The hallmark of a just society is its commitment to upholding these rights, even in the face of adversity. Therefore, the question arises: How can anti-terrorism legislation be crafted to address the grave threat of terrorism without infringing upon the rights and freedoms that define the essence of democracy?

The Indian Constitution, a living document that reflects the collective will of the people, stands as a sentinel guarding against the erosion of civil liberties, even in times of crisis. As a vibrant democracy, India has faced multifaceted challenges to its security. The Constitution, adopted in 1950, not only guarantees a range of civil liberties but also outlines the mechanisms through which these rights can be protected and enforced. Thus, any anti-terrorism legislation must be subjected to the constitutional litmus test to ensure that it respects the letter and spirit of the foundational document.

This article embarks on a journey through the intricate interplay between national security imperatives and civil liberties protections within the context of anti-terrorism legislation in India. By delving into the nuances of harmonizing these seemingly opposing forces, the article seeks to uncover how the Indian Constitution provides the framework for this endeavour. Through an exploration of legal provisions, judicial interpretations, and case studies, this article aims to shed light on the delicate balance that India strives to achieve – one that respects its security concerns while safeguarding the democratic values that define its identity. In doing so, it contributes to the broader discourse on reconciling security and liberty in an increasingly complex world.

BACKGROUND OF ANTI-TERRORISM LEGISLATION

Since terrorism causes legitimate security concerns, the state takes a variety of steps to address them. One such measure is the deployment of anti-terrorism laws. Anti-terrorism laws are passed to combat terrorism. Many nations have passed suitable and strict anti-terrorist laws in response to the increase in terrorism over the past few years. India has also passed several anti-terrorism laws, some of which stem

from the country's colonial background and others of which were passed in, especially after 1980. However, several of these laws were abandoned or overturned because they had been applied improperly. These laws were intended to be passed and implemented until the situation got better. Making these extremely harsh actions a permanent part of the law of the land was not the objective. However, the statutes have been reintroduced with the required amendments due to ongoing terrorist activity. Since terrorism has long been an issue in our nation, the Indian government has implemented a number of legal measures to combat terrorist and separatist activities.

These legislative measures may be divided into two categories –

I. Preventive Detention Laws and

II. Punitive Laws to Control Terrorism

PREVENTIVE DETENTION LAWS

Essentially the term "Preventive Detention" appeared in the legislative lists of the Government of India Act, 1935, and has been used in Entry 9 of List I and Entry 3 of List III in the Seventh Schedule to the constitution[2], there is no authoritative definition of the term in Indian law. It is a preventative action and has nothing to do with a crime. When compared to the word punitive, the word "preventive" is employed. Instead of punishing a man for what he has done, the goal is to stop him in his tracks before he even starts. Therefore, the primary goal of preventive detention is to stop him from harming society in any way and to defend the state against sabotage, and violent operations planned in secret to cause public commotion.

The East India Company Act, passed in 1780, contains the earliest known case of preventative detention of a person by presidential order, but an Act with the same name passed in 1784 was more thorough. The Governor-General was authorized to secure and detain any person or persons suspected of carrying on correspondence or activities prejudicial to or dangerous to the peace and safety of the

[2]Priti Saxena, *Preventive Detention and Human Rights* (Deep & Deep Publications, 2007).

British settlements or possessions in India, in addition to using preventive detention for those whose activities endangered the security of the state Nevertheless, the aforementioned Act gave the detenue the chance to learn what was being charged against him within five days[3].

Several later Acts, including the Bengal Regulation of 1812, the Bengal State Prisoners' Regulation of 1818, the Madras State Prisoners' Regulation II of 1819, the Bombay State Prisoners' Regulation XXV of 1827, and the State Prisoners' Act of 1850, included provisions for the right to be detained and arrested without a warrant. According to these rules, a prisoner was not permitted to ask the court for a writ of habeas corpus. Despite this, the detenue had the right to present evidence in his defence and section 491 of the Criminal Procedure Code also recognized the right to habeas corpus[4].

The current Article 22 of the Constitution, which addresses the protections afforded to those who have been arrested and those who have been imprisoned under rules governing preventive detention, was the subject of extensive dispute at the time the Constitution was being drafted. Preventive detention laws can be passed in India under the pretexts of "national security" and "maintenance of public order," according to the constitution.

However, the central and provincial governments were given the authority to create laws for preventive detention once the Government of India Act, of 1935, was adopted as the temporary constitution. To ensure the defence of British India, the public safety, the maintenance of public order, the effective conduct of war, or the maintenance of supplies and services essential to the community's life, a second Defence of India Act was passed in 1939, at the start of the Second World War.

Shortly after the Constitution took effect, Parliament passed the Preventive Detention Act of 1950, which established detention as a means of preventing anyone including foreigners from acting in a way that would be detrimental to India's defence, its relations with other countries, its security, the maintenance of public order, and the upkeep of supplies and services that are vital to the community. The

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[3] Chatterjee, Dr. S. S. (2003). Control of Political Offences in India Through Laws (p. 226). Kolkata: Kamal Law House.

