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Is National Security eclipsing dissent in India?

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Dissent is crucial when the citizens become outliers to the hegemony of any idea. Laws of nations, International Treaties, and Doctrines on Human Rights have fundamentally recognized and placed this sacred principle at the summit of fundamental human rights. In a perfect world, one has the right to speak dissent, vehemently express his opinions, and even remain silent. The Indian Constitution even acts as the torchbearer in this regard while reasonably limiting the flame through Article 19(2). This freedom has nevertheless been subject to a catena of legislations that have found shelter under the restrictions imposed under Articles 19(2) and 22(3). In addition to constitutional restrictions, this paper also seeks to address the untoward application of anti-Terrorism laws in India that disarms individuals' rights by deeming them guilty for sedition, terrorism, and anti-nationalism. For instance, the Unlawful Activities (Prevention) Act (1967) and the Prevention of Terrorism Act (2002) have incorporated vague terms that can be interpreted in a manner as desired by the reader. The Unlawful Activities (Prevention) Amendment Act (2019) has now expanded its vast scope to deem even individuals as terrorists; Hence, stripping an individual of his right to the aids of law which is to be made available in the interests of justice. A wide array of provisions has brought speech within their gamut, under the garb of security as they chip out any scope of dissent by instilling fear. However, the question still remains as to what extent speech will be protected. This paper seeks to establish the virtual boundary of free speech and when it is said to have been extended while studying the implications of such National Security legislation on the common man.

Keywords: *dissent, sedition, unlawful activities (prevention) act, national security, free speech.*

INTRODUCTION

Freedom of speech and expression has been magnanimously recognized as the mother of all liberties and holds a sacred premier position across the hierarchy of 6 other freedoms.[1] This freedom contains within it, the right to dissent and express displeasure against the government which has been recognized since the very inception of the Constitution. Dissent is a symbol of a vibrant democracy that cannot be muzzled merely because it is for an unpopular cause.[2] It is essential to understand that this freedom does not arise from the state's kindness but is an indispensable right available to each citizen.[3]

It may be conveyed either through the means of a rights protestor or a passive resister, with the former relying on law and the latter acting in defiance of it.[4] Individual liberties are at stake when even the rights protestors' acts are suppressed and their freedoms curtailed for voicing against the government. Free speech can only be best served when it invites discussions and disputes to seek the acceptance of a new idea, for which dissent is the way forward.[5] The absence of any opposition leaves opens an incorrigible void in a democracy in the form of a static, majoritarian government with no hope for a change in ideologies or policies.

The present-day Article 19(2) establishes a gist of instances for which acts of the legislature can impose reasonable restrictions that may be in part or absolute, such as sovereignty and integrity, the state's security, and public order. Had it not been for the strong pursuit for an amendment to Draft Article 13 by K.M. Munshi, Article 19(2) would have come with the term "sedition," a restriction so severe that there would be no place for criticisms.[6]

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[1] *Ramlila Maidan Incident In Re* (2012) 5 SCC 1
[2] *Romila Thapar & Ors v Union of India & Ors* (2018) 10 SCC 753
[3] Chanan Parwani and Akash Nagar, 'Right to Lie: Extending the Guarantee of Free Speech to Protect Falsity' (2014) 4 NLIU LR 144, 151
[4] Charles Maechling, Jr, 'The Right to Dissent in a Free Society' (1969) 55 ABA 848, 850
[5] *Terminiello v City of Chicago* 337 US 1 (1949)
[6] Siddharth Narrain, 'Disaffection' and the Law: The Chilling Effect of Sedition Laws in India' (2011) 46 Economic and Political Weekly 33, 35

This paper seeks to address the judicial interpretation to the extent of freedom of speech and expression in addition to the nature of certain anti-terrorism laws, one such being the Unlawful Activities Prevention Act (1967) (UAPA). This statute has an unreasonably high delay in disposal of matters with a 77.3% pendency rate (those pending investigation), with the majority falling under the bracket of pending since the past 1-3 years.[7] The fact that the trial courts' conviction rate was as low as 29.2% in 2019 is indeed shocking. The UAPA Amendment Act (2019) has now expanded the definition of "terrorist" under Sections 35 & 36 to bring distinct individuals within its ambit. The Prevention of Terrorism Act (2002) is yet another example of a statute that contained vague and ill-defined definitions, which during its reign enabled for arbitrary use until its repeal in 2004.

