

# Analysing The Constitutional Validity of The National Security Act 1980

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## Abstract

This research paper aims to comprehensively analyse the constitutional validity of the National Security Act of 1980, examining its various provisions in light of the Indian Constitution and relevant legal precedents. The paper commences with an overview of the National Security Act of 1980, outlining its key provisions and objectives. It further discusses the historical context in which the act was promulgated, elucidating the reasons that led to its enactment. The focus then shifts towards a detailed examination of the constitutionality of the Act, particularly with regard to fundamental rights enshrined in the Indian Constitution. To assess the constitutional validity, the study employs a multi-faceted approach, including a thorough review of case law and precedents. The paper scrutinises the Act's compatibility with the fundamental rights guaranteed by the Constitution, such as the right to liberty, freedom of speech and expression, and the right to a fair trial. The research paper also explores the implications of the National Security Act on civil liberties, public dissent, and the delicate balance between national security and individual freedoms. It analyses landmark judgments from the Indian judiciary that have dealt with challenges to the Act's constitutionality. In conclusion, this research paper seeks to provide a comprehensive assessment of the constitutional validity of the National Security Act of 1980. The findings of this analysis are essential for understanding the legal and human rights landscape in India and for fostering discussions about potential amendments or reforms to ensure a balance between national security imperatives and individual freedoms.

**Keywords:** Preventive Detention, Violation of Rights, Arbitrary, Article 14, Article 19

## Introduction

A democratic country like India thrives when its national security and public order are maintained and peace is ensured. The sovereignty of the State can only be maintained when there is a balance struck between the protection of individual liberties and maximising national security. There are several countries in the world which have adopted preventive detention laws, such as India, and several countries like Japan which have chosen not; but what remains a dilemma is whether such actions by the State can be constitutionally justified and in what circumstances can such constitutionally guaranteed protections be overlooked for the larger interests of the State. In this regard, India has adopted several preventive detention laws, such as the National Security Act of 1980, which the legislature intended to be used as a tool of keeping society safe and protecting the lives and rights of the people.

Through this paper, the author intends to identify the lacunas present in the provisions of the National Security Act of 1980, analyse how they violate the very fabric of the Constitution under the garb of security and whether such provisions actually have a legal validity in a democracy like India.

### Statement of Problem

The present day Act was the then Rowlatt Act of 1919 which was enacted by the British colonial rule as a means of curbing dissent by the revolutionaries and freedom fighters and was then adopted by the legislature post independence. It underwent several changes and amendments over the period of time and these laws are now used as political tools of suppression to silence any opposition and rule with an iron fist rather than for the security of the nation. In the present day, there are certain provisions of The National Security Act of 1980 which are draconian in nature and are in conflict with the protection guaranteed to the citizens with regard to their personal liberty and life by the Constitution. These laws continue to be arbitrarily used by the State and this raises several questions over the reality and validity of such laws in the country.

### Research Objective

The aim of the research is to study The National Security Act of 1980 and to legally analyse the validity of its provisions with reference to the Constitution of India and the several fundamental rights and protections guaranteed by it to the citizens of the country. The objectives of this research paper are

1. To identify the constitutionally invalid provisions of the Statute
2. To analyse how these laws are ultra vires the Constitution and what rights of the accused are being infringed

### Hypothesis

In modern day India, the essence and use of such a law has shifted dramatically from serving a national interest to becoming a draconian tool of suppressing voices and serving personal interests of those in power. The National Security Act of 1980 has failed its objective of ensuring safety and providing liberty to the citizens of the country.

### Research Question

On the basis of the Problem Statement and Hypothesis , the researcher tends to answer the following research question within the ambit of the present study:

How are provisions 8(2), 9(1)(2),10 and 14(2) of The National Security Act of 1980 violative of and ultra vires the Constitution and what scope of misuse do they provide for the infringement of the rights of the accused ?

