SEDITION AND STATUTORY STABILITY: DECODING THE DEFECTS OF INDIA'S NATIONAL SECURITY LAWS

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ABSTRACT

Effective legislation to defend national security is essential for the smooth functioning of any modern democracy. However, it is equally imperative that these laws possess adequate safeguards to ensure that their implementation maintains a reasonable balance between human rights, international standards, and respect for constitutional provisions. This paper seeks to provide a brief overview of the development of national security legislation in India, while delving deeper into two specific laws – Section 124-A regarding Sedition that was introduced in 1870 in the Indian Penal Code and the National Security Act, 1980. Section 124-A has – historically and even as recently as in 2020 – led to numerous instances of misuse by authorities, creating a need to adequately review the statute. In the four decades of its operation, the exploitation of the inherent lacunae in the National Security Act has caused several human rights violations in

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oft-overlooked cases throughout its implementation.

This paper thus aims analyze two kinds of contentious laws – a colonial remnant of British legislation and a modern legislation intended for application in a post-Independent India. While there has been considerable legal scrutiny of these laws, the effective implementation of these judicial decisions is left wanting. This gives rise to a pertinent question – are these laws so inherently flawed so as to not only permit, but also facilitate their misuse by successive governments? The paper thus traces a brief history of these laws, analyzes the various flaws in their drafting, constitutionality and implementation and reflects on relevant judicial decisions. The author then concludes that these laws must urgently be revised to bring them up to the prevailing societal standards of the 21st Century and ensure that they are in tandem with the ever-changing principles of constitutional law.

I. INTRODUCTION

"*Law is made not to be broken but to be obeyed and the respect for law is not retained by demonstration of strength but by better appreciation of the reasons, better understanding of its reality and implicit obedience."*[1] – Justice S. Pandian.

[1]*Kartar Singh v State of Punjab* (1994) SCC 3 569.

This perceptive observation by the Supreme Court assumes vital significance while evaluating the national security laws of India. Since its independence, India has enacted and adopted several laws that are aimed specifically for crimes of a nature far more egregious than daily transgressions: those that have the potential of inflicting serious imbalance and disequilibrium in society. That being said, although extraordinary in nature, these legislations work in tandem with the regular civilian criminal provisions.

As far as their objectives are concerned, the principal aims of national security laws may be summarized as the following:[2]

i) To ensure and protect the fundamental and enduring needs of a nation.

ii) To guard the lives and safety of the citizens of a nation.

iii) To maintain the sovereignty of a nation, while also ensuring that its values, institutions, and territories remain intact.

iv) To promote the prosperity of the nation and its inhabitants.

Mr. K.P.S. Gill, former Director General of Police of Punjab, has highlighted the need for national security laws in India aptly.[3] He states that: "*National security legislation is not just a definition of crimes or new patterns of criminal conduct and the prescription of penalties. It relates to the entire system, institutional structures, and processes that are required to prevent and penalise such crimes, to preserve order, and secure the sphere of governance*." Thus, he felt that a comprehensive set of laws to combat terrorism and other organized crimes must be brought into the legal sphere.

[2]White House, 'A National Security Strategy for A New Century' (*Clinton Whitehouse*, May 1997) <https://clintonwhitehouse2.archives.gov/WH/EOP/NSC/Strategy/> accessed 14 January 2021.

[3]K.P.S. Gill, 'The Imperatives of National Security Legislation in India' *India Seminar* <https://www.india-seminar.com/2002/512/512%20k.p.s.%20gill.htm> accessed 14 January 2021.

India, with its quasi-federal structure,[4] comprises national security regulations at both the Centre and the State levels of Government. In particular, 'Security' and 'maintenance of public order' fall within the purview of the Concurrent List *i.e.* List III in the Seventh Schedule of the Constitution of India, 1949 ("**Constitution**"). This enables both the Centre and State to legislate on these subjects and thereby make appropriate measures to their satisfaction.[5]

Over the past decades, India's national security laws have witnessed several developments and updates. However, with these legislations arose numerous polarizing issues of national contention, including but not limited to the extent of implementation, constitutionality, and human right violations. According to the author, while there is no iota of doubt that such legislations are essential for the smooth functioning of any democratic state, it can under no circumstance be ignored that some provisions of these laws require further introspection and possible re-evaluation.

Recent instances of misuse clearly demonstrate the need for the same. Sedition is a topic that holds an absolutely essential position in every debate on national security. In recent times, the use of the Sedition law in India has stirred many controversies. Thousands of protestors opposing the Citizenship Amendment Act were charged under this section, while over 3000 (three thousand) farmers were charged due to protests in 2019 in Jharkhand.[6] Nearly 191 (one hundred and ninety-one) cases of sedition were filed between 2016 and 2018 but only 4 (four) people were convicted.[7] Further, the National Security Act, 1980 has recently completed (four) decades of operation and has been the

[4]D.D. Basu, *Introduction to the Constitution of India* (24th edn, Lexis Nexis 2019).
[5]Constitution of India 1950, Item 3 Concurrent List, Schedule 7.
[6]Pooja Dantewadia, 'Sedition cases in India: What data says' *Mint* (25 February 2020) <https://www.livemint.com/news/india/sedition-cases-in-india-what-data-says-11582557299440.html> accessed 15 January 2021.
[7]National Crime Records Bureau, 'Crime in India 2018' <https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%202.pdf> accessed 14 January 2021.

subject of numerous criticisms. This Act has continuously been exploited by the Government in oft-overlooked cases. Therefore, the author believes that the deliberations on these issues must be re-ignited. The article, while evaluating national security legislations of the country as a whole, applies *a more detailed focus on the laws governing sedition and the National Security Act, 1980*. *Part II* of this article briefly describes the history and development of national security laws in India. *Part III* analyses the major issues in the laws, focusing on issues of constitutionality, defects in drafting and human rights issues. Finally, *Part IV* of the Article suggests a way forward for the country, including possible avenues to revamp these contentious pieces of legislation.

II. DEVELOPMENT OF NATIONAL SECURITY LAWS OF INDIA

A. Colonial British legislation

The national security laws of India have their roots firmly entrenched in colonial British Legislation. The earliest enactment of significance that resembled national security was the Indian Council Act, 1861, which stated, *"Notwithstanding anything in this Act contained, it shall be lawful for the Governor General, in cases of emergency, to make and promulgate from time to time ordinances for the peace and good government of the said territories or of any part thereof"*.[8] In his dispatch regarding this Act, Sir Charles Wood, later popularly known as Lord Halifax, observed that the quoted provision would empower the Governor-General of India with a new and extraordinary power of promulgating ordinances in emergency situations, as the supreme authority for India is responsible for the peace and security of their

[8]Indian Councils Act 1861, s 23.

territory.[9] It must be noted that the words 'peace', 'security', and 'good government' have ultimately formed the basis of most modern national security laws globally.