While these anti-terrorism legislation has become a necessity in maintaining India's national security from outside and within, they have infamously sunk into gradual disrepute for stifling dissent from citizens and organizations alike. The analysis of the following legislations will demonstrate the counter-productive sections embedded in them.

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2012: AN OPPRESSIVE DEVICE

The Unlawful Activities (Prevention) Amendment Bill (2011) was drafted to meet the Inter-governmental Financial Action Task Force (FATF) obligations, which India agreed to comply with by 15/03/2012, as a part of its membership to combat money-laundering and terrorist financing.[8] It gave the executive abundant powers to term any organisation as unlawful and terrorist while overturning fundamental rights, criminal justice provisions, and international covenants, all in the name of national security; "*It is a weapon in the hands of government masquerading as a statute of the juridical system*."[9]. The Act has been conceptualised by a CDRO

[7] National Crime Records Bureau, 'Crime in India Statistics, Volume III' (*ncrb.gov.in*, 2019) <https://ncrb.gov.in/sites/default/files/CII%202019%20Volume%203.pdf> accessed 03 January 2021
[8] SAHRDC, 'An International Trojan Horse? Need for Review of UAPA Bill 2011' (2012) 47 Economic and Political Weekly 19, 20
[9] *Ibid*

Report to represent a colonial-era mindset of criminalizing dissent.[10] The fundamental flaw with the UAPA is that it contains vague and arbitrary definitions for unlawful activities, which results in their exploitation to curb dissenting opinions of the citizens. For example, one category of unlawful activity is *disclaiming* or *questioning* the nation's sovereignty or territorial integrity.[11] In an ideal world, the definition seeks to apply to acts affecting the collective integrity of the nation by carrying out revolutionary or subversive speeches or acts. However, the interpretation is bound to change in ground reality to refer to acts that question governmental actions.

Subject to multiple amendments, it has increased the ban period for organisations involved in illegal activities from 2 years to 5 years without judicial review. An amendment post the 26/11 attacks on Mumbai introduced Section 43D, which doubled the period of custodial interrogation from 90 to 180 days. In contrast, detention periods in nations such as Canada, Russia, Turkey, and France are under 8 days.[12] Such an extended period of police remand can subject an individual to atrocities such as torture and infliction of injuries while denying medical assistance.[13]

The nefarious Section 10 that penalised mere membership in an unlawful association has now been considered as being violative of Articles 19 & 21.[14] This principle was reiterated in *Arup Bhuyan vs State of Assam*, as mere membership could not establish criminality unless one resorted to violence or incited it.[15]

In 2009, a women's rights activist was unlawfully arrested and imprisoned for 4 years on the charge of being a Maoist member. The only evidence substantiated over the years was that of

[10] Anushka Singh, 'Criminalising Dissent: Consequences of UAPA' (2012) 47 Economic and Political Weekly 14, 16
[11] Unlawful Activities (Prevention) Act 1967, s 2(o)(ii)
[12] Bibhu Prasad Routray, 'National Security Decision-Making' [2013] Rajaratnam School of International Studies 43, 48
[13] Asish Gupta Et Al, Unlawful Activities (Prevention) Act' (2010) 45 Economic and Political Weekly 4, 5
[14] *Indira Das v State of Assam* (2011) 3 SCC 380
[15] *Arup Bhuyan v State of Assam* (2011) 3 SCC 377

possession of a book on discrimination against a girl and one on political economy.[16] Members of the PCAPA (People Committee against Police Atrocities) were charged under the UAPA for the Adivasi-Lalgarh movement against police repression and were kept in prison for 6 years without bail.[17] The unjustified imprisonment of Binayak Sen, a prominent human rights activist, is yet another example as he was imprisoned for 2 years on bogus and fabricated evidence.[18] This shows the glaring reality of the scope of application of the UAPA that has only been deviating its roots to a more local sphere and predominantly to imprison individuals for unjustified periods based on flimsy evidence.