### Research Methodology

The researcher has adopted a doctrinal approach in the research paper in order to identify the lacunae in the law and analyse how they are violative of the Constitution. The data relied on is qualitative in nature and it is secondary data which means that the data has not been collected personally but rather collected by others and then analysed upon. The data was collected by referring to indexed journals, articles and reviews by legal professionals in the country. The approach adopted is a grounded theory approach where rich data on a topic of interest is analysed to develop theories inductively. The relevant data has been examined qualitatively using a thematic analysis approach where data has been closely examined to identify broad theories and patterns.

## MODE OF CITATION

The researcher has adopted the Bluebook (20th Edition) format of citation. The mode of citation is uniform throughout the paper.

## CHAPTER SCHEME

In Chapter I, the researcher discusses the jurisprudential argument from a sociological perspective.

Chapter II seeks to analyse the evolution of the Act and examine the contended provisions validity in the present context.

Chapter III discusses the Judicial precedent and remarks by the Judiciary that support the claims of the researcher.

## CHAPTER 1

### Jurisprudential Arguments against the National Security Act of 1980

#### Utilitarianism

The concept of Utilitarianism revolves around the Hedonistic Doctrine i.e all actions that human beings do are motivated by a drive to minimise pain and maximise pleasure or utility. All those actions which maximise utility are morally right whereas those actions which increase pain are morally wrong. Utilitarianism rests on the foundation of the ‘greatest happiness principle’ which prioritises outcome over means and this theory believes that all those actions which bring about happiness of the greater number of people are justified morally. At its core, Utilitarianism believes that all social norms and government legislations should aim to produce such happiness of the masses and focus on the outcome rather than the means adopted or circumstances of such actions to bring about such happiness.<sup>1</sup>

Preventive Detention laws such as the National Security Act of 1980<sup>2</sup> may be justified on the basis of such theories which the legislation adopts while framing laws, however its enforcement begs the question whether such an approach is justified in the face of a person's liberty, which is left in limbo for an indefinite period of time on mere suspicion or apprehension. The answer falls in the negative as there is a conflict between the Theory of Utilitarianism and its goal to protect the society (in this context) , and the moral principles of respecting individual liberties and providing fair treatment to all which has been ingrained in the heart of the Constitution. It suggests that while preventing harm to many is important, it cannot and should not come at the cost of compromising the rights and freedoms of people without being subjected to the established procedure of law.

#### The Doctrine of Separation of Powers

The Doctrine of Separation of Powers deals with the mutual relation among the three organs of the State- The Executive , Legislature and Judiciary. It was first put forth and highlighted in the works of John Locke and Montesquieu with the main objective of allowing for a system where rule of law is followed and at no times can the society be run by authoritarian and arbitrary decisions of the government and mitigates the risks that can arise with concentration of power in the hands of a few which is essential in protecting the rights of citizens provided by the Constitution. The essence of the Doctrine in this context is concerned with the independence of the Judiciary that allows it to act in the protection and preservation of Constitutional provisions without the interference of the Executive.<sup>3</sup>

Preventive Detention laws, and in specific the National Security Act of 1980, allows the Executive to play

<sup>1</sup> Brandt R.B, Utilitarianism and Criminal Law, Law of Philos 14, 65-89 (1995)

<sup>2</sup> The National Security Act, 1980, Act no.65 of 1980

the role of the judge, jury and executioner i.e- it allows the Executive to act in a manner that infringes upon the interests and ambit of functions of the Judiciary. The Act allows the Executive to extend the detention of the accused without formal and typical interference of the Judiciary which is a direct overreach and overlap of the functions within the organs of the State as deciding the term and validity of detention is the duty and responsibility of the Judiciary. Laws that allow for the infringement of interests and overreach of organs within the State gives scope for authoritarian practices and as a result are in conflict with the protections guaranteed by the Constitution.<sup>3</sup>