During the course of World War I, the British Government went on to enact the Defence of India Act, 1915, which postulated that an 'Emergency Code' would be imported from Britain empowering the Governor-General to use civil and military forces for the safety and defence of India. It extended the powers of detention for the first time to include controlling of residences where, in the opinion of the relevant authorities, there were *"reasonable grounds for suspecting that any person has acted, is acting or is about to act in a manner prejudicial to the public safety."*[10] This introduced legitimacy into the rudimentary concept of preventive detention in colonial India. A similar act was passed in 1939 during World War II. However, the earliest instance of preventive detention can be witnessed in the Bengal State Prisoners Regulation of 1818, which provided for such 'personal restraint' but also ensured proper care for such prisoners of the State.[11] These regulations were later extended to the Presidency towns of Bombay and Madras as well. The British were aiming to justify the concept of 'preventive detention' by claiming that this was essential for public order, albeit there were several instances of their arbitrary application.[12]

In a bid to expand on the provisions of the Defence of India Act, 1915, the Government of British India passed one of the most notorious and infamous laws in Indian history – the Anarchical and Revolutionary Crimes Act, popularly known as the Rowlatt Act of 1919. This law came into being after a committee headed by Mr. Justice Rowlatt

[9]AP Pandey, 'Hundred Years of Indian Ordinances' (1968) 10 Journal of Indian Law Institute 259.
[10]AWB Simpson, 'Round Up The Usual Suspects: The Legacy of British Colonialism and the European Convention on Human Rights' (1996) 41 Loy. L. Rev. 629.
[11]Regulation 3 of 1818.
[12]*Simpson* (n 10).

recommended the continuation of wartime emergency powers to ordinary peaceful times as well. It provided for arrest and deportation on a mere suspicion of sedition as well as arrest for possession of treasonable literature. It also gave authorities the power to arrest without warrant or trial, while also allowing the press to be controlled.[13] The term 'anarchical and revolutionary crimes' was left open to pure interpretation, with no definition being found in the Act. Under Section 39(1), existing orders under the Defence of India Act would be in continuance post the World War as well. The draconian provisions of this Act formed a key component of Mahatma Gandhi's Satyagraha.[14]

After the Rowlatt Act lapsed three years later, the Bengal Criminal Law Amendment Act, 1925 was enacted which granted new emergency powers.[15] This was followed by the Emergency Powers Ordinance, 1932, which aimed to severely suppress nationalist tendencies. The provisions in the ordinance were termed by the then British Home Secretary as "*a species of Martial Law administered by civil officers*". Congress-affiliated organizations were banned, thousands of protestors were arrested and nearly 3,500 were held under preventive detention at one point.[16]

Finally, the law of Sedition, under Section 124-A of the Indian Penal Code ("**IPC**"), states that if any person – through actions or words, excites or attempts to excite 'disaffection' against the 'Government established by law' – they may be punished with imprisonment ranging from three years to life-imprisonment along with a fine. There have been several notable trials and judgments pertaining to the same, which will be dealt with in detail later in this article.

[13]Rowlatt Act 1919, s 4.
[14]*Simpson* (n 10).
[15]*Simpson* (n 10).
[16]Anil Kalhan and others, 'Colonial Continuities: Human Rights, Terrorism, And Security Laws In India' (2006) 20 Columbia Journal of Asian Law 93.

B. Laws in independent India

The IPC – inherited from the colonial regime – and Criminal Procedure Code ("**CrPC**") enacted in 1974 – remain the two principal legislations that govern criminal activities and maintain public order. However, alongside these statutes, there exist certain laws framed for the maintenance of India's national security. They have been discussed below.

a) Anti-terrorism legislation

Modern India has witnessed a slew of anti-terrorism laws being enacted for the protection of the nation. The spate of terrorism, especially in and around Kashmir and Punjab post partition, led to a pressing need for some laws that can effectively codify India's anti-terrorism stance.

*b) The Terrorist and Disruptive Activities (Prevention) Act, 1987 ("**TADA**")*

The first Act of significance in this regard was TADA. TADA was primarily brought into effect as a retaliatory move following Indira Gandhi's assassination.[17] TADA had a sunset clause included within its provisions by which the Parliament had to renew it every two years. Section 3 of TADA defines terrorist attacks and prescribes the punishments that the Government is empowered to inflict on offenders. Section 4 on the other hand creates another group of offences termed as 'disruptive activities', defining such activities as:

"*any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, -*

(i) which questions, disrupts or is intended to disrupt, whether directly or indirectly, the sovereignty and territorial integrity of India; or

[17]Jayanth Krishnan, 'India 's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy' (2004) 22 Law & Ineq 265.

(ii) which is intended to bring about or supports any claim, whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union."

It is apparent that the loose and vague term of 'disruptive activities' is capable of rendering TADA amenable to misuse. Section 16 of TADA also provides for *in camera* proceedings, should the Courts designated under TADA deem it fit to do so, making the proceedings secret. It also does not impose an obligation on the police to produce the offender before a magistrate within 24 (twenty-four) hours, as is the practice under the CrPC.[18] Confessions to a police officer above the rank of superintendent could also be used as evidence, and TADA also removed all appeals other than to the Supreme Court. In *Kartar Singh v State of Punjab*,[19] the Supreme Court of India made some pertinent observations along the lines of the excerpt provided at the start of this Article. While upholding the constitutional validity of TADA due to a belief that strict anti-terrorism laws were the need of the hour, the Court dictated that a legislation must be examined keeping in mind the context in which it was enacted.

*c) Prevention of Terrorism Act, 2002 ("**POTA**")*

The provisions of TADA were mercilessly misused, and it led to several human rights atrocities.[20] These criticisms led to TADA being repealed and the POTA being enacted by the Government in 2002, which nevertheless largely reflected the spirit of TADA. POTA arose out of several calls for a more humane and reasonable anti-terrorism law. The same was addressed in the 173rd Report of the Law

[18]Code of Criminal Procedure 1973, s 57; Constitution of India 1950, art 22.
[19]*Kartar Singh* (n 1).
[20]Amnesty International, 'Misuse of TADA in Bombay' (August 1994). <http://www.unipune.ac.in/snc/cssh/HumanRights/01%20STATE%20DEMOCRACY%20AND%20LAW/22.%20Special%20issue%20on%20TADA%20Information%20Documentation%20Research%20and%20Analysis%20Kendra,%20Via%20Media%20%201%20(8.pdf>.

Commission.[21] POTA introduced the power to declare an organization as a terrorist organization, while introducing a schedule for the listing of such organizations as well. It included fund-raising for terrorist organizations as an offence and extended the powers of authorities to seize cash as well.[22] POTA also provided that when it comes to evidence, "*the Special Court shall draw adverse inference against the accused.*"[23] POTA also had implications on privacy, as it provided that police officers not below the rank of superintendent could submit an application for interception of communication. Police custody however, was reduced from 60 (sixty) days in TADA to 30 (thirty) days, and judicial custody was reduced to 6 (six) months from a year.[24] The misuse of POTA, however, gained so much notoriety that the scrapping of POTA became one of the UPA Government's chief electoral promises in 2004.[25]

*d) Unlawful Activities (Prevention) Act, 1967 ("**UAPA**")*

While POTA stands repealed, the UAPA – first enacted in 1967 – remains in operation. There have been several amendments to UAPA, with the most recent Amendment being in 2019. UAPA embodies many provisions of the erstwhile terrorism laws. The salient features of UAPA include seizures by the National Investigation Agency ("**NIA**"), the procedure for such investigation, the monitoring of terrorist organizations, funding any unlawful activities and organizations, prescribing the penalties for them. The important aspect of this Act is that the Government has to simply 'believe' that a group is 'involved in terrorism' to enforce its provisions, with the 2019 Amendment extending this power of the Government to even individuals. Thus,

[21]Bharat Das, 'Terrorism and POTA' (2002) 31 Ban LJ 154-165.
[22]G Haragopal, B Jagannatham, 'Terrorism and Human Rights: Indian Experience with Repressive Laws' (2009) 44 Economic and Political Weekly 76–85.
[23]Prevention of Terrorism Act 2002, s 53.
[24]Prevention of Terrorism Act, 2002, s 49(2).
[25]*Haragopal, Jagnnatham* (n 22); the Act was ultimately repealed in September 2004, a month prior to its expiry.