[4] Ghosh, S.K. (2005). Terrorism: World Under Siege (pp. 397-398). New Delhi: Ashish Publishing House.

Maintenance of Internal Security Act, which was passed in 1971 and effectively reinstated the PDA's powers after it expired in 1969, replaced the Preventive Detention Act. On December 4, 1971, Parliament passed the Defence of India Act, 1971. This Act granted the superpowers of indefinite "preventive" detention of individuals, search and seizure of property without warrants, and wiretapping in the quelling of civil and political disorder in India, as well as countering foreign-inspired sabotage, terrorism, subterfuge, and threats to national security. The Act was passed in light of the serious emergency that had been declared by the President at the time, and it included provisions for exceptional measures to guarantee public safety and interest, the defence of India and civil defence, the prosecution of certain offences, and issues related thereto.

The National Security Act of 1980 was passed by the Parliament in 1980 after Congress regained control, and it is still in force today. Numerous PDA and MISA provisions were reinstated by this Act. It gives security forces the right to detain someone without a warrant if they're suspected of doing something that threatens public safety, economic vitality, or national security. The procedural criteria are virtually the same as those under the PDA and MISA, and it also permits preventative detention for a maximum of 12 months. The Act also grants immunity to the security personnel who participated in putting an end to the violence. The only statute allowing for preventive detention to combat terrorism in India is this one. The Act gives the Central Government or the State Government the authority to detain a person to prevent him or her from acting in any manner detrimental to the security of the State, detrimental to the maintenance of Public Order, detrimental to the maintenance of supplies and services essential to the community, or in any other manner for which it is necessary to do so. The length of any detention order issued under this act must not exceed 12 days[5], and it may be carried out anywhere in India. Twelve months[6] is the maximum detention time. A detention order can be changed or removed at any moment[7].

Punitive Laws to Control Terrorism

[5] National Security Act 1980, s 3.
[6] Ibid s 13.
[7] ibid s 14.

There are various anti-terrorism laws in India, which are punitive, but some of them were already repealed at different points of time. At present, the legislation in force to check terrorism in India are the National Security Act, 1980, National Investigation Agency Act, 2008, Unlawful Activities (Prevention) Act, 2012, Unlawful Activities (Prevention) Act, 2008, Unlawful Activities (Prevention) Act 2004 and the Unlawful Activities (Prevention) Act, 1967, Armed Forces Special Powers Act 1958.

A few of the anti-terrorism acts along with their provisions include:

Unlawful Activities Prevention Act, 1967 (UAPA)

India adopted its Constitution on November 26, 1949, and on January 26, 1950, it went into effect. The Constitution gave its citizens a wide range of rights, and it was quickly apparent that if these rights were not governed, the state's functioning would become seriously unbalanced. As a result of this exigency, the Indian Constitution underwent its first revision in 1951, replacing clause (2) in Article 19, which set appropriate limitations on the exercise of such rights. On the recommendation of the Committee on National Integration and Regionalism, which was appointed by the National Integration Council to impose reasonable restrictions in the interest of India's sovereignty and integrity, Article 19(2) was further amended in 1963 by the Constitution (Sixteenth Amendment) Act, 1963. Additionally, the Unlawful Activities (Prevention) Bill was introduced in the Parliament in order to carry out the provisions of the aforementioned Constitutional Amendment. It was approved by both Houses of Parliament and received the President of India's assent on December 30, 1967, after which it became the Unlawful Activities (Prevention) Act, 1967[8]. The original statute was intended to establish a process for gathering information, and the accused were to be tried in accordance with the guidelines set forth in the Criminal Procedure Code, 1973[9]. According to the original act's declaration of goals and justifications, it aims to stop any illegal activity that might be carried out by both people and groups.

[8] Unlawful Activities (Prevention) Act 1967.

[9] Anjana Prakash, 'It’s Time for the Government to Redeem Itself and Repeal the UAPA' (2023) <https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa> accessed 10 June 2023.

After the 9/11 attack[10], there was a marked increase in the severity of anti-terrorism laws in all liberal democracies. Countries that were worried by terrorist activity in one of the most industrialized nations saw this as a chance to enact punitive legislation. As nations were appalled by this tragedy, there wasn't much opposition to it at the time. Similar was the case after September 26, 2001, in India[11]. While the State must defend its residents from those who could infringe upon their rights, it should not do so at the expense of the rights of the nation's minority. Older anti-terrorism laws were removed because they granted the executive branch enormous power without offering any effective safeguards[12]. The UAPA still reflects the same, and as a result, public disgust with this law grows with each amendment. Parliamentarians debated the need for and potential abuse of UAPA at the time of its first formation, during which the opposition parties raised concerns[13]. The government responded that the Act's requirement that it bear the burden of proof in order to establish an organization's prohibition[14] would prevent an arbitrary ban on the association from occurring at that time.