## CHAPTER 2

### Evolution and Analysis of the National Security Act of 1980

The National Security Act of 1980<sup>4</sup> has its roots in the colonial rule by the British that preceded the independence of India, in a statute called the Bengal Regulation which was used as a tool to curb dissent and disruption in public order by the rebels. The Act was then amended and called the Rowlatt Act which sparked the protests in Jallianwala and later the massacre by General Dyer. Post Independence, the legislatures adopted the Preventive Detention Act and was used as a tool to curb political dissent and maintain power over the opposition which was then remodelled as the Maintenance of Internal Security Act, under the regime of the then Prime Minister of India Indira Gandhi during the Emergency period which was abused to detain and silence all those who criticised the government. In 1980, the Act was amended again and was titled The National Security Act of 1980.<sup>5</sup>

An accused, regardless of the charges and crime alleged, holds certain rights such as the right to legal representation, prompt notification of charges to the accused, appearance before the Court within 24 hours of arrest and the presumption of innocence until proven guilty which are provided under Articles 21, 22 and 32 of the Constitution<sup>6</sup> along with Section 50(1) of the Code of Criminal Procedure<sup>7</sup>. However the National Security Act of 1980 does not extend such safeguards in cases of preventive detention, instead it permits extra judicial detainment of individuals. The Act, a law permitting arrest without formal charges and trials, is frequently employed by the governments for facilitation of incarceration of individuals. The issue lies not only in the punishment but in the entire procedure, which is labelled as punitive, pre-trial detention often occurs solely on suspicion or inadequate evidence with no obligation on the part of law enforcement to promptly disclose the grounds for arrest, consequently, individuals may languish in detention facilities for extended periods without undergoing a trial due to the absence of a legal recourse.<sup>8</sup> Section 3 of the Act<sup>9</sup> lacks clear definitions for what State security and public order are, leaving it open to potentially capture a wide range of arbitrary action by the government. Hence the terms have to be subjected to reasonable interpretation which comes within the ambit of and under the scrutiny of tests under Article 19 to determine what is reasonable or not. The foundational liberties protected under Article 19(1) of the

<sup>3</sup> Suvigya Saxena, *Crushing Dissent under the Veil of National Security*, Law College Dehradun (2015)

<sup>4</sup> The National Security Act, 1980, Act no.65 of 1980

<sup>5</sup> Kartikay Agarwak & Arjun Sharma, *NSA 1980- Iniquitous Act & Constitutional Tyranny or a Justified Piece of Legislation?*, JURIST- Student Commentary, May 2020

<sup>6</sup> Constitution of India, Article 21, Article 22, Article 32

<sup>7</sup> Code of Criminal Procedure 1973, Section 50(1), Act of Parliament 1973

<sup>8</sup> Shagnik Mukherjea, *The Fading Contours of Presumption of Innocence: PMLA and The Supreme Courts Dilemma*, RGNUL Research Review 2022

<sup>9</sup> The National Security Act 1980, Section 3, Act of Parliament, 65 of 1980

Indian Constitution<sup>10</sup> are not absolute, as they are subject to reasonable restrictions. This limitation is necessary so that order is maintained in society and no element can act as a tool of infringing others rights within a civil setup where there are varied interests of different people. Hence, no one's interest should wrongfully infringe on others.

The rationale behind the imposition of reasonable restrictions has been extensively discussed, particularly in the case of *A.K. Gopalan v. State of Madras*<sup>11</sup>. Justice Das emphasised that these restrictions are imposed because there are situations where individual liberty must yield to broader societal interests. Justice Shastri noted that in a civil society, the actions stemming from the exercise of fundamental rights need control and regulation to harmonise the conflicting exercise of civil rights by others.

It is crucial to emphasise that reasonable restrictions can only be imposed through legal means and not through arbitrary administrative instructions. The term "reasonable" signifies that the restrictions should not be excessive and must serve the larger societal interest. Deprivation of fundamental rights under Article 19(1) should be guided by reason and intelligence, not arbitrary decisions of the government of the day. The requirement of reasonableness provides the constitutional courts in India with the authority to assess the reasonableness of the restrictions in question.