there has been much criticism for misuse, with some quarters terming the Act as an avenue for 'Absolute Power to the State'.[26]

e) Preventive detention legislation

*i. Preventive Detention Act, 1950 ("**PDA**")*

Along with counter-terrorism, several acts were made to regulate preventive detention of individuals as well, such as the PDA – which was enacted to authorize the ruling government to detain, without any reason for such restraint, any individual for up to a year. This had to be based on some suspicion that the detainee poses a threat to society and is capable of committing a crime imminently. Section 3 of the Act used the term 'satisfaction', enabling the authorities to detain individuals that simply they felt satisfied that there was a threat to (i) the defence, security or foreign relations of India; (ii) the security of the State and maintenance of public order; or (iii) the maintenance of essential supplies and services. Another key provision was Section 14, which expressly prohibited the Courts from demanding to know the grounds on which a person had been detained, ensuring convenient confidentiality for the Government.[27] The Act also authorized the Central and State governments to create Advisory Boards for the purposes of this Act, which can produce a report conveying their opinion on cases of preventive detention referred to it by the Government.

The Constitution, via Article 22, has sought to provide some rights to those preventively detained in an attempt to protect the basic rights of detainees as well. Article 22(4) states: *"No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless (a) an Advisory Board*

[26]Nitika Khaitan, 'New Act UAPA: Absolute Power to State' *Frontline* (25 October, 2019) <https://frontline.thehindu.com/cover-story/article29618049.ece> accessed 15 January 2021.
[27]Preventive Detention Act 1950, s 14.

consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention." However, in contrast, it also accords the Government some flexibility in this regarding by stating within Article 22(7) that: *"Parliament may by law prescribe (a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub clause (a) of clause (4); (b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and (c) the procedure to be followed by an Advisory Board in an inquiry under sub clause (a) of clause (4).*"

The constitutionality of this Act was dealt with in the landmark case of *A.K. Gopalan v State of Madras.*[28] The Court upheld the validity of the Act, declaring it *intra vires* the Constitution. It had been argued by the Petitioners that Article 19(1)(d) of the Constitution guaranteed a fundamental right to movement subject to reasonable restriction and consequently, preventive detention does not fall within such reasonable restrictions. The Court rejected this Petition and in doing so shut any avenue for the judicial introduction of safeguards in matters of preventive detention. The only provisions that preventive detention were to be subjected to were those enumerated in Article 22 of the Constitution.[29]

Article 21 of the Indian Constitution postulates that the right to life cannot be violated barring the procedure established by law. The Apex Court in *A.K. Gopalan v State of Madras* distinguished between

[28]*A K Gopalan v State of Madras* (1950) 51 Cri. LJ 1383.
[29]PK Tripathi, 'Preventive Detention: The Indian Experience' (1960) 9 American Journal of Corporate Law 219.

'procedure established by law' and 'due process of law', stating that legislation duly enacted with the correct procedure would come within procedure established by law, the PDA coming within this purview. This view was later reconsidered in *Maneka Gandhi v Union of India*, which directed that even procedure established by law needs to be reasonable and fair.[30]

*ii. Maintenance of Internal Security Act, 1971 ("**MISA**")*

After the expiry of the Preventive Detention Act, 1950, former Prime Minister Indira Gandhi introduced one of the most draconian laws witnessed in Modern India – the MISA. MISA was immune to any judicial review, completely disregarding the constitutional check on any legislation.[31] This was ensured by the 39th Amendment to the Constitution that placed MISA under the Ninth Schedule of the Constitution, rendering it outside the scope of judicial review even if it violated fundamental rights or basic structure as expounded in *Kesavananda Bharati v State of Kerala*.[32] It provided the authorities with several powers, including but not limited to indefinite preventive detention and search and arrests without warrants.

While the *prime facie* objective of MISA was to deal with anti-national objectives, it was hardly being used to do so. Indira Gandhi weaponized MISA as a tool of suppression.[33] Over 1,00,000 (one lakh) opposition party members and dissidents were detained preventively without trial for over eighteen months. People were arrested even for opposing the 'forced sterilization' program being carried out as well as the demolition of slums.[34] Some detainees were even tortured and forcibly

[30]*Maneka Gandhi v Union Of India* [1978] SCR 2 621.
[31]Maintenance of Internal Security Act 1971, s 16.
[32]*Kesavananda Bharati v State of Kerala* (1983) 4 SCC 225.
[33]Sumit Ganguly, Larry Diamond, Marc F Plattner, *The State of India's Democracy* (Johns Hopkins University Press 2007).
[34]ibid.

sterilized.[35] MISA was finally repealed in 1977 by the new Janata Government. While repealing MISA, the Janata Government simultaneously proposed the incorporation of MISA into ordinary civil laws.[36] This consequently led to the enactment of the National Security Act, 1980 a little over two years later.

*iii. National Security Act, 1980 ("**NSA**")*

The 'successor' of the PDA, NSA, has remained in operation for over 4 (four) decades. The provisions and shortcomings of NSA have been analyzed in detail later in this article.

III. SEDITION AND NSA – A DETAILED ANALYSIS

A. Sedition

The concept of sedition evolved from the long-prevailing concepts of treason and *Scandalum Magnatum* (defamation of the Crown) in England.[37] However, *Scandalum Magnatum* had a defence of truth attached to it, while treason possessed its own safeguards. Thus, it proved extremely difficult for the Crown to curb dissident opinions at their own whims and fancies. To achieve this purpose, the law of Sedition slowly came into effect in UK.[38]

Thomas Babington Macaulay, in his initial draft of the IPC in 1837 as the chairman of the First Law Commission, provided for an anti-sedition law under Section 113 that corresponds to the present-day Section 124-A, but it was introduced only 33 (thirty-three) years later. It was claimed that this omission from the IPC was an 'unaccountable

[35]N.S. Gehlot, *Current Trends in Indian Politics* (Deep and Deep Publications 1998).
[36]*Kalhan* (n 16).
[37]Philip Hamburger, 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 Stanford Law Review 661.
[38]William T. Mayton, 'Seditious Libel and the Lost Guarantee of a Freedom of Expression' (1984) Columbia Law Review 91.

mistake' and an 'oversight by the Committee'.[39] Addressing the possibility of ambiguity in the provision even back then, Sir James Stephens, member of the Imperial Legislative Council, stated that "*you could no more mistake the severity of criticism or the severity of discussion for the writing of a person whose object was to produce rebellion or excite disaffection against the Government than you could mistake the familiarity of friendship to the familiarity of an insult.*"[40] The Council, however, did not envisage that the liberal wordings of this provision would facilitate misuse and an abuse of power by future Governments – the provision was ultimately subject to countless scrutiny by the courts.