Thus, while the original Act contained constitutional protections[15], its modifications and ongoing restrictions on specific minority organizations made it the subject of public and academic inquiry. The UAPA has undergone a number of revisions, and in 2004 anti-terror clauses were included. It was revised again in the years 2008, 2012, and 2019, which was the mostrecent and contentious as it designated individuals as terrorists.

National Investigation Agency Act, 2008

The National Investigation Agency Act of 2008 was passed to investigate and prosecute individuals for offences affecting the sovereignty, security, and integrity of

[10] Mark Pearson & Naomi Busst, 'Anti-terror laws and the media after 9/11: Three models in Australia, NZ and the Pacific' (2006) 12(2) Pacific Journalism Review <https://www.researchgate.net/publication/27826847 Antiterror laws and the media after 911 Three models in Australia NZ and the Pacific accessed 23 June 2023.>.

[11] Maeen Mavara Mahmood, 'The Conundrum of the Unlawful Activities (Prevention) Act, 1967: A Comparative Analysis with Analogous Legislations' (2021) 26 Supremo Amicus 214.

[12] Bhamati Sivapalan & Vidyun Sabhaney, 'In Illustrations: A Brief History of India's National Security Laws' (The Wire, 27 July, 2019) <https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws>accessed 25 June, 2023.

[13] Maeen Mavara Mahmood(n 15).

[14] Ibid.

[15] Sneha Mahawar, 'Terror of Unlawful Activities Prevention Act, 1967 (UAPA)' (2020) 21 Supremo Amicus 103.

India, as well as offences relating to state security, friendly relations with foreign states, and offences under laws enacted to carry out international treaties, agreements, conventions, and resolutions of the United Nations, its agencies, and other international organizations[16].

The National Investigation Agency (NIA) Act, 2008 was passed by the Parliament in the wake of the recent spike in terrorist attacks, including the attack on the British Parliament and the Mumbai attacks, with the aim of increasing professionalism in the investigation of terrorist acts for the first time, a national investigation agency with the authority to look into matters over the entirety of India's territory has been envisioned by the NIA Act. It is the shared obligation of the federal, state, and local governments to combat terrorism. It is crucial to develop tactics, precise intelligence, and current databases on terrorists to counter terrorist actions.

Only an empowered central organization with regional and local field offices and quick communication can complete this multi-agency coordination and time-bound action. Similar to this, a committed group of officers who are highly motivated, trained, and totally professional may move quickly to confront terrorism when given the necessary power, resources, and equipment. For this reason, the National Agency Act was passed. Centre-state collaboration is envisioned in the investigation of terrorism situations. It restricts the new agency's authority to a select list of scheduled offences covered by seven Central Acts that address nuclear energy, illegal activities, anti-hijacking, civil aviation safety, marine safety, weapons of mass destruction, and commitments under the SAARC Terrorism Convention. Offences against the State[17] and offences involving money and bank notes[18] are included in the scheduled offences under the jurisdiction of the National Investigation Agency in the Indian Penal Code.

The important aspect of The National Investigation Agency Act of 2008 is that it applies to the whole of India, Indian citizens living outside of India, and passengers on ships and aircraft with Indian registry. During the investigation of a

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[16] "Amendment to the National Investigation Agency Act, 2008: An Act of Violation" (Amendment to the National Investigation Agency Act, 2008: An act of violation - Frontline, August 5, 2019) <https://frontline.thehindu.com/the-nation/article28758410.ece> accessed on 27 April 2023.

[17] Indian Penal Code 1860, s 121-130.

[18] Ibid s 489A-489E.

crime, the NIA personnel is attributed with the same rights as that of a police officer. The NIA investigates a crime only when the central government believes the crime is related to terrorism and requests that the NIA look into it. It can look into additional offences related to terrorism. The State Government provides the NIA with full support in conducting criminal investigations. The Act's investigation-related provisions have no bearing on the State Government's authority to look into and prosecute any terrorism-related crimes or other offences. For the trial of offences related to terrorism, special courts established by the centre may meet anywhere. The High Court may transfer such matters to any other special court within the state, and the Supreme Court of India may transfer any case that is ongoing with the Special Court to another Special Court in the same State or any other State. For the trial of any offence under the Act, the Special Courts would have all the authority granted to the court of sessions under the Criminal Procedure Code (CrPC).

Such cases' trials would take precedence over those for other offences. One or more special courts may be established at the discretion of the State Governments. After the first 90 days have passed, no appeal will be considered in such situations. Terror-related acts have been specifically referred to and addressed in the NIA Act. Terrorist acts include using bombs, dynamite, poisons, different gases, biological, radioactive, and nuclear substances. One very distinct distinction between the National Investigation Agency and the Central Bureau of Investigation is that the NIA Act of 2008 makes no mention of bail. If an accused person is in custody, he cannot under any circumstances be given bail. Additionally, there is no possibility for bail if the accused is not an Indian citizen and entered the country unlawfully.

