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IMPERATIVES OF NATIONAL SECURITY AND JUDICIAL REVIEW *

Introduction

The term 'national security' has not been precisely defined either in the Constitution of India or any statutes dealing with the internal security of the state. However, the word 'internal security' and 'internal disturbance' have been mentioned in the Constitution and in many statutes but not with a precise meaning thereof. National Security, according to Wikipedia, is a concept that a government, along with its parliament(s), should protect the state and its citizens against all kind of "national" crises through a variety of power projections, such as political power, diplomacy, economic power, military might, and terrorism and so on. Any threat to security and unity of nation will have ramification on the life of people and State has bounded duty under the Constitution to protect the life and liberty of the citizen. It is universally recognized that the range of judicial review exercised by the superior courts in India is perhaps the widest and most extensive known to the world of law. It is this power and jurisdiction of the High Courts that is most frequently and potently invoked and exercised. The power of judicial review is the power of superior courts to test the legality of any governmental/state action.

No clear definition of what constitutes 'national security' has emerged from international jurisprudence. The UNHRC has at least made it clear that suppression of democratic discourse and human rights cannot be justified on the grounds of national security. The legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. International courts have however generally quickly accepted governments' claims that restrictions on freedom of expression were in fact directed at the protection of national security. Instead, they have focused

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their attention on whether the restrictions at issue were necessary. In the *Observer and Guardian v. United Kingdom*¹, for example, the ECHR did not question whether a British ban on the memoirs of a former secret agent served a national security goal, even though the book had already been published and widely circulated in Australia and the USA. Instead, the Court found that the ban failed the necessity test since any possible harm to national security had already become irreversible due to prior publication².

Scope of judicial review in State's measures to regulate freedom of Speech & Expression

Freedom of expression has been a serious casualty in security crackdowns globally. National Security is used a ground to justify both legal and practical fetters on freedom of expression. There are two aboriginal freedoms with the individual. These are freedom to have ideas or thought and freedom to expression those ideas and thoughts. These freedoms are inherent and inalienable right with the individual. The Constitution of India also confers fundamental freedom on its citizen under Art.19 (1) and Art.19(2) sets out domains where individual's liberty could be trammelled. These restrictions are in the interest of the State based on national security, public order, and social order; to maintain friendly relationship with foreign States etc. These restrictions are apotheosis on which freedom of citizen to speech and expression is regulated. An individual has freedom to think in terms of his aspiration unless his aspiration confronts with any positive law of the State as laid or enacted under Article 19(2) of the Constitution. Individual's ideas and thoughts even they are not in not conformity with the constitutional values, remain unbridled unless they are impinged upon any of the restrictions under Art. 19(2).

In *Romesh Thappar v. State of Madras*³ the Supreme Court held as follows:

"... (The freedom) lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible. A freedom of such amplitude might involve risks of abuse ... (But) "it is better to leave a few of its noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits".

¹ *Observer and Guardian v. United Kingdom*, Application No. 13585/1988 (European Court on Human Rights/ 12.07.1990)

² <https://www.article19.org/pages/en/national-security-more.html>

³ (1950 SCR 594)

In ***A and others v. Secretary for the Home Department***⁴ in page 85 it is noted as follows:

“The Government, democratically accountable to Parliament, is responsible for the protection of the public; assessment of the risk to the public and the appropriate formulation and implementation of the protective measures are, on grounds of political legitimacy, primarily for the Government and Parliament.”

It is further held as follows:

“It is not for the court to substitute its view for that of the Government as to the effective measures to be taken, and the Court of Appeal was correct not to disturb the commission's finding of fact that the measures did not exceed what was strictly required by the exigencies of the situation.”

The Kerala High Court recently held:

“the scope of judicial review must be narrowed down to find out whether the State action is consistent with the objectives of criteria under Art.19(2) and materials or evidence relied on by the State are having proximate relation to protect the substantial interest of the State in relation to security, unity and integrity or public order or any other criteria as the case may be under Art.19(2) of the Constitution. If the State is able to show the proximate relation of materials relied on substantial interest of the State, it is not for the Court to assess ‘reasonableness’ of evidence or materials. The wisdom of the Home Department or any Authority analyzing such materials cannot be subjected to judicial scrutiny for reasonableness.”⁵

Courts in India have not been uniformed in approach while dealing with the cases related to national security. For instance, the Supreme Court had maintained the petition challenging the slapping of National Security Act (NSA) on Varun Gandhi by then Uttar Pradesh Government in 2009 for his alleged anti-Muslim speeches disturbing public order and court quashed the detention order passed under NSA holding that state government had "no valid ground" to oppose the state advisory board's order for revocation of the security law against the BJP leader. This is not the only case, in other cases too such as Binayak Sen and Soni Sori, the Apex Court set aside the decision of the High Court and granted bail to them despite the resistance from the Government on the ground of National Security as they were alleged to be sympathiser to Naxalites.