Perhaps one of the most famous trials based on Sedition in India is the prosecution of Bal Gangadhar Tilak in 1908.[41] However, often overlooked is that the earliest indication of the stringent enforcement of Section 124-A by the Crown came in a judgment delivered by the Allahabad High Court in *Queen Empress v Amba Prasad*[42] – nearly a decade prior in 1897. The Chief Justice in this judgment laid down the law that if there was any indication at all of an intention in someone's writings to spread 'disaffection' against the government, it could be classified as sedition. The veracity of the statements penned down would be immaterial in such a situation. Following this precedent, the Bombay High Court went on to convict Tilak in 1908. The judge laid down a loose and vague guideline to determine the fate of an offender accused of being seditious, namely that an article must be read or a speech must be heard and if the contents seem to be within the boundaries of Section 124-A, then the accused may be termed as not guilty. In two future cases of *Queen Empress v Luxman*[43] and *Queen*

[39]Walter Russell Donogh, *Treatise on the Law of Sedition and Cognate Offences in British India: Penal and Preventive* (Book on Demand Ltd. 2013).
[40]ibid.
[41]*Emperor v Bal Gangadhar Tilak* [1908] 10 BOMLR 848.
[42]*Queen-Empress v Amba Prasad* [1898] ILR 20 All 55.
[43]*Queen-Empress v Luxman* [1899] 2 Bom. L.R. 286.

Express v Vinayek,[44] the Courts did not deem it necessary to amend or limit the scope of Section 124-A.

An interesting point to note is that in 1891, the Calcutta High Court in *Queen Empress v Jogendra Chunder Bose*[45] had differentiated between Sedition under English Law and Indian law for the jury. The judge stated that while in England any overt act carried out with a seditious intention was punishable, in India it would only be an attempt to resist by force or an attempt to excite disobedience by force that could fall within the sedition provisions. The Court believed that this was during the process of including the section in the IPC. By stating this, the Court differentiated between the terms disapprobation and disaffection, stating that the citizens have a right to the former but not the latter.

However, the judgments in the cases of *Tilak* and *Amba Prasad* seem to have neglected and ignored this point. Thus, the Courts prior to independence failed to issue concrete guidelines for the initiation of proceedings under the said section and kept its vague and wide-reaching wordings intact. The only caveat provided was that even if a person has criticized the government, he would not be guilty if he were 'loyal at heart' – another ambiguous terminology susceptible to abuse.[46]

Sec 124-A of the IPC, according to the author, is an archaic and colonial relic that needs an urgent re-evaluation to rid it of the numerous flaws that plague its provisions. The main issues with the statute have been elaborated as under.

a) Failure of the Litmus Test of Articles 14 and 19

Soon after independence, the Constitutional validity of Section 124-A was challenged before a Constitution bench of the Hon'ble Supreme

[44] *Queen-Empress v Vinayek* [1899] 2 Bom. L.R. 304.
[45] *Queen-Empress v Jogendra Chunder Bose and Ors* [1892] ILR 19 Cal 35.
[46] *Emperor v Tilak* (n 41).

Court in the matter of *Kedar Nath Singh v State of Bihar*[47] – the '*locus classicus*' on sedition. Here, the Court upheld the validity of Section 124-A but categorically stated that mere criticism or expression of disapproval could not be considered seditious. Only incitement to violence against the Government or an attempt to create public disorder would come within its purview. In *Arup Bhuyan v State of Assam*,[48] the Hon'ble Supreme Court followed the guidelines laid down by the US Supreme Court in *Brandenburg v Ohio*[49] that provided that only the incitement of imminent (not remote) lawlessness and violence could be punishable.

These judgments, while prima facie limiting the scope of Section 124-A, have in the author's opinion been rendered as 'token judgments' or dead letters by the actions of successive governments – Section 124-A is still being utilized to curb legitimate dissent by violating constitutional principles.

With regards to statements or actions that may be in contravention of Article 19(2) of the Constitution of India, which provides for reasonable restrictions to be placed on the freedom of thought, speech and expression, the Supreme Court established an extremely high threshold to prove the same in *S. Rangarajan Etc v. P. Jagjivan Ram.*[50] The Court stated that the expression of thought should be intrinsically dangerous to public interest and should be inseparable from the contemplated action – "*like a spark in a powder keg*". It is this high threshold that Governments need to satisfy in order to charge somebody under Section 124-A, which seems to be absent in practice. It must be noted that the Court in *Kedar Nath Singh* in 1962 did not have the foundation of numerous subsequent landmark Indian Supreme

[47] *Kedar Nath Singh v State of Bihar* [1962] AIR 95.
[48] *Arup Bhuyan v State of Assam* (2011) 3 SCC 377.
[49] *Brandenburg v Ohio* 395 U.S. 444.
[50] *S. RangarajanEtc v P. Jagjivan Ram* [1989] SCR (2) 204.

Court decisions[51] that established that fundamental rights are not isolated rights but are in fact synchronous and animate each other. While *Kedar Nath Singh* tested only the ambit of Article 19 in singularity, it did not view Article 19 in tandem with Article 14, which is now the practice. It would be impudent and misguided to continue this error.

Under Article 14, In *Shayara Bano v Union of India*,[52] the Court held that arbitrariness is very much a facet of unreasonableness. The sedition law in India definitely does not satisfy the test of "manifest arbitrariness" as laid down in a catena of judgments by the Supreme Court, making the provision in question liable to be struck down. Section 124-A, which was propagated as a reasonable restriction of free speech, is inherently arbitrary. The very definition of arbitrariness, as per the Black's Law Dictionary, is 'any act founded on prejudice or preference, rather than on reasons or facts'.[53] A recent Law Commission Reports has suggested changes to the Sedition law in an attempt to reduce the scope of misuse, but they have fallen on deaf ears and have been repeatedly ignored by Government.[54] It is clear that it is the Government's preference and in their interest to maintain this provision, making a clear case of bias towards the law rather than a sound understanding of the reasons. Further, *Shayara Bano* also mentions that anything excessive and disproportionate can be termed as manifestly arbitrary. In the author's opinion, the current ambiguous reading of the Section – as displayed in the following point – along with the instances in which the administration has been recently using it clearly portrays the disproportionate nature of this provision. Further,

[51]*Maneka Gandhi v Union of India* (n 30); *R.C. Cooper v Union of India,* (1970) AIR 564; *Indira Nehru Gandhi v Shri Raj Narain* [1976] 2 SCR 347.
[52]*Shayara Bano v Union of India And Ors* (2017) 9 SCC 1.
[53]Henry Campbell Black, *Black's Law Dictionary* (2nd edn, West Publishing Co. 1968).
[54]Law Commission, *Consultation Paper on Sedition* (Law Com No 21, 2018).

Section 124-A can also be used as an easy tool due to its vagueness to make an offence non-bailable and more egregious in nature during trial.

Recently, the Punjab High Court opined in October 2020,[55] "*the State needs to be more tolerant and circumspect while invoking laws pertaining to sedition and religious disaffection. Current tendency to the contrary has been frowned upon by the Supreme Court of India."* This judgment, in the clearest of terms, signifies that the arbitrary usage of Section 124-A must be prevented and emphasizes the responsibility that the Government has while using this provision. Therefore, Section 124-A must be reviewed under the judicial scanner of Articles 14 and 19 with a deeper analysis and an understanding of the modern world.