There is no exact or standardised test for determining the reasonableness of a restriction. Instead, the judiciary must consider the facts and circumstances of each case to reach a conclusion. However, there are certain guidelines that the courts should follow to assess the reasonableness of imposed restrictions.

In the case of *State of Madras v. V.G. Row*<sup>12</sup>, it was established that reasonableness should be determined using an objective standard, taking into account the perspective of a reasonable person. It was also recognized that there is no precise test for assessing the reasonableness of a restriction, with each case requiring a careful analysis of its unique circumstances.

From the outset, the Supreme Court of India has maintained that the validity of legislation can be challenged on grounds of excessive delegation by the legislature or the delegation of essential functions. Additionally, the courts have developed the doctrine of excessive delegation of discretion, which holds that granting unbridled discretion to administrative authorities is invalid. Therefore, the legislature must establish specific and detailed guidelines for the exercise of administrative discretion. The distinction between delegated legislation and administrative discretion lies in the courts' approach, where they have upheld the validity of legislation with vague provisions in the former case but strictly regulated administrative discretion when fundamental rights are involved.

In the case of *Sheo Nandan Paswan v. State of Bihar*, Justice Bhagwati observed that the development of administrative law in India has consistently aimed at ensuring that administrative authorities do not receive unrestricted and unregulated discretion from the legislature. Instead, administrative discretion should be subject to procedural safeguards and comprehensive guidelines to maintain its legitimacy.<sup>13</sup>

Under Section 10 of The National Security Act of 1980<sup>14</sup>, detainees can be held for a maximum of 10 days without being informed about the reason for the same, whereas Section 8(2)<sup>15</sup> clarifies that authorities are not obligated to disclose such information in consideration of public interests and safety. Under Section

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<sup>10</sup> Constitution of India, Article 19, Clause 1

<sup>11</sup> *A.K. Gopalan v/s State of Madras*, AIR 1950 SC 27

<sup>12</sup> *State of Madras Vs. V.G. Row* [1952] 19 SC

<sup>13</sup> *Sheo Nandan Paswan Vs. The State of Bihar* (1987) 1 SCC 28

<sup>14</sup> The National Security Act 1980, Section 10, Act of Parliament, 65 of 1980

<sup>15</sup> The National Security Act 1980, Section 8(2), Act of Parliament, 65 of 1980



9(1)(2)<sup>16</sup>, the Statute mandates the Union and State Governments to establish Advisory Boards which are composed of individuals that are qualified to be or have been High Court judges and are appointed by the Executive itself. This raises questions on the credibility of such an Advisory Board as such appointments can be easily influenced to serve the interests of the State as they are only accountable and answerable to the Governments<sup>17</sup>. Under the national security act, the opportunity for review of the detention order is limited solely to matters concerning whether the relevant authorities have followed the proper procedure during detention with no consideration given to the treatment of the detainee in custody<sup>18</sup>. Adding to this irregularity, the NSA imposes a prerequisite administrative review before a judicial review can take place which hands substantial authority to the advisory board to express their primary opinions, delegating the judicial rights of the detainee to a secondary position. The NSA grants the government the authority to pre-emptively detain individuals to prevent actions against public order or security. Consequently, ordinary citizens find themselves with no reliable recourse with the executive or judiciary to shield themselves from unlawful actions authorised by the NSA. As a result, legal provisions appear increasingly ineffective against the draconian powers vested by this statute.<sup>19</sup>

Section 14(2)<sup>20</sup> of the contended statute allows the Executive to issue new orders for the extension of the period of detention regardless of earlier revocations or extensions passed by the Advisory Board, in light of new facts or evidence found during investigation. However, due to the nature of the Act, it is left to the approval of the Advisory Board whether such facts are sufficient for the furtherance of detention and a reading of Section 12(1)<sup>21</sup> points out that even if the Advisory Board finds sufficient cause for extension of detention, it is left to the Government to pursue such an order or not<sup>22</sup>. Such a clause allows for arbitrary use of power by the State and violates the rationality tests and tests of reasonability laid down under Article 14 and Article 19 of the Constitution respectively<sup>23</sup>. These clauses are not only violative of mandatorily guaranteed Constitutional rights but are also in contradiction with another.<sup>24</sup>

## CHAPTER 3

### Judicial Precedents

The contented sections and the Act in general have received the attention and criticism of the Supreme Court which serves as the apex court in the Country on several occasions.