⁴ (2004) UKHL 56

⁵ WP(C).No. 10727 of 2013 (M)

Personal Liberty v. National Security

It is very difficult to define the "liberty". It has many facets and meanings. The philosophers and moralists have praised freedom and liberty but this term is difficult to define because it does not resist any interpretation. The term "liberty" may be defined as the affirmation by an individual or group of his or its own essence. It needs the presence of three factors, firstly, harmonious balance of personality, secondly, the absence of restraint upon the exercise of that affirmation and thirdly, organization of opportunities for the exercise of a continuous initiative⁶. Chambers' Twentieth Century Dictionary defines "liberty" as "Freedom to do as one pleases, the unrestrained employment of natural rights, power of free chance, privileges, exemption, relaxation of restraint, the bounds within which certain privileges are enjoyed, freedom of speech and action beyond ordinary civility".

All human beings are born with some unalienable rights like life, liberty and pursuit of happiness. The importance of these natural rights can be found in the fact that these are fundamental for their proper existence and no other right can be enjoyed without the presence of right to life and liberty. "Liberty" may be defined as a power of acting according to the determinations of the will. According to **Harold Laski**, liberty was essentially an absence of restraints and **John Stuard Mill** viewed that "all restraint", qua restraint is an evil". In the words of **Jonathon Edwards**, the meaning of "liberty" and freedom is: "Power, opportunity or advantage that any one has to do as he pleases, or, in other words, his being free from hindrance or impediment in the way of doing, or conducting in any respect, as he wills."

The right to life and personal liberty⁷ is the most sacrosanct. The judicial contribution to the protection of personal liberty is perhaps the most impressive chapter on the working of democratic societies. Reference may be made to historic cases of John Wilkes and Enticks in the mid 18th century when general warrants were issued by the State which claimed that the power to issue warrants was essential to government and indeed the only mean of quieting the clamours and sedition. The Court of King's Bench held that in the absence of a statute or a judicial precedent the practice was illegal. It was a victory for individual's liberty and democratic principles. A full bench of Madras High Court in **E.P. Govindan Nair v. Emperor**⁸ held that every person in every part of the British Empire has a right to be protected from illegal imprisonment by issue of writ of habeas corpus and the High Court had the power to issue the same. This was the tradition of the passionate protection of liberty by the High Courts.

⁶ AIR 2011 SC 312

⁷ Art 21

⁸ AIR 1992 Mad 499

A new rising gainsay for the courts in India are affairs of personal liberty and national security. Life and liberty are sacrosanct but national security is equally crucial. Preamble to the Constitution of India assures the dignity of the individual and the unity and integrity of the nation. This implies individual freedom and a government by law which are the foundations of civilized living. These fundamental values have to be reconciled. The larger question is, whether judicial approach to the great issue of liberty and of the right balance between public interest on the one hand and individual liberty on the other hand, should be idealistic or pragmatic. The judicial task in this area is, indeed, delicate and challenging. In ***Maneka Gandhi v. Union of India***⁹ the Hon'ble Supreme Court has cautioned about unguided and unrestricted powers in an authority to affect the rights of a person without laying down any policy or principle which is to guide the authority, in exercise of the power. In ***Whitney v. California***¹⁰ the Supreme Court opined, while upholding individual liberty to advocate, as follows:

“Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it. Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger, it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.”

Administrative action of the State in dealing with security measures often perplexed the scope of the exercise of judicial review. The standards of the review in reviewing the decision of the Government in security related issues must be placed at different pedestal by the Courts. The

⁹ AIR 1978 SC 597

¹⁰ 274 US 357 (1927)

Courts have to be cautious by applying normal test like unreasonableness, proportionality, secondary review or strict security on the matters reviewing decisions of security of the Country¹¹. Supreme Court while dealing with constitutional validity of various provisions of the Prevention of Terrorist Act, 2002 in **Peoples Union for Civil Liberty v. Union of India**¹² in para 12 held as follows:

“12. Therefore, the anti-terrorism laws should be capable of dissuading individuals or groups from resorting to terrorism, denying the opportunities for the commission of acts of terrorism by creating inhospitable environments for terrorism and also leading the struggle against terrorism. Anti-terrorism law is not only a penal statute but also focuses on pre-emptive rather than defensive State action.....”

The most of the measures taken by the Government are therefore, as a preventive measure to avert possible threat to the life of the citizen. Any threat to the security, unity and integrity of the Nation, necessarily, will have ramification on the life of the people. Therefore, the Courts particularly in UK have taken an approach to give respect to Governmental wisdom in dealing with measures for National security, unity and integrity of the Country¹³

The House of Lords in **Secretary of State for the Home Department v. Rehman**¹⁴ unanimously upheld the decision of the Secretary of the State to deport a Pakistani-born Imam because he was involved in terrorist activities in India. The House of Lords was of the view that even if his activities found no threat to National security, “the cost of failure can be high” and further held that “this seems to me to underline the need for the judicial arm of the Government to respect the decision of the members of the Crown on the question whether support for terrorist activities in a foreign country constitutes a threat to National security.