The author would like to bring oft-forgotten cases on Section 124-A to the forefront again. In *Tara Singh Gopi Chand v. The State*,[56] the Punjab High Court had declared Section 124-A as ultra vires, stating – "*a law of sedition thought necessary during a period of foreign rule has become inappropriate by the very nature of the change which has come about*". Moreover, in *Ram Nandan v. State*,[57] the Court opined on Sedition by referring to a quote by Pandit Jawaharlal Nehru – "*Now so far as I am concerned that particular Section is highly objectionable and obnoxious…".* The Court went on to make an important observation by stating that – "*If there is a possibility in the working of our democratic system – as I think there is – of criticism of the policy of Ministers and of the execution of their policy, by persons untrained in public speech becoming criticism of the government as such and if such criticism without having any tendency in it to bring about public disorder, can be caught within the mischief of Section 124-A of the Indian Penal Code, then that Section must be invalidated because it restricts freedom of speech.*"

[55] *Jasbir Singh @ Jasvir Singh v State of Punjab* Cri. Misc. No. 19376 of 2020, delivered on 30 October 2020 (P&H HC).
[56] *Tara Singh Gopi Chand v The State* [1951] CriLJ 449.
[57] *Ram Nandan v State* [1959] CriLJ 1.

The author believes that the law on Sedition needs to be viewed from the needs and societal climate of a modern India and not the erstwhile 19th century Colonial India. The above judgments are testament to the fact that Section 124-A must constantly be reviewed according to the changing times.

b) Ambiguity in wordings

It may be argued by supporters that the incorrect usage of a statutory provision by the executive does not deem the provision itself as ultra vires.[58] It may further be contended that there is an inherent presumption of constitutionality in statutory provisions.[59]

However, this cannot hold true when the wordings of the Section itself are so amenable to misuse. The word 'disaffection' in the Section is perhaps its deepest defect. The explanation of the section terms it as disloyalty or feelings of enmity. However, in a series of cases prior to independence, the term 'disaffection' was held simply to be 'an absence of affection'. This raises a pertinent issue – at what point does the 'right to offend' cross the line to be termed sedition and an absence of affection. The term 'disaffection' in itself has the power to obliterate the right to criticize due to its vague scope. While the Courts have attempted to classify sedition as only violent rebellion, people charged under this provision invariably have to spend large amounts of time in jail till the Courts acquit them. The word 'disaffection' allows the incumbent governments to imprison a person and stifle his voice of dissent for the time being, which conveniently suits their purpose.

The term 'Government established by law' was also a bone of contention, as it was interpreted to be anybody part of the Government. It was clarified by the Supreme Court in *Kedar Nath Singh v State of Bihar*[60] that this term signifies only the 'visible symbol of the state' and

[58] *Shri Ram Krishna Dalmia v Shri Justice S. R. Tendolkar* [1958] AIR 538.
[59] ibid.
[60] *Kedar Nath Singh* (n 47).

not any individual part of the ruling party. However, according to the author, even the clarification by the Supreme Court is not definitive enough to remove the ambiguity. Continued cases of misuse of this provision prove that even the Apex Court decision has virtually been rendered a dead letter.

c) Existence of other provisions

It is important to note that there are enough other provisions that deal with the actions that may be considered seditious. Chapters VI, VII and VIII of the IPC deal with mutiny, armed rebellion or disruption of public tranquility. Section 141 defines an unlawful assembly and Section 143 prescribes a punishment for the same. Section 153A prohibits actions generating enmity between different groups. These Sections are, in the author's opinion, sufficient to tackle any kind of illegal and unnecessary disruption of public order and armed rebellion, as there are sufficient safeguards enlisted under them that do not require for the invocation of Section 124-A. In presence of these various provisions, there is no need for a law as vague and susceptible to misuse as Section 124-A. Furthermore, the existence of Acts such as the Contempt of Court Act, 1971, UAPA and Prevention of Insults to National Honour Act, 1971 already act as efficient safeguards.

B. National Security Act, 1980

Following the draconian provisions of MISA, NSA was enacted into operation as a supposed moderate and liberal – but also effective – alternative. However, it established its stringent permanency right from the start by excluding any clause similar to the sunset clause of one-year contained in its predecessor. This legislation clearly reflects many similarities from the PDA.

Section 2 of NSA enables both the Central and State Governments to preventively detain any individual that they deem poses a threat to

India's national security.[61] The maximum time of detention under NSA is 12 (twelve) months, but a person can be held for a maximum of only 10 (ten) days without being informed of the charge against them.[62] The detainee has no right to be represented by a lawyer. The word 'satisfied', which had been previously used in the PDA has been inserted in NSA as well, leaving the judgment of threat solely to the Governments in power.[63] A key aspect of NSA, which the author shall highlight later in the article, is provided under Section 16, which states – "*No suit or other legal proceeding shall lie against the Central Government or a State Government, and no suit, prosecution or other legal proceeding shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act*", which renders actions done under the Act beyond the scope of judicial review. If any individual has been detained under more than one charge, Section 5A provides that he would be considered as detained under each charge separately and it would be irrelevant if some of these charges are vague or unnecessary.

The Government must also, within three weeks of the detention order, convey the grounds of detention to an Advisory Board.[64] The Advisory board, after receiving the necessary information required, must prepare a report within seven weeks, conveying their opinion on the grounds of detention and due process followed by the authorities to the Government.[65]

NSA is riddled with certain flaws that indicate that it may just nothing more than a polished remnant of its preceding legislations that received universal criticism. These flaws, as elaborated under, call for an urgent review of the Act, both by the legislature and the judiciary.

[61]National Security Act 1980, s 2.
[62]National Security Act 1980, s 8.
[63]National Security Act 1980, s 3.
[64]The Composition of the Advisory Board (National Security Act 1980, s 9.
[65]National Security Act 1980, s 11.

a) Human right violations

"*I could never have conceived that in the Constitution of free India, detention without trial will be permitted under the fundamental rights of the people. Having been convicted to total penal servitude for some 31 years in six trials on six different occasions during the Freedom struggle and having passed 10 years of my total life in prison dungeons and condemned cells... I know the tortures which detention without trial means and I can never reconcile with it."*[66] These words echoed the sentiments of Shibban Lal Saxena and fully represent the faults with NSA. NSA has long been criticized for numerous human rights violations. The NSA re-enacted several provisions of MISA and the PDA and "*presaged years of new repressive legislation.*"[67]

The first glaring denial of human rights is the curtailed right to approach courts for relief. The NSA permits review only for questions relating to whether the concerned authorities had followed the due procedure while carrying out the detention,[68] but not the treatment of the detainees while in custody. To add to this anomaly, the NSA also mandates for an administrative review that must be complied with prior to a judicial review.[69] By transferring power in the hands of the Advisory Board to state their primary opinion and views on the matter, the judicial rights of detainees have been given a backseat.

These Advisory Boards themselves are appointed by the ruling Government, with the only provision being that the Chairman must be a retired or sitting judge of any High Court. There are no other mandates for choosing the remaining members, which virtually allows

[66]Constituent Assembly Debates (19 November 1949) <http://loksabhaph.nic.in/writereaddata/cadebatefiles/C19111949.html> accessed 15 January 2021.
[67]Granville Austin, *Working A Democratic Constitution: The Indian Experience* (Oxford University Press 2003).
[68]National Security Act 1980, s 10.
[69]Surabhi Chopra, 'National Security Laws in India: The Unraveling of Constitutional Constraints' (2015) 17 Oregon review of International Law 1.

the Government to appoint an Advisory Board to suit their needs. Thus, the reports produced by the Advisory Boards can hardly be considered as completely impartial or unbiased.

The Government had amended the NSA in 1984 during the Punjab Agitation. This amendment helped the Government to extend the period of detention from one year to two years and the deadline of referring the matter to the Advisory Board from three months to four-and-a-half months and in certain situations, it enabled the Government to exclude the opinion of the Advisory Board.[70] In the author's opinion, such an action clearly shows the lack of uniformity in the implementation of a pan-India Act. If the Government can, at any particular time, according to its whims and fancies, alter the provisions of an Act in such a way that its implementation becomes more draconian or aggressive in nature, such a piece of legislation should be considered as inherently dangerous to a free society.