When looking into specific offences, the NIA disregards the Police Act of 1861's requirements. Although the states have been informed since the NIA Act of 2008 gives them the authority to alert the NIA when they discover such offences, such as offences related to terrorism, being committed, the NIA can also act Suo Motto to deal with any of the scheduled crimes. This is a departure from the CBI's practice, which called for the State's consent before the agency could take over the case. The Federal Bureau of Investigation in the United States served as a model for the NIA. The NIA's goal is to make the judicial system stronger so that the Central Government can successfully combat terrorism. The NIA is also intended to combat cybercrime and insurgency.

The National Investigation Agency (hence referred to as NIA) was formed under the NIA Act. The Central Government established, ran, and oversaw the NIA to look into and prosecute scheduled offences[19]. Any FIR or information pertaining to a crime on the list must be sent by the state to the central government[20]. Within fifteen days of receiving the report, the Central Government will decide whether the offence is related to a scheduled offence or not based on reports from State governments or other sources. If the findings are positive, it will then be decided if the case is appropriate for NIA investigation by taking into account the seriousness of the offence[21]. Without awaiting a State Government's report, the Central Government may order the NIA to conduct the scheduled offence inquiry on its own initiative[22]. The State Government must offer all cooperation and hand over all papers and evidence to the NIA once the NIA assumes control of the inquiry.

Armed Forces Special Powers Act, 1958

One of the harshest pieces of legislation ever approved by the Indian Parliament is the Armed Forces (Special Powers) Act of 1958 (AFSPA). The statute gives the military forces unique authority in what it refers to as "disturbed areas" and only has six provisions. In 1972, it was revised to include all seven states in India's north-eastern area. Originally, it only applied to the north-eastern states of Assam and Manipur[23]. The Armed Forces (Special Powers) Act of 1948 is where the Armed Forces (Special Powers) Act of 1958 got its start. The Indian government passed four ordinances in response to the situation that developed in some areas of the country because of the country's 1947 division.

In order to put an end to the Quit India Movement started by M. K. Gandhi during the colonial era, Lord Linlithgow, the viceroy of India, enacted the Armed Forces Special Powers (Ordinance) on August 15, 1942. Police shootings at Indian protesters resulted in thousands of deaths and many more arrests. The Naga

[19] National Investigation Agency Act 2008, s 3-4.
[20] Ibid s 6(1) 6(2).
[21] ibid s 6(3) 6(4).
[22] ibid s 6(5).
[23] 'Explained: What Is AFSPA, and Why Are States in Northeast against It?' (The Indian Express, December 7, 2021)<https://indianexpress.com/article/explained/nagaland-civilian-killings-indian-army-repeal-of-afspa-northeast-7661460/>accessed on 29 May 2023.

insurgency, however, started in the modern era in 1954, following independence. The Armed Forces (Special Powers) Act was passed in 1958 by Nehru's administration to stifle this movement. As vicious as the British troops in India were the atrocities committed by Indian soldiers in Nagaland. Since then, AFSPA has been implemented in all the North Eastern states, as well as in Punjab and Jammu & Kashmir.

The major purpose of the act is to make it possible for military personnel to be granted special authority in troubled areas of the states of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, and Tripura. According to the Act, the Governor must declare a certain area to be a disturbed area before AFSPA can be implemented there[24].

Definitions pertaining to this Act are provided under Section 2 of the Act. The statute specifies that the phrase "armed forces" refers to both armed forces and air forces, which are regarded as armed forces on land[25]. Any other Union armed forces could also be included in it. A "disturbed area"[26] is further defined as a region that has been identified as a disturbed area under Section 3 of the Act.

Accordingly, the Governor must declare a certain area to be a disturbed area before AFSPA can be implemented there. The Hon'ble Supreme Court of India, however, ruled that section 3 cannot be read to give the authority to make a declaration at any time. Before the term of six months has passed, the declaration should be periodically reviewed[27].

The provision of the act that has generated the most debate is Section 4, which establishes some specific authorities for the military services. The Act's Section 4 gives the armed forces the authority to forbid groups of five or more people from congregating in a given location. If they believe that someone or several persons are breaking the law, they have the right to start shooting after issuing a proper warning. If the authorities have a good faith suspicion that a vehicle may be carrying weapons of any type, they have the authority to stop and search the vehicle. If a cognizable

[24] Armed Forces Special Powers Act 1958, s 3.
[25] Ibid s 2(a).
[26] ibid s 2(b).
[27] Naga People's Movement of Human Rights v. Union of India [1998] SC 413.

offence has been committed, the army may arrest the suspect(s) without a warrant if there is reasonable doubt. The Act provides the military with a right to enter a location without a search warrant and conduct a search there[28].

"The Naga People's Movement for Human Rights v. Union of India"[29] case, where the Act's legality was contested through a writ petition, was decided by the Supreme Court of India in 1997. It was claimed that the Act had created a sort of imbalance between military personnel and civilians, as well as between the Union and State authorities and that it had breached constitutional rules governing the procedure for issuing proclamations of emergency. These arguments were dismissed by the court. It determined that the Act's various sections were being complied with the pertinent provisions of the Indian Constitution and that the Parliament had the authority to adopt the Act.