In the case of *Nand Lal Bajaj v/s State of Punjab and Anr*<sup>25</sup>. The Supreme Court held that the fundamental scheme of the Parliament conflicted with the preventive detention laws. It inferred in its reasoning on the

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<sup>16</sup> The National Security Act 1980, Section 9(1)(2), Act of Parliament, 65 of 1980

<sup>17</sup> Shreya Rawat, National Security Laws in India against Freedom of Speech and Expression, 30 *Supremo Amicus* ( 341) (2022)

<sup>18</sup> Aman Saraf, Sedition and Statutory Stability : Decoding the Defects of India's National Security Laws, 10 *NLIU Law Review* 458(2021)

<sup>19</sup> Surabhi Chopra, National Security Laws in India: The Unravelling of Constitutional Constraints, *Oregon Review of International Law* 12(2015)

<sup>20</sup> The National Security Act 1980, Section 14, Act of Parliament, 65 of 1980

<sup>21</sup> The National Security Act 1980, Section 12(1), Act of Parliament, 65 of 1980

<sup>22</sup> Gaurav Kumar Mishra and Sunil Kumar , Preventive Detention Laws Through The Lens of Constitutional Consistency, 4 *Indian Journal of Law and Legal Research* 1 (2022)

<sup>23</sup> Constitution of India, Article 14, Article 19

<sup>24</sup> Dr. Gopal Krishan, Preventive Detention in India: A Legal Perspective, *International Journal of Reviews and Research in Social Sciences*, 2019

<sup>25</sup> *Nand Lal Bajaj v/s State of Punjab & Anr.* AIR 1981 SC 2041

basis that it is the responsibility of the statesman to review laws that could be considered as encroachment into the space of legislature, executive and judiciary.<sup>26</sup>

The Supreme Court in *Rekha v/s State of Tamil Nadu* that the contended provisions were repugnant to the rule of law and the democratic ethics on which the foundation of Constitution is set on.<sup>27</sup>

In *Shri Pawan Kharetilal Arora v/s Shri Ramarao Wagh and Ors*, the Bombay High Court highlighted the gross infringements of fundamental rights that the citizens could be exposed to owing to the nature and scope of arbitral use in The National Security Act 1980.<sup>28</sup>

*A.K Roy v/s Union of India* held that preventive detention laws are constitutionally valid subject to restrictions provided by Part III of the Constitution which contains the fundamental rights of the citizens. However, it also laid down the principle that in cases where the government may use a legal practitioner, the detainee shall not be denied the use of legal aid as it would violate the principle of parity which is the essence of Article 14 of the Constitution and indirectly be violative of Article 32 which warrants for the provision of a legal representation to the accused. The case also highlighted how a detainee is not a convict and can not be treated or interrogated in a manner that the law allows in the cases of those who have been convicted of their crimes.<sup>29</sup>

In *Maneka Gandhi v/s Union of India*, the Supreme Court widened the scope of the word 'liberty' in Article 21 by including a reading of Article 19 with it and that if there is any law that has a tendency to violate the personal liberty of a person, it will be left at the mercy of the tests employed under Article 14, 19 and 21 i.e the fundamental rights must be read collectively thereby providing a higher degree of protection under Article 14 than was what envisaged in *AK Roy v/s Union of India*.<sup>30</sup>