An internal review of *habeas corpus* by the South Asian Human Rights Documentation showed that it seems to have become a practice in India that police officers rely on NSA in cases where they are unable to make out a reasonable case against existing constitutional and statutory provisions.[71] The main aims of such practices are to find an easy avenue for arrest without trial and denial of bail.

NSA is contrary to a host of International Law provisions and principles as well. The United Nations ("**UN**") Security Council, via Resolution 1456, has made it clear that States must adopt measures to counter terrorism only so far as they comply with international human rights standards.[72] Article 9(1) of the International Covenant of Civil and Political Rights ("**ICCPR**") guarantees individuals against

[70]*Kalhan* (n 16).
[71]Ravi Nair, 'National Security Act: Obscuring the Flaws in India's Criminal Justice System' *The Wire* (India, 5 March 2018) <https://thewire.in/caste/national-security-act-obscuring-flaws-indias-criminal-justice-system> accessed 15 January 2021.
[72]United Nations Security Council, 'Resolution No. 1456' (20 January 2003) S/RES/1456 (2003).

arbitrary arrest and detention, while Article 9(2) states that every individual has the right to know the reason of arrest at the time of detention. Finally, the ICCPR also provides that every person arrested must be brought before a magistrate and be entitled to a trial that could lead to release within a reasonable time.[73] Article 10 of the Universal Declaration of Human Rights ("**UDHR**") states – "*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*."[74]

The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment adopted by the UN General Assembly reaffirms the principle that a person should ideally not be kept within detention without a judicial authority hearing his side effectively. It also provides that a detained individual must always have the Right to Counsel.[75] NSA's provisions in effect overlook all these international law principles that are universally regarded as the yardstick for preservation of human rights.

There have been several instances of misuse of NSA in India. Recently in 2019, 3 (three) people allegedly accused of slaughtering cows were detained in the Bulandshahr District of Uttar Pradesh. The Government justified their actions on the grounds that the action of slaughtering cows hurt Hindu sentiments in the area and led to a breakout of violence and disruption of public order, thus bringing it within the scope of NSA.[76] In fact, out of the 139 (one hundred and thirty nine) people

[73]International Covenant on Civil and Political Rights 1966, art 9.
[74]Universal Declaration of Human Rights 1948, art 10.
[75]United Nations General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (9 December 1998). <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx> accessed 15 January 2021.
[76]Editorial, '3 charged under National Security Act in Bulandshahr cow slaughter case' *Hindustan Times* (Meerut, 14 January 2019) <https://www.hindustantimes.com/india-news/seven-arrested-for-alleged-cow-

booked under NSA in Uttar Pradesh in 2020, 76 (seventy six) such charges were a result of cases of cow slaughter.[77]

A Manipuri journalist named Kishore Chandra Wangkhemcha was detained for a period of 133 (one hundred and thirty-three) days under NSA in November 2018 for allegedly uploading videos on Facebook criticizing the incumbent Government. Initially charged with Sedition, the Court acquitted him, leading the Government to book him under NSA, detaining him for a further 12 (twelve) months as per the order. In fact, as of May 2021, there is a Public Interest Litigation filed by him pending in the Supreme Court that challenges the constitutional validity of Sedition.[78]

Dr. Kafeel Khan was also arrested after a supposed hate speech at Aligarh Muslim University during the Citizenship Amendment Act Protests that took place in early 2020. He was granted bail by the Court, but later charged under NSA that allowed him to be kept under preventive detention for three months without trial. After this period lapsed, it was renewed for a further three months. Finally, the District Magistrate ordered his release, dropping the charges of NSA against him. It is important to note that in his speeches, Dr. Khan had made aggressive statements against Home Minister Mr. Amit Shah and the Rashtriya Swayamsevak Sangh, which may be said to have upset the ruling party.[79]

slaughter-in-up-s-bulandshahr-charged-under-nsa/story-VwdbljfHnDjqieHDmJwnjM.html> accessed 15 January 2021.

[77]Editorial, 'UP is Primarily Using the National Security Act Against Those Accused of Cow Slaughter' *The Wire* (New Delhi, 11 September 2020) <https://thewire.in/government/up-national-security-act-cow-slaughter-accused> accessed 15 January 2021.

[78]*Kishorechandra Wangkhemcha & Anr v Union of India* 2021 SCC OnLine SC 374.

[79]Editorial, 'Kafeel Khan's NSA Detention Extended by Three Months' *The Wire* (Lucknow, 17 August 2020) <https://thewire.in/rights/kafeel-khans-nsa-detention-extended-by-three-months> accessed 15 January 2021.

In Madhya Pradesh, a man was recently remanded under NSA for allegedly selling Beef in Indore. [80] As far back as 2000, NSA was used in Uttarakhand to detain 2 (two) civil rights activists who were a part of the NGO 'Sahyog'. The activists had published a booklet named '*AIDS Aur Hum'* that encouraged people to be mindful of their sexual health, which apparently scandalized the people of the locality.[81]

The above instances clearly portray NSA as a weapon for curbing dissent and practices that the Government disapproves of.[82] According to a 1993 Report, nearly 72.5% of the 3,783 people arrested under NSA were released due to lack of evidence. Further, between 1980 and 1990, a shocking 2/3 (two-thirds) of approximately 16,000 (sixteen thousand) detentions made under NSA were overturned by advisory boards and tribunals.[83] This demonstrates the blatant misuse of NSA.

b) Ambiguity in wordings and constitutionality

NSA provides the Government the power to preventively detain somebody from committing an action against public order or security of the State. The words 'State security' and 'public order' have not been defined anywhere. This lack of clarity makes NSA clearly susceptible to misuse. In *Dr. Rammanohar Lohia v State of Bihar*,[84] the Apex Court made some perceptive observations – "*One has to imagine three concentric circles. Law and order represents the largest circle within which is the next circle representing public order and the smallest circle represents security of State. It is then easy to see that an act may*

[80]Editorial, 'Man arrested under NSA for selling beef in Madhya Pradesh' *Deccan Herald* (Indore, 14 September 2020) <https://www.deccanherald.com/national/north-and-central/man-arrested-under-nsa-for-selling-beef-in-madhya-pradesh-887386.html> accessed 15 January 2021.
[81]Editorial, 'India's Unforgivable Laws' *EPW Engage* (20 September 2018) <https://www.epw.in/engage/article/indias-unforgivable-laws> accessed 15 January 2021.
[82]'Time to end abuses' *India Seminar* <https://www.india-seminar.com/2002/512/512%20seminarist.htm> accessed 15 January 2021.
[83]*Ganguly* (n 33).
[84]*Dr. Ram Manohar Lohia State of Bihar and Ors*. [1966] SCR 1 709.

affect law and order but not public order just as an act may affect public order but not security of the State." Thus, issues that violate law and order may not necessarily violate public order or security of State. NSA fails to realize this distinction and lays down blanket powers for the Government to exercise at will.

The terms 'defence of India' and 'relations of India with foreign powers' in Section 3 possess the same flaw as the terms discussed above. As contended by Mr. Ram Jethmalani in *A.K. Roy v Union of India*,[85] these terms are "*so vague, general and elastic that even conduct which is otherwise lawful can easily be comprehended within those expressions, depending upon the whim and caprice of the detaining authority*."