Maharashtra Control of Organized Crime Act, 1999 (MCOCA)

In an effort to overthrow both organized crime and terrorism, the Maharashtra Control of Organized Crime Act, 1999 (MCOCA), was passed by the state of Maharashtra in 1999. The threat of organized crime was growing, as stated in the declaration of object and reasons, and the Maharashtra State lacked any effective legislation to effectively control organized crimes. It was necessary to pass laws along the lines of the current law to deal with them. The Act itself contains provisions to prevent the misuse of the law. The passage of this law is expected to significantly reduce the propagation of fear in society and allow for significant control of the criminal groups supporting terrorism[30]. The present legal framework, which includes the penal and procedural legislation and the adjudicatory system, seems rather to be inadequate to curb or control the menace of organized crime, according to the preamble of MCOCA. In order to combat the threat of organized crime, the government has decided to enact a special law with strict and dissuasive provisions, including the ability to intercept wire, electronic, or oral communication under certain conditions.

[28] Armed Forces Special Powers Act 1958, s 4.
[29] Ibid n 68.
[30] 'Maharashtra Control of Organized Crime Act, 1999 Explained by Adv. Ravi Drall, Delhi High Court' (Lawstreet.co) <https://lawstreet.co/vantage-points/maharashtra-control-organized-crime-ravi-drall> accessed on 29 March 2023.

Only the Special Court whose local jurisdiction the offence was committed to or, as the case may be, the Special Court established for trying offences may trial any offence under the MCOCA[31]. In MCOCA cases, the police have the ability to file a charge sheet within 180 days as opposed to the usual 90 days. In MCOCA proceedings, an apprehended person may be held in police custody for 30 days rather than the usual 15 days after the accused is produced in court within 24 hours, as opposed to regular criminal cases[32].

The Act permits the interception of wire, electronic, or oral communications[33], makes the intercepted information admissible as evidence against the accused in court, mandates that every order issued by the authority with the necessary authority to authorise the interception[34]be reviewed by a review committee, and places certain restrictions on the interception[35].

If the Special Court requests it, the proceedings under this Act may be conducted behind closed doors[36]. On a request made by a witness in any process before it, by the Public Prosecutor in connection to that witness, or on its own initiative, a Special Court may take whatever steps are necessary to protect a witness's identity and address. Without limiting the generality of the requirements of subsection (2), a Special Court may take the following actions under that subsection:

1. Proceedings to be held at such location as determined by the Special Court;

2. Names and addresses of the witnesses in its orders or judgments or in any records of the case available to the public need to remain anonymous

3. the issuing of any directives to ensure that the identification of the witnesses are not disclosed; and

4. All proceedings pending before the court shall not be made public.

[31] Maharashtra Control of Organized Crime Act 1999, s 9(1).
[32] The Code of Criminal Procedure 1973, s 167(2).
[33] Maharashtra Control of Organized Crime Act 1999, s 14.
[34] Ibid s 15.
[35] ibid s 16.
[36] Ibid s 19.

Anyone who disobeys a direction given under subsection (3) faces a period of imprisonment that may last up to a year and a fine that may amount to one thousand rupees.

For the safety of the witness, it is stipulated that the witness need not be produced in court if they are not willing. There is no danger of victimization under such a judicial system. It is recommended that a Deputy Commissioner or higher rank officials supervise the case, especially in MCOCA instances. Only in MCOCA cases can a Deputy Commissioner of Police or an officer of higher rank record the voice of an apprehended gang member who wishes to confess, and the confession will be admissible in court[37]. However, the case shouldn't be under investigation or supervised by the Deputy Commissioner of Police or any higher-ranking official who would record the confession.

Karnataka Control of Organized Crime Act, 2000 (KCOCA)

The Karnataka Control of Organized Crime Act, 2000 (KCOCA) is a law that was passed by the state of Karnataka and received presidential approval on the 22nd day of December 2000. This Act included special provisions for dealing with organized crime syndicate or gang criminal activity, as well as matters related to or incidental to such activity, prevention, control, and management. It is a duplicate of the Maharashtra Control of Organized Crime Act (MCOCA), which was passed in 1999. The act defines "organized crime" as any ongoing illegal activity by an individual, singly or jointly, either as a member of an organized crime syndicate or on behalf of such syndicate, using violence or the threat of violence, intimidation or coercion, or other unlawful means, with the aim of obtaining financial benefits, obtaining an unauthorized advantage in the economy or in any other way, or promoting insurgency”[38]. “The statute also outlines the establishment of one or more special courts for the trial of the listed offences[39]. A judge to be chosen by the State Government would preside over the special court, with the approval of the Chief Justice of the High Court of Karnataka.

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[37] ibid s 23 (1)(b).

[38] Karnataka Control of Organized Crime Act 2000, s 2(e).

[39] ibid s 5.

The KCOCA also permits the police to listen in on electronic communications like phone calls. Evidence that is on tape has always been accepted as evidence. Sections 14, 15, 16, 17 and 28 of the KCOCA offer comprehensive provisions to stop unauthorized invasions of privacy.