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT BILL (2019)

The chief change brought about by the Unlawful Activities (Prevention) Amendment Bill (2019) was through Section 35 as it expanded its wings even to declare individuals as terrorists when compared to the erstwhile application on organisations alone. Detractors of the amendment argued that it would violate the right to speech and the right to reputation and give the executive arbitrary power. When misused, such a scathing provision enables the attachment of wrongful designation to an individual, causing social exclusion and infringement of Articles 14, 19, and 21. The Bill has been scrutinized as the Indian *McCarthyism movement*; a dark point in American history for its infringement of the freedom of speech and associations by political opponents, by abuse of vague language.[19]

Various Supreme Court petitions have been filed, with the most prominent ones being *Sajal Awasthi v. Union of India* and *Association for Protection of Civil Rights v. Union of India,* which challenged the validity of the Amendment as being violative of Articles 14, 19, and 21 fuelled by Section 35 of the Bill.[20] Section 39 of the Act applies to offenses relating to support given to terrorist organisations, intending to further the activity, invite support for the terrorist

[16] B Anuradha, 'How 'Unlawful' I Was! An Experiential Lesson on the UAPA' (2014) 49 Economic and Political Weekly 26, 29
[17] C Chandrasekhar and others, 'UAPA: Political Vendetta' (2015) 50 Economic and Political Weekly 4, 4
[18] Jyoti Punwani, 'The Trial of Binayak Sen' (2010) 45 Economic and Political Weekly 21, 22
[19] SAHRDC, 'Stifling Freedom of Expression and Opinion' (2010) 45 Economic and Political Weekly 19, 19
[20] Balu Nair & Jai Brunner, 'Brief History: Challenges to the UAPA, Supreme Court Observer' (*SCC Observer,* 11 May 2019) <https://www.scobserver.in/beyond-the-court/uapa-challenge-a-brief-history> accessed 29 December 2020

organisation and arrange or manage a meeting by a terrorist organisation is punishable with imprisonment for 10 years or with fine, or both. However, the provision's ambiguity is intensified by using the word "support," which has not been given any explanation or limit to interpretation.

Unlike other previous security legislation that has led a comparatively shorter life, the UAPA has been ever-expanding with a growing scope permeating through the society while covering a range of activities that go far beyond the realm of national security.

THE PREVENTION OF TERRORISM ACT, 2002

The Prevention of Terrorism Act (POTA) entailed overreaching provisions while defining terrorism as any violence "with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people."[21] Furthermore, mere membership in an unlawful association (under the UAPA) was brandished as having committed a terrorist act according to Section 3(b). This signifies the intermixing of activities that are unlawful along with those that are terrorist ones. Such a vital differentiation has nonetheless been brought under the UAPA but does not provide much relief to an individual who has been accused of unlawful activity. Declaring of organisations was carried out by the power of the Central Government under Section 18. However, the purpose of banning ought to be formed on objective criteria and not merely based on some unverified intelligence report.[22]

Section 49(2) of the POTA allowed a suspect's detention up to 180 days without a formal charge. Section 3(3) imprisoned individuals for a minimum of 5 years for having *advocated* or *incited*, which had a direct impact on free speech on multiple levels by trapping even those unintentional and bona fide acts.[23] POTA had been utilized in the past to selective application based on the choice resorted to by the state thus highlighting a discernible difference between

[21] Prevention of Terrorism Act 2002, s 3
[22] K G Kannabiran. 'Repealing POTA: Some Issues' (2004) 39 Economic and Political Weekly 3794, 3794
[23] Christopher Gagné, 'POTA: Lessons Learned from India's Anti-Terror Act' (2005) 25 BC Third World LJ 261, 269

the purpose of the Act and its actual use.[24] Though the repeal of such draconian legislation ought to have brought cheer, its removal made little difference as its essential purposes had been saved within the UAPA.

THE CLASH BETWEEN DISSENT AND SECURITY

India has witnessed the birth and fall of various security legislations that have been invoked to avoid acts of terror while calling upon preventive detention. Security legislations such as the AFSPA have been used to target Human Right Defenders and civil rights organisations by branding them as Naxalites, terrorists, and anti-nationalists.[25] The Maintenance of Internal Security Act was used to silence political opponents and civil society groups.[26] The Prevention of Terrorism Act resulted in profiling and created suspect communities that were blatantly based on religious discrimination.[27] There has always been a tendency to utilize national security laws against individuals and groups that do not revere or follow the government's ideology, be it political or ideological by branding them as anti-nationals and terrorists.