A basic yet interesting aspect of evaluating a crime is criminal intention. In *Scull v Commonwealth of Virginia*,[86] the United States Supreme Court observed that the very principle of 'Fundamental Fairness' implies that an individual cannot be arrested for a crime that he could not know with reasonable certainty that he was committing. This in effect means that when vagueness in an act or law may translate to even a regular legally permissible action being interpreted as a crime, it goes against some basic principles of justness. According to the author, NSA certainly suffers from this defect.

There appears to be a contradiction of some degree within the provisions of NSA as well. Section 8(1) of NSA mandates that the reason for detention be conveyed to the detainee within ten days of the detention. However, Section 8(2) provides a caveat, which states that irrespective of Section 8(1), nothing can compel the authorities to release any information that they deem against public interest. This creates a glaring loophole in the structure of the act – where should the line be drawn between the communication of charges to a detainee and

[85]*A. K. Roy, Etc v Union of India and Anr.* (1982) 1 SCC 271.
[86]*Scull v Commonwealth of Virginia* [1959] 359 US 344.

the concealment of charges in public interest? These sections provide the Government with an easy avenue to hide even the grounds of detention in cases of arbitrary use.

The preamble of the NSA states that – "*in the prevailing situation… it was considered necessary that the law-and-order situation in the country is tackled in a most determined and effective way*".[87] Emphasis must be applied on the term 'prevailing situation'. This clearly means that NSA was meant to deal with the needs of the 1980s and the threats to national security in that era. The ambiguity that arises from this is the need to establish whether the term 'prevailing situation' renders the NSA as unnecessary in modern time or not.

Further, the term 'subjective satisfaction' creates some element of confusion by leaving the decision of detention solely to the whims and fancies of the Government. In *Anil Dey v State of Bengal*,[88] the Court held that such satisfaction must be "*honest and real and not imaginary and fanciful*." Further, in *Naresh Chandra v State of West Bengal*,[89] the Court opined that the executive must rationally apply their mind in detention orders. It seems that NSA has created a standard that translates to a procedural burden impossible to match up to due to decisions of satisfaction being beyond the purview of Courts.[90]

The constitutionality of NSA was challenged in *A.K. Roy v Union of India* where the Apex Court upheld the constitutional validity of the Act. The Court nevertheless insisted that NSA be as narrowly construed as possible, limiting the scope of its application in principle. However, a cumulative reading of the issues shown above indicates that the act must come under the judicial scanner again. In the author's opinion, the inherent prohibition of detailed judicial review in the cases

[87]National Security Act 1980, Introduction.
[88]*Anil Dey v State of West Bengal* (1974) 4 SCC 514.
[89]*Naresh Chandra Ganguli v The State of West Bengal And Ors* [1960] SCR 1412.
[90]'Time to end abuses' *India Seminar* <https://www.india-seminar.com/2002/512/512%20seminarist.htm> accessed 15 January 2021.

under NSA constitutes a ground for unconstitutionality. It must be kept in mind that even if the Indian courts attempt to restrict the usage of acts like NSA as far as possible, it still remains incredibly easy for successive Governments to render such rulings as dead letters through their actions. If NSA is not revised, then two kinds of abuses of the act will be rampant:

(i) Detentions to settle political and ideological differences, which will ultimately have a chilling effect on the fundamental rights enshrined in the Constitution.

(ii) Detentions of suspected criminals that can easily be entertained under the existing criminal provisions and do not call for the use of NSA.[91]

c) Lack of accountability

NSA's provisions seem to translate to an inherent lack of accountability of the authorities. There is limited information available in the public domain with respect to the details of arrests made under NSA, although the numbers of such detentions are high. The Government, via NSA provisions, owes no obligation to the public at large to disclose any facts that they deem to be against public interest. Further, the Courts have a limited scope of review, with any matters relating to determining the validity of the Government's 'satisfaction' being virtually removed from their jurisdiction. A cumulative reading of the above facts shows that the common man can neither rely on the legislature, executive or judiciary to insulate them from illegal actions under NSA. Legal provisions have started to seem virtually ineffective against the draconian powers of this act. Human tendency makes it clear that where there is an inherent lack of accountability, misuse is certain to follow.

[91] ibid.

IV. WAY FORWARD FOR INDIA – SEDITION AND NSA

A. Sedition

According to the author, there is an urgent and pressing need to review India's Sedition provision. The archaic and colonial statute has been unable to detach itself from the socio-political situation of the 19th and 20th centuries and acclimatize to the modern world.

Firstly, Section 124-A was introduced as a British concept in colonial India and therefore, India must take inspiration from the UK. 2019 marked a decade since the UK enacted the Coroners and Justice Act, 2009[92] and by Section 73, repealed its sedition and seditious libel provisions. Simply a year after the UK carried out this legislation, Australia also introduced the National Security Legislation Amendment Act, 2010[93] by which the term 'sedition' was replaced with 'urging violence offences.' Following this, according to the author, the provision of Sedition is hardly needed in Indian law and must be removed. The provision also seems to be repetitive and unnecessary due to the presence of various other statutes that deal with similar offences.

Secondly and alternatively, Section 124-A may be replaced by a new provision that considers renaming 'sedition' to a term that provides more clarity. The Section may also be amended to clearly draw a line between the rights under Article 19 and the offence of Sedition. This can be achieved by explicitly including the element of violence in the provision and eliminating ambiguous terms like 'disaffection' that have proved to be a bone of contention. Any statement or action that, according to the Government, could possibly incite violence in the future, it can be dealt with a host of regular criminal provisions of the IPC that have been enlisted previously in this article.

[92]Coroners and Justice Act 2009, s 73.
[93]National Security Legislation Amendment Act 2010, s 18.

The term 'Government established by law' must be clearly laid down in the section itself, to prevent personal rivalries from being brought within the scope of the provision. It must exclude any politician, minister or government servant in their personal or individual capacity from its scope. This will prevent any direct attack to a minister from being construed and enforced as sedition by the authorities.

Thirdly, it must be noted that in *Sanskar Marathe v. The State of Maharashtra and Anr.*,[94] the Bombay High Court had issued certain guidelines for the use of Section 124-A. The Court aimed to clearly separate the 'right to offend' that comes along with the fundamental right of speech from the offence of Sedition. However, these guidelines have barely been adhered to. Therefore, law enforcement agencies must be actively educated in the use of Section 124-A and action must be taken against those officials that have flagrantly misused the act frivolously. Stricter penalties must be imposed on such officials, which may act as an efficient safeguard against misuse.

Fourthly, Justice Gwyer in the case of *Niharendu Dutt v. The King Emperor*[95] rightly stated that – "*This is not made an offence in order to minister to the wounded vanity of Governments, but because where Government and the law cease to be obeyed because no respect is felt any longer for them, only anarchy can follow.*" This can be used as a benchmark for deciding cases under Sedition – only when there is a threat of anarchy as a result of violence should this provision be used and anything below this threshold should be dealt with other relevant criminal laws.

Fifthly, sedition must be made into a non-cognizable offence as well. This may at least provide for some judicial intervention prior to the arrest, as police officers cannot arrest without a warrant.[96] Courts may then be able to actively deny warrants rather than having to hear

[94]*Sanskar Marathe v The State of Maharashtra and Anr* [2015] CriLJ 3561.
[95]*Niharendu Dutt Majumdar and Ors. v Emperor* [1942] FCR 48.
[96]Code of Criminal Procedure 1973, s 2(l).

tiresome and lengthy bail or release applications post the arrest. Further, investigation under this provision may also be confirmed by a gazetted officer of the State for more accountability. This also ensures that no individual is compulsorily incarcerated without justification.