In accordance with the Indian Evidence Act, the accused's police confessions are typically not admissible as evidence against them. However, if the confessions are voluntary and made in front of a police officer with at least the rank of superintendent of police (equivalent to deputy commissioner of police in cities), they are admissible under the KCOCA and can be used against both the confessing offender and the other accused parties in the same cases[40]. According to Section 22, anyone accused of committing a KCOCA offence is not eligible for anticipatory bail. The sole conditions under which a court may give bail to an accused person are that "the court is satisfied that there are no reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. If the Court learns that the defendant was out on bail for an offence under this Act or another Act on the day of the alleged offence, it should not grant bail to the accused.

A person can be prosecuted for presumption as to an offence for an organized crime offence punishable by Section 3 if it is proven that unlawful weapons and other materials, including documents or papers, were recovered from the accused's possession or by expert testimony, that the accused's fingerprints were discovered at the scene of the offence or on anything, including unlawful weapons and other materials, including documents, or if the accused's fingerprints were found on anything, including unlawful arms and other materials, including documents[41].

Indian Penal Code, 1860

Crimes against the state are covered in Chapter VI of the Indian Penal Code, 1860. The next two sections deal with conspiracy and preparation to conduct such an offence by gathering arms, etc., while Section 121 specifies the punishment for those involved in waging war against the Government of India. Disguising with the intent to aid acts intended to wage war is prohibited under Section 123. An expansion of section 121A, section 124 provides a deterrent penalty for assault, wrongful restraint,

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[40] Ibid s 19.
[41] ibid s 23.

etc. intended to intimidate or prevent the President or the Governor of any state from acting within the scope of their constitutionally granted authority. Sedition is defined by Section 124A as the commission of certain acts that will incite hatred, contempt, or strong feelings against the legal government of India. Such deeds may be carried out by the use of spoken or written words, signs, or other audible or visual representations.

Criminal Procedure Code, 1973

Any Executive Magistrate or official in charge of a police station (not below the rank of a sub-inspector) has the authority to issue a directive to disperse any unlawful assembly or any assembly of five or more people that is likely to disturb the public peace[42]. The aforementioned magistrate or police officer may employ whatever amount of force is required to disperse the unlawful assembly or to apprehend and confine its participants[43]. If the Executive Magistrate is unable to disperse the unlawful assembly using ordinary means, he is further authorized to utilize armed forces to do so[44]. Any commissioned officer of the armed forces may disperse such a gathering with the assistance of the armed forces under his command when public security is obviously threatened by such an assembly and no Magistrate can be reached[45]. Additionally, under section 144 of the Criminal Procedure Code, 1973, the District Magistrate, Sub Divisional Magistrate, or any other Executive Magistrate, specially empowered by the State Government, may order a specific person or the public at large to cease doing something or to refrain from congregating in a public place in order to prevent immediate harm or danger to human life, health, or safety, a disturbance of the public tranquillity, a riot, or an affray. Although the aforementioned clause is not specifically directed against terrorism, it may nonetheless serve to indirectly restrain terrorist activities in certain areas where it is forbidden for any citizens to leave their homes. If a terrorist chooses to emerge in such an area, he will be easily recognized if police are effectively patrolling the area.

[42] The Code of Criminal Procedure 1973, s 129(1).
[43] Ibid s 129 (2).
[44] ibid s 130 (1).
[45] Ibid s 131.

CONSTITUTIONAL VALIDITY OF ANTI-TERRORISM LEGISLATIONS

Anti-terrorism laws are special laws that have occasionally been passed to address unique circumstances. The judiciary has consistently maintained the legitimacy of these legislations. Through a number of cases, the legislative authority of the Parliament to pass various anti-terrorism laws has been contested.

Since anti-terrorism laws are special laws, they are consistent with the jurisprudential history of other special laws that have occasionally been passed to address unique circumstances. India is not an exception to this rule. The British only intended to arrest those who were seen as a threat to the British settlement in India when they passed the first preventive detention law in 1793. The Bengal State Prisoner's Regulation was afterwards passed by the East India Company in Bengal, and it survived for a long time as Regulation III of 1818. Regulation III, an extra-constitutional regulation contradicting all fundamental liberties, allowed for the indefinite detention of anyone against whom no legal action would be taken for lack of sufficient grounds. The British's most effective weapon for putting an end to political violence was Regulation III. Regulation III of 1818, which was gradually extended to other regions of British India, was heavily employed during the first two decades of the 20th century to quell revolutionary terrorist operations in Bengal. The Regulation permitted the "personal restraint" of people against whom there might not be sufficient grounds to initiate any legal proceedings for the prevention of tranquillity in the territories of native princes entitled to its protection and the security of British dominions from external hostility and internal commotion. The beginning of the 20th century saw the emergence of numerous covert organizations seeking independence through violent means, which led to the observation of the revolutionary movement in India. During this time, various laws were passed to halt the rising tide.

The judiciary has played a variety of roles in relation to anti-terrorism laws. On the one hand, the courts have typically upheld the legality of security, emergency, and special laws. Even when a person's human rights are being infringed, courts have a tendency to recognize the existence of particular circumstances and settings as justifications for a less strict interpretation and implementation of the law.

Before the Indian Constitution of 1950, India was administered by the Government of India, and the distribution of legislative power between the Federation and the Provinces followed a similar pattern. In accordance with Entry 1 of List II of the seventh schedule to the Government of India Act, 1935, those subject to such custody are those who are subject to preventive detention related to the maintenance of public order. The creators of our Constitution believed that the need for drafting such preventative detention legislation would be seldom and should only be applied sparingly and cautiously in a free India with a democratic and representative government. However, the Preventive Detention Act, which was passed by the Parliament in 1950 to stop the "violent and terrorist" activities of the communists in the states of Madras, West Bengal, and Hyderabad, was a wise decision. A.K. Gopalan v. State of Madras[46] was the first case to be heard by the Indian judiciary after the Indian Constitution was enacted. The Preventive Detention Act is not subject to the declaration of an emergency under Part XVIII of the Constitution or to the occurrence of any war with a foreign power. Therefore, Preventive Detention was accepted by our Constitution as separate from emergency laws. Preventive detention being included in the Constitution is a novel element.

The Armed Forces (Special Powers) Act of 1958 (AFSPA) was challenged through a writ petition before the Supreme Court of India in Naga People's Movement for Human Rights v. Union of India[47]. The petitioner claimed that the Act had upset the balance between military and civilian, as well as the Union and State authorities and that it had breached constitutional rules governing the procedure for issuing proclamations of emergency. These arguments were dismissed by the court. It determined that the Act's various sections were compliant with the relevant provisions of the Indian Constitution and decided that the Parliament had the authority to adopt the Act.

The petitioner argued that the AFSPA was unconstitutional because it gave the armed forces complete control over preserving public order in a volatile area, even though the Constitution only allows Parliament to enact laws relating to the use of the Armed Forces in aid of civil power. The Court specifically rejected this argument. However, the Supreme Court decided that the "in aid of civil power" phrase required

[46]A.K. Gopalan v. State of Madras [1950] SC 27.
[47] Naga People 's Movement for Human Rights v. Union of India [1998] SC 431.

the continuous existence and significance of the authority to be assisted in rejecting this claim. Therefore, the AFSPA prohibits the military forces from "supplanting or acting as a substitute" for a state's civilian authority in maintaining public order and mandates that they work in close coordination with them.

An important MISA case is ADM Jabalpur v. Shivakant Shukla[48]. In this case, the interpretation of MISA's Section 16A (9) was in question. The declared emergency from 1975 is a topic of the case. This case involved more than 100,000 persons who were detained during the emergency under the MISA, including journalists, activists, intellectuals, and politicians. The constitutionality of such arbitrary detentions was under question. The Supreme Court's majority decision upheld MISA as legally valid and ruled that petitions for habeas corpus to challenge unlawful detention during an emergency cannot be filed in any High Court or the Supreme Court. The Indian judiciary had one of its worst periods during this time. Justice HR Khanna, in a fair dissent, opined that no citizen's right to life and personal liberty under Article 21 of the Indian Constitution can be violated, not even in times of emergency[49].

The Supreme Court has heard appeals regarding the laws of TADA and POTA. In Kartar Singh v. State of Punjab (referred to as "Kartar Singh"), the petitioners argued that TADA was unlawful on two grounds: first, the Central Legislature lacked the authority to enact the laws, and second, some of the provisions (particularly 15, which permitted the admission of confessions made to police officers as evidence) were in violation of the fundamental freedoms outlined in Part III of the Constitution. Furthermore, it claimed that TADA violated humanitarian law and universal human rights, lacking impartiality, and woefully failing the fundamental justice and fairness test, which is the cornerstone of law. The Supreme Court heard the petition and noted that the petitioners made a bitterly severe attack seriously asserting that the police are engaging in a 'witch-hunt' against innocent people and suspects by misusing their arbitrary and un analysed power under the impugned Acts and branding them as potential criminals and hunting them constantly and overreacting thereby unleashing a reign of terror as an institutionalized terror

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[48]ADM Jabalpur v. Shivakant Shukla [1976] AIR 1207.
[49] 'Revisiting the Emergency: A Primer – the Leaflet' (theleaflet.in25 June 2020). <https://theleaflet.in/revisiting-the-emergency-a-primer/> accessed 15 June 2023.

perpetrated by Nazis on Jews. The Peoples' Union for Civil Liberties (PUCL) objected to POTA with nearly identical concerns.

However, the claim that these laws had "the voice of unconstitutionality" was rejected in favour of constitutionality because none of their provisions violated the fundamental right to a fair trial by violating established evidentiary rules and allowing the admission of confessions, secret witnesses, extended detention, etc. TADA's constitutionality was confirmed by the Kartar Singh decision, whilst POTA's was defended by the Supreme Court in PUCL. Since terrorism, in the court's opinion, dealt neither with "law and order" nor "public order," but rather with the "defence of India," the Supreme Court supported the legislative competence of the Parliament to adopt these legislations in both instances. In both rulings, the court overruled concerns about civil liberties by invoking the threat of terrorism. In Kartar Singh, the Supreme Court supported the constitutional soundness of TADA by recommending a quarterly review of cases and adding certain safeguards to the recording of confessions.

The Court noted that terrorism affects the security and sovereignty of nations and should not be equated with the law and order or public order problem that is confined to the State alone when responding to the question of the legislative competence of the Parliament to enact anti-terrorism legislation. The Court maintained the Parliament's authority to establish and implement this Act because it recognized the need for collective worldwide action. The court even went so far as to suggest that a statute cannot be declared unconstitutional based only on misuse of the law.

It has also been questioned in the past whether the National Investigation Agency (NIA) is constitutionally valid in this regard and whether it is able to conduct investigations under the National Investigation Agency Act, of 2008. It is possible to use Entry 8 of List I (the Union List) as proof that the Central Government established the NIA, but there is no connection between Entry 8 of List I and Entry 2 of List II. The phrase Central Bureau of Intelligence and Investigation appeared in Entry 8 of List I (Union List) of the Seventh Schedule. This phrase effectively prohibited the Central Government from conducting an investigation into a crime because it would only be constitutionally possible for a police officer to conduct an

investigation under the CrPC because police are solely a state subject. Although this power is subject to the limitations under Articles 249 and 252 of the Constitution, Entry 2 of List II is about "police," which is a state topic. The centre has no authority to legislate on this subject other than as stated in Entry 2A of List I. A matter on the state list that is in the national interest may be the subject of legislation by the Parliament for a year only, as stated in Article 249 of the Constitution. By agreement and the approval of such legislation by any other state, Article 252 allows for the creation of laws that apply to two or more states. In addition, Entry 93 of List I list legal violations related to any of the items on this list. Therefore, by establishing NIA, the centre may also pass the NIA Act.

Entry 1 of List I, which deals with the defence of India, and Article 355 of our constitution give the centre the authority to pass laws in this area. This pertains to the defence of India and every part of it, including preparation for defence, as well as all acts that may be conducive in times of war to its prosecution and after it ends to effective demobilization, as well as the obligation of the Union to protect states against external aggression and internal disturbance.

CONCLUSION

The confluence of national security imperatives and the preservation of civil liberties remains an ongoing challenge for democratic societies worldwide. Within the framework of anti-terrorism legislation, this challenge becomes particularly pronounced, as states endeavour to safeguard their citizens from threats while upholding the democratic values they hold dear. The exploration of India's approach to harmonizing national security and civil liberties through its constitutional lens reveals insights that resonate beyond its borders. The journey through the gradation of Indian anti-terrorism legislation and its constitutional underpinnings underscores the delicate equilibrium that must be struck. The Indian Constitution stands as a steadfast guardian of civil liberties, enshrining the principles of equality, freedom, and justice. It is precisely during times of security crises that the true mettle of a democracy is tested, as it must navigate the treacherous waters of countering terrorism while staying true to its core values.

The lessons drawn from India's experience provide valuable takeaways for the global community. The need for precision in defining 'terrorism' within legislation, avoiding broad and vague terminology that could lead to abuse, is a paramount consideration. Any counterterrorism measures must be proportionate, necessary, and subject to judicial oversight, ensuring that they do not infringe upon the rights they are meant to protect. The role of the judiciary emerges as a cornerstone in the endeavour to harmonize national security and civil liberties. Courts serve as the ultimate arbiters, interpreting the Constitution's provisions and ensuring that anti-terrorism legislation adheres to its principles. The principle of 'constitutionalism' underscores that even in the face of adversity, the fundamental rights of individuals must be upheld.

Striking a delicate balance between national security imperatives and the protection of civil rights remains a formidable challenge within the framework of the Unlawful Activities (Prevention) Act (UAPA). While acknowledging the imperative of safeguarding the nation from potential threats, it is crucial for lawmakers and policymakers to continually reassess and refine the legislation to ensure that it upholds constitutional values and respects individual liberties. Stricter oversight mechanisms, periodic reviews, and transparent accountability measures must be implemented to prevent the misuse of UAPA provisions and to safeguard citizens from unwarranted infringement on their civil rights. Ultimately, fostering an environment where national security and civil rights coexist harmoniously necessitates a nuanced and adaptive approach, recognizing the evolving nature of threats and the enduring importance of upholding the principles of justice and democracy.

In conclusion, the endeavour to harmonize national security and civil liberties is a complex and evolving process. It requires a delicate touch – one that respects the necessity of safeguarding citizens from terrorism while upholding the democratic values that define the essence of a nation. The Indian Constitution, with its emphasis on fundamental rights, separation of powers, and the rule of law, provides a framework that navigates this balance.