In 2018, a Manipuri journalist was charged under the NSA and kept in custody for 5 months for speaking against the ruling party until a court ordered his release.[28] In 2019, a journalist from Telangana was charged under the UAPA for his critical writings against the Central and State Governments and was later implicated as an accused of a case of Maoist conspiracy.[29] In January 2020, New Delhi was placed under the regime of the National Security Act for a period of 3 months, enabling police personnel to detain anyone whom they deemed to be a threat to national security in the light of the ongoing anti-CAA protests. These Acts are lessons

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[24] Nithya Ramakrishnan, 'The Ideology of Deviant Legislations' (2005) 31 India International Centre Quarterly 23, 25

[25] Jadallah and others, 'Civic Space in India: Between the National Security Hammer and the Counterterrorism Anvil' (2018) Center For Strategic And International Studies 61, 62

[26] Priyanka Anand, 'Unravelling the Impediments to National Security: The Need to Reconcile Security and Human Rights' (2019) 8 CNLU LJ 22, 27

[27] Ujjwal Kumar Singh, 'The State, Democracy, and Anti-Terror Laws in India' (2007) Routledge 165, 219

[28] 'Manipur HC Orders Release of Journalist held under NSA since November' (*The Wire*, 2019) <https://thewire.in/media/kishorechandra-wangkhem-manipur-journalist-release> accessed 01 August 2021

[29] Meenakshi Ganguly, 'Dissent is 'Anti-National' in Modi's India' (*Human Rights Watch,* 2019) <https://www.hrw.org/news/2019/12/13/dissent-anti-national-modis-india> accessed 02 January 2021

to be learned from, as they seemed harmless on the surface but were malleable enough to be bent according to the wants of those wielding power.

The various restrictions under the nest of Article 19(2) have aided in upholding legislation that curb free speech to a great extent, even on mere precautionary grounds. Decisions of the Supreme Court that validated security legislations such as the Prevention of Terrorism Act & the Terrorist & Disruptive Activities (Prevention) Act were neither to assert law and order nor public order but rather the "defence of India".[30] When the nation's security is legitimately at stake, the justification to invoke such legislations is undisputed, but when such power is invoked to curb criticisms, it has a chilling effect on free speech.

It thus becomes essential to sift the various notions that relate to the maintenance of order in society. Public order implies public safety and tranquillity, whereas public safety connotes freedom from danger.[31] As stated in *Ram Manohar Lohia v. State of Bihar*, law, and order forms the largest circle under which public order is encompassed, and "security of the state" forms the smallest circle within public order.[32] Acts that cause disturbances in local areas or unlawful assemblies may be a breach of law and order or public order but not necessarily affect the security of the state, for which national security legislations have been enacted.[33] The purpose of such differentiation is to achieve the notion that local disturbances do not come within the purview of security statutes. Co-existence with present-day security legislations as discussed earlier is indubitable but a question still remains as to what extent free speech will be protected.

THE EXTENT OF DISSENT AS RECOGNIZED BY INDIAN COURTS

The Supreme Court in *Express Newspapers (P) Ltd. vs Union of India* established that every person has the right to dissent and comment on matters of public importance. [34] The

[30] Manisha Sethi, 'Tenuous Legality: Tensions Within Anti-Terrorism Law in India' (2017) 13 Socio-Legal Rev 139, 145
[31] *State of Punjab v Sukhpal Singh* (1990) 1 SCC 35
[32] *Ram Manohar Lohia v State of Bihar* (1966) 1 SCR 709
[33] Parwani (n 3)
[34] *Express Newspapers (P) Ltd v Union of India* (1986) 1 SCC 133

permissible limit of dissent was established by the High Court of Bombay in *Binod Rao v. Minocher Rustom Masani* as a state until it turned into incitement to revolutionary or subversive activities.[35] A similar take was adopted in *Romila Thapar* (supra), wherein the virtual boundary was said to have been crossed when it resulted in violence or the subversion of a Government by unlawful means.