Lastly, some procedural changes must be mandated by the provision. Within a week from the date of detention, a written report outlining the exact reasons and rationale behind imposing Section 124-A must be issued by the concerned department and released to all concerned parties. This Report must be held as the direct source of accountability, and must be analyzed in tandem with the legal opinion of any capable public prosecutor to ascertain its applicability. Should it be found as unduly frivolous, reasonable penalties should follow.

B. National Security Act, 1980

NSA, being 4 (four) decades old, requires drastic reforms to bring it up to the standards of expectations and legal climate in the present societal landscape.

Firstly, there is a desperate need to introduce the element of judicial review in NSA. The onus is not only on the legislature to amend the act, but also on the judiciary to alter its approach to such draconian laws. It appears that while hearing arguments regarding the constitutional validity of NSA, the Supreme Court neglected constitutional as well as international norms and regulations.[97] The effective omission of ICCPR and UDHR from its considerations can be considered as a 'missed opportunity'.[98] The Supreme Court must cease considering 'public order' on a platform higher than basic rights. The Courts must depart from their previous approach[99] and allow themselves to delve into the factual correctness of a preventive detention decision, especially when the detainee alleges that malafides

[97] *Chopra* (n 68).
[98] ibid.
[99] *Muthuramalinga Thevar v The State of Madras* [1958] CriLJ 1047.

exist on behalf of the Government. This change in attitude of the Judiciary, along with an amendment to NSA permitting further judicial review, would significantly reduce human rights trespasses arising from the act.

Secondly, in *United States v Salerno*,[100] the US Supreme Court highlighted some safeguards that are essential for upholding the concept of preventive detention as constitutional. The Court opined that all detainees should be allowed to:

(i) Have the 'right to counsel';

(ii) Testify on their own behalf;

(iii) Present information by proffer or otherwise;

(iv) Cross-examine witnesses who appear in trials.

In addition to the above, the officer in charge with determining the need for preventive detention must follow some statutory guidelines that include the nature and circumstances of the charges, the past history and character of the detainee and the weight of the evidence. The officer must also clearly provide in writing the reasons for detentions and the evidence for the same. According to the author, these key points must be explicitly provided for in NSA and should be strictly enforced. An Amendment may be added to NSA that clearly provides for the guidelines that must be followed while detaining an individual.

Thirdly, a balance must be maintained in the implementation of NSA. The current provisions of NSA state that the maximum time for preventive detention pursuant to any detention order is 12 (twelve) months. However, this does not prevent the Government from issuing a fresh order to detain the individual for an extended period. It may be mandated that successive detention orders should not be issued against an individual, with a compulsory time limit to be adhered to before

[100] *United States v Salerno* (1987) 481 US 739.

issuing a fresh order. Further, Section 8(2) of NSA, which allows the Government to conceal the grounds of detention in 'public interest', must be removed. This may ensure more transparency in the process. The words "*the earliest opportunity of making a representation*" in Section 8(1) should be amended to provide a specific time frame within which authorities must mandatorily permit the detainee to make the requisite representation.

Fourthly, the role of the Advisory Boards set up to review cases must be revamped. While the Advisory Board's report should certainly be considered, detainees should be given the right to appeal the decision of the Advisory Court in the judiciary. It must be recognize that the Advisory Board is a non-judicial body that is appointed by the very authorities carrying out the detentions – the State and Central Government. Issues of prejudice and bias in the Advisory Board preclude it from being an entirely reliable body that will fairly give an opinion on a case-by-case basis. Thus, the right to appeal must be strictly implemented in the working of the board.

Fifthly, the objective of NSA must be completely redirected. While NSA was enacted in 1980 to strictly control anti-state and ant-society elements, it must now be used as a tool to simply provide protection, reassure and empower citizens – this is the real need of the 21st century. This can be done by adding a preamble to the Act clearly stating that the main aim of the act is to uphold human rights and stability in society, for that is the true meaning of national security in a modern world. The UN Secretary General, in a report named *In Larger Freedom: Towards Development, Security and Human Rights for All*, stated – "*Not only are development, security and human rights all imperative; they also reinforce each other. This relationship has only been strengthened in our era of rapid technological advances, increasing economic interdependence, globalization and dramatic geopolitical change… Accordingly, we will not enjoy development without security, we will not enjoy security without development, and*

we will not enjoy either without respect for human rights."[101] This spirit must be enshrined in NSA via the preamble and cases under the act must be reviewed under this scanner. If the entire paradigm of implementation of NSA is shifted, then the Act can be used in a new perspective that has evolved with the needs of today's society.

Lastly, it must be recognized that NSA is not an emergency legislation. If it were considered as one, then the interpretation of vague words would be liberally held in the favour of the State.[102] NSA, being at par with any ordinary legislation, does not enjoy this privilege. Therefore, terms like 'satisfied', 'defence of India', 'security of India' etc. enlisted in Section 3 need to be elaborated upon with specific parameters. While India has time and again defended NSA in international forums,[103] the crux of the issue being the vagueness and loopholes created by NSA have gone unanswered. The implementation of NSA after the application of the new definitions may be done in co-ordination with the National Human Rights Commission ("**NHRC**"). The valuable quality of NHRC is that its "*moral legitimacy is based on its members' impartiality and integrity, and not on its institutional independence or its guaranteed powers.*"[104] Thus, it will provide fairness, transparency and accountability to a revamped and clearer NSA.

V. CONCLUSION

National security legislations are imperative for the stability and security of any democracy. Alladi Krishnaswami Ayyar, in the Constituent Assembly Debates, stated that such laws have – "…*become*

[101]Raj Kumar, 'Human Rights Implications of National Security Laws' (2005) 33 Denv. J. Int'l L. & Pol'y 195.
[102]*Union Of India Etc. v Bhanudas Krishna Gawde and Ors.* [1977] SCR 2 719.
[103]Derek Jinks, 'The Anatomy of an Institutionalized Emergency: Preventive Detention and Personal Liberty in India' (2001) 22 Michigan Journal of International Law 311.
[104]*Kumar* (n 100).

a necessary evil under the existing conditions of India. Even the most enthusiastic advocate of liberty says there are people in this land at the present day who are determined to undermine the Constitution and the State…"[105] It would be our folly to suggest that this statement is irrelevant in modern society.

However, when these laws expose an inherent disregard for the basic principles of human liberty, they require serious introspection. It is essential that a vibrant democracy create "*a paradigm of understanding and appreciating the values inherent in particular traditions ... while stretching our interpretive framework to more universal horizons. No intellectual task is more basic to the work of human rights.*"[106]

Along with this, NSA and Section 124-A also possess some inherent shortcomings. Their ambiguities, contradictions and instances of misuse by the Government are striking causes of concern. These laws need to be viewed in accordance with international standards and the provisions of the Constitution with increased judicial intervention. Their relevance must be examined regularly as the years roll on – for the law is a constantly evolving organism. Only if this is achieved will the true objective of these laws be fulfilled – not to simply create a veneer of public order, but to actually ensure stability and security in the true sense according to the needs of the era.

[105]Constituent Assembly Debates, 15 September 1949, vol 9.

[106]Paolo G. Carozza, 'Uses and Misuses of Comparative Law in International Human Rights: Some Reflections on the Jurisprudence of the European Court of Human Rights' (1998) 73 Notre Dame L. Rev. 1217.