4Conclusion

In our Country, individuals' rights on liberty are measured on the line of constitutional protection and therefore, any action of the State has to be tested on the anvil of reasonable restriction laid down under Art.19(2) and 21 of the Constitution. The actual crime has to be dealt with in accordance with the procedure of ordinary law. It is only when such procedure

¹¹ W.P. (C) No. 10727 of 2013

¹² 2004 9 SCC 580

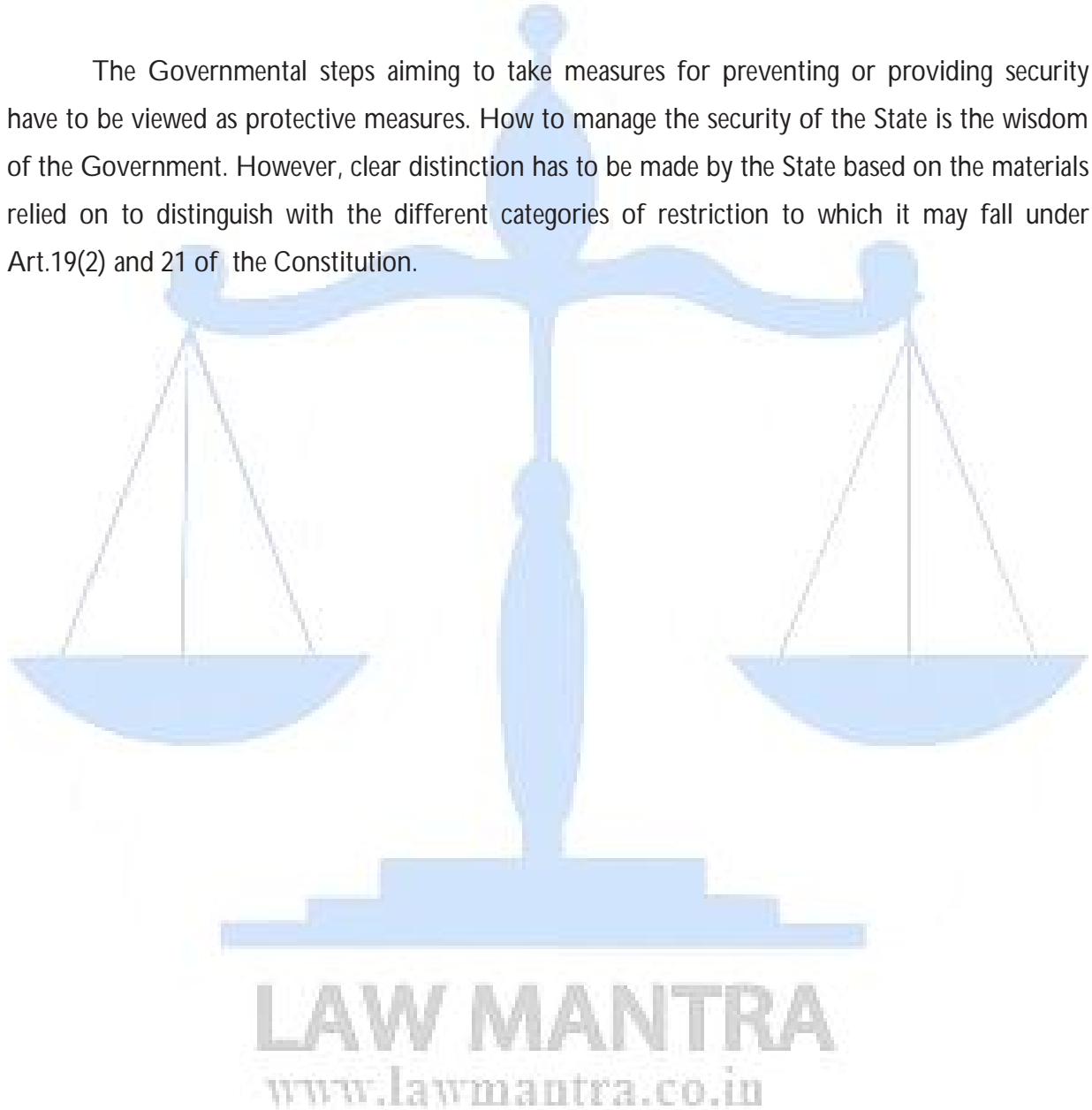
¹³ WP(C).No. 10727 of 2013 (M)

¹⁴ [(2001) UKHL 47]

is violated it gives room for complaint on violation of individual liberty. The words of *Brennan J.* of the Supreme Court of US in the decision of ***Baker v. Carr***¹⁵ are apposite in this regard:

“.....the courts are not fit instruments of decisions where what is essentially at stake is the composition of those large contests of policy traditionally fought out in non-judicial forums, by which governments and the actions of governments are made and unmade.”

The Governmental steps aiming to take measures for preventing or providing security have to be viewed as protective measures. How to manage the security of the State is the wisdom of the Government. However, clear distinction has to be made by the State based on the materials relied on to distinguish with the different categories of restriction to which it may fall under Art.19(2) and 21 of the Constitution.



¹⁵ [369 US 186 (1962)]