The Apex Court, while dealing with a case of criminal contempt in *D.C. Saxena (Dr.) v. Hon'ble, The Chief Justice of India* viewed that vehement, sarcastic, and unpleasant sharp criticism of the government and public officials was vital to ensure stability in the community.[36] The form of restriction implied was that of the use of appropriate language and the words used by a speaker to understand one's intentions. [37] Justice R.F. Nariman in *Shreya Singhal v. Union of India* used the concepts of discussion, advocacy, and incitement to enumerate free speech. An act would fall under Article 19(2) if it reached the level of incitement so as to affect any of the restrictions enlisted under the same.[38]

In 2015, the Government of India had barred an avid environmental activist from giving a talk before British Parliamentarians because it tended to portray a negative image. When the same was challenged, a Single Judge Bench of the Delhi High Court held that criticisms that were not acceptable by the majority could not be muzzled merely because they constituted dissent.[39] The Court added that citizens had the right to bring to the notice of the state, the "incongruity in its development policies". It further reiterated that views of a certain class of people could not be deemed as anti-national merely because they didn't prescribe to majoritarian norms unless it threatened the very existence of the state.

Peculiarly, this freedom blossoms when interlinked with democratic processes. The freedom to argue and discuss has been regarded as an essential process for the formation of a formal legislative process of democracy.[40] Any such restriction imposed by the ruling party: the

[35] *Binod Rao v Minocher Rustom Masan*i (1976) 78 Bom LR 125
[36] *DC Saxena (Dr) v Hon'ble, The Chief Justice of India* (1996) 5 SCC 216
[37] *Ibid*
[38] *Shreya Singhal v Union of India* (2015) 5 SCC 1
[39] *Priya Parameswaran Pillai v Union of India and Ors* (2015) 218 DLT 621
[40] *Govt of AP v P Laxmi Devi* (2008) 4 SCC 720

temporary majority, would affect the integrity of the process of converting that majority into a minority.

While dealing with police power abuse against Kashmiri Migrants who marched to Delhi to voice their displeasure, the Court in *Anita Thakur & Ors. v. Govt. of Jammu & Kashmir & Ors*. held that individuals had the freedom to raise slogans in a peaceful and orderly manner without using offensive language as the right to protest was a fundamental one.[41] When a foreign student's Visa was cancelled and he was expelled from India, a Single Judge Bench of the Calcutta High Court held that an act of participating in a political rally expressing displeasure against the government would fall under the ambit of freedom of speech and expression.[42]

The Citizenship Amendment Act, 2019 drew flak from individuals across the nation due to its tendency of being discriminative against the Muslim community. Widespread protests broke with the most prominent being the one at Kalindi Kunj-Shaheen Bagh in New Delhi that involved the closure of public roads for the protest. The resultant case of *Amit Sahni v. Commissioner of Police & Ors*. incorporated the view that democracy and dissent went hand in hand, but dissent could be expressed only in designated places.[43]

In *State of Punjab v. Sukhpal Singh*, a Division Bench of the Supreme Court penned that Courts would not look into the subjective sufficiency of the grounds of detention but only if authorities had duly followed the procedure of law. [44] The mere fact that the police have the power to arrest does not justify the exercise of such power without following the procedure of law.[45] Factors such as non-compliance with the procedure of law, unlawful arrests, and fabricated charges can entitle an individual's detention order from being overturned, regardless of the state deeming necessity. It is in this way that courts keep a check on the detention and arrest orders of those dissenting.

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[41] *Anita Thakur & Others v Govt of Jammu & Kashmir & Others* (2016) 15 SCC 525
[42] *Kamil Siedczynski v Union of India* 2020 SCC OnLine Cal 670
[43] *Amit Sahni v Commissioner of Police & Ors* 2020 SCC OnLine SC 808
[44] *State of Punjab v Sukhpal Singh* (1990) 1 SCC 35
[45] Clemens Arzt, 'Police Reform and Preventive Powers of Police in India – Observations on an Unnoticed Problem' (2016) 49 Law and Politics in Africa, Asia