#### Rational Nexus and Proportionality Tests

The Court employs a dual-pronged examination to assess potential Article 14 violations. This examination involves ascertaining whether there exists a rational connection with the intended objective. When assessing non-classificatory arbitrariness, the proportionality criterion comes into play, wherein the appropriateness of the means in relation to the objective is scrutinised. On the other hand, for classificatory arbitrariness, the scrutiny centres on the rational connection test, which deems it satisfactory if the means exhibit a 'nexus' with the objective. The extent of substantiation required under this examination influences this Court's decision regarding whether the law is inadequately inclusive or excessively inclusive. A law is considered 'inadequately inclusive' when it fails to regulate all individuals contributing to the issue at hand, while it is deemed 'excessively inclusive' when it regulates individuals not pertinent to the problem the law seeks to address. The determination of both inadequacy and excessiveness, as well as the extent of judicial leniency, depends on the relationship aspect (either a 'rational nexus' or 'proportionality') of the examination. The nexus examination, in contrast to the proportionality standard, does not aim to narrow down the means or identify the optimal means for attaining the objective. It is sufficient if the means exhibit a 'rational connection' to the objective. Consequently, courts exhibit a higher degree of judicial leniency when the rational nexus test is applied. A greater degree of judicial leniency is accorded to classification as the legislative body can classify individuals based on the degree of harm, thereby furthering the principle of substantive equality, and such classification does not necessitate pinpoint preci-

<sup>26</sup> *Nand Lal Bajaj v/s State of Punjab & Anr.* AIR 1981 SC 2041

<sup>27</sup> *Rekha v/s State of Tamil Nadu* 2011 SCC 244

<sup>28</sup> *Pawan Kharetilal Arora v/s Shri Ramrao and Ors.* Cr. Writ Petition 545 of 2009

<sup>29</sup> *A.K Roy v/s Union of India* AIR 1982 SC 710

<sup>30</sup> *Maneka Gandhi v.s Union of India* AIR 1978 SC 597

ion. Indian courts do not impose the proportionality standard on classificatory provisions.<sup>31</sup>

### Conclusion

The presence of ambiguous terms used in the Act make it prone to misuse and the limited judicial review makes it more concerning as far as its constitutionality is concerned. Preventive detention laws have a broad scope, with the offences intent or mens rea being particularly difficult to discern. Such laws without change can not be subjected to substantive review easily. The National Security Act of 1980 is against constitutional values and infringes the fundamental rights of people provided specifically under article 14,19, 21 and 32 of the Constitution.

As mentioned earlier regarding the test of reasonability and proportionality, the contented sections of the Act do not seem to satisfy either as neither there is no rationale behind the means adopted in to order for it ro reach the desired objective and neither are the means adopted proportional to the benefits derived from the Act. It was noted that the true meaning of the equality clauses under the Indian Constitution was not furthered by the overemphasis placed on the "objective" of the law rather than its "effect," especially when the objective is ostensible. In order to conduct a substantive review of Article 14 violations by the Courts, the traditional two-pronged classification test must be broadened in order to move away from the twin test's formalist tendencies<sup>32</sup>. With this kept in mind, in most States, the conviction rates dispute such stringent rules that give unadulterated powers to the authorities are alarmingly low. For example, Between January 2018 and December 2020, the Allahabad High Court ruled in 120 habeas corpus petitions challenging preventive detention under the NSA. In 94 detentions, it quashed orders of District Magistrates in as many as 32 districts and ordered the release of the detainees. This points at the obvious conclusion and which was remarked by the Allahabad High Court that the NSA 1980 is being abused by the government i.e the contented provisions are what provide scope for such misuse<sup>33</sup>. The author from the material referred to, arguments raised and conclusions formulated does not intend to question the existence of such a law which has its inception and legality guarded by Article 23 of the Constitution , but rather argues against the existence of such provisions within the Act which provide arbitrary powers to the State and give wide scope for misuse and abuse of power which indirectly affects the society at its most atomic level and also the very fabric of the democracy that the nation runs under.

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<sup>31</sup> State of Tamil Nadu & Anr. Versus National South Indian River Interlinking Agriculturist Association 2021 SC

<sup>32</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

<sup>33</sup> Kaunain Sheriff M, 94 out of 120 orders quashed: Allahabad High Court calls out abuse of NSA in Uttar Pradesh, The Indian Express, April 7 2021