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NATIONAL SECURITY AND FUNDAMENTAL RIGHTS: THE CONSTITUTIONAL BALANCE IN INDIA

~ *NANDANI SINGH*

INTRODUCTION

The Indian Constitution provides a delicate balance between the two competing objectives of maintaining individual freedom and protecting the State. Fundamental Rights are contained in Part III of the Constitution¹, which guarantees all individuals the freedoms which are necessary for democracy to function properly; however, they are not absolute, as the State is permitted to impose reasonable limits on these rights in the interests of national security, public order, the sovereignty or integrity of India,² or some other major interest. Thus, as we look at the recent developments regarding issues such as surveillance, internet shut-downs, preventive detention, anti-terrorism laws and so forth, it raises the question of whether national security can be used to justify restrictions on fundamental rights under the Constitution.

CONSTITUTIONAL FRAMEWORK

The Constitution is based on the idea that some rights can be limited in a legitimate way to protect state interests.

Article 19(2)-(6) allows reasonable restrictions³ on the freedoms guaranteed by Article 19 when necessary for the purposes of sovereignty, territorial integrity, security of the State and maintaining public order;

Article 21 protects people's right to life and liberty⁴ and requires that any deprivation of these rights occur according to procedures established by law; and

¹ INDIA CONST. pt. III.

² INDIA CONST. art. 19(2).

³ INDIA CONST. art. 19, cls. 2–6.

⁴ INDIA CONST. art. 21.

Article 22 sets out safeguards against arbitrary arrest while allowing for preventive detention⁵ under certain circumstances.

The Supreme Court has reiterated that restrictions imposed in the name of national security must conform to the legal principles of legality, necessity and proportionality⁶ as required by the Constitution.

JUDICIAL MEANS TO BALANCE SECURITY AND LIBERTY

1. The Proportionality Principle

Proportionality is a constitutional framework for balancing competing rights. The State must establish that any limitation of rights has three components: necessity; rational connection with the State's objective; and minimally restrictive solutions.

The Supreme Court in *K.S. Puttaswamy (Retd) v. Union of India* laid down the judicial standard of proportionality⁷ under which any curtailment of fundamental rights must meet the test of looking at the constitutionality of a limitation imposed.

2. The Right to Free Speech and the Right to Info on the Internet via Internet Shutdowns

There has been a proliferation of state-ordered shut down of the internet⁸; it has raised many questions on the rights of free speech and access to information. The Supreme Court of India has recognized that one's access to the internet forms an essential part of exercising one's rights of free speech and commerce via the internet and has established that state-ordered shutdown must meet the standards of being for a temporary period, be a necessity, and be subject to judicial review⁹.

The court appears to have made strides towards maintaining accountability of state-imposed security through constitutional review.

3. National Security and Preventative Detention

⁵ INDIA CONST. art. 22.

⁶ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁷ *Id.*

⁸ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637.

⁹ *Id.*

Preventive detention laws cloaked in national security give authority to prevent future acts against the security of the State without trial¹⁰. The Court upholds the constitutionality of these powers, but there have been frequent challenges of misuse of these powers.

The initial interpretation of personal liberty was narrow in *A. K. Gopalan v. State of Madras*¹¹. The ruling on the other hand was expanded via the later judgement in *Maneka Gandhi v. Union of India*¹². The Supreme Court requires any procedure that restricts liberty be fair, just, and reasonable and therefore, preventive detention has received greater constitutional recognition today than it did when the Republic was first established.

ANTI-TERRORIST LEGISLATION AND HUMAN RIGHTS ISSUES

India has passed a number of different anti-terrorism laws (e.g. Unlawful Activities (Prevention) Act 1967 - UAPA)¹³ each containing provisions to assist with national security efforts. However, several of these anti-terrorism laws have raised issues regarding long term detention, strict bail requirements, and infringement on individual rights.¹⁴

The Supreme Court has consistently made it clear to stay within the bounds of the Constitution and the rule of law when exercising their authority in the name of national security, and that anti-terrorism legislation must also comply with the principles of constitutional democracy and remain subject to the judicial process.

THE RIGHT TO PRIVACY AND STATE SURVEILLANCE

The growth of digital technology has heightened the discussion on privacy and surveillance. The security services of a country often use national security as their justification for needing to implement surveillance, with claims that they need these measures to prevent terrorism and keep people safe.

In the case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*, the Supreme Court held that the right to privacy, is guaranteed by Article 21 of the Constitution¹⁵. The Court further held that state surveillance must comply with the Constitution by satisfying the three tests of legality, necessity, and proportionality¹⁶.

¹⁰ *A.K. Roy v. Union of India*, (1982) 1 SCC 271.

¹¹ *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.

¹² *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

¹³ Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (1967).

¹⁴ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569.

¹⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

¹⁶ *Id.*

Overall, the judgment has provided strengthened protections against unlawful interference with individuals' rights resulting from government actions, while still permitting for security.

CHALLENGES IN ACHIEVING THE CONSTITUTIONAL BALANCE

There continue to be serious challenges to achieving the proper balance between national security and fundamental rights:

Broad, unclear security laws.

Limited transparency around the procedures of surveillance.

Frequent use of preventive detention.

Long-term restrictions on internet access in conflict-prone areas.

Limited ability to provide effective judicial oversight in emergencies and national security situations.

The above problems demonstrate that the proper constitutional balance between national security and Individual rights is a dynamic one, requiring constant monitoring and evaluation by the courts, legislatures, and society¹⁷.

CONCLUSION

Both National Security and Fundamental Rights Are about protecting citizens in a free society. They are both just as legitimate as each other, but National Security is an obligation of government, and must comply with Constitutional protections for the rights of individuals.

To protect and provide a secure environment for their citizens the government needs to have access to certain information to monitor, prevent and prosecute those who harm the citizens of the State. To do this, the government needs to be able to operate within the confines of international law and domestic laws, including fair treatment, proportionality and the right to question through the judiciary¹⁸ how the Government conducts its business.

With Data Dilemma expanding, we expect the Foundations of Liberty (Fundamental Rights) and Security will continue to be one of the Major Constitutional Issues that will challenge India going forward.

¹⁷ Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech Under the Indian Constitution* 145–60 (Oxford Univ. Press 2016).

¹⁸ M.P. Jain, *Indian Constitutional Law* 1280–1305 (8th ed. 2018).

As India faces new challenges such as digital surveillance, artificial intelligence and international cyber threats, the balance between liberty and security (found in the Constitution of India) will continue to change. The judiciary will have a key role in determining the compatibility of national security measures with constitutional principles and democratic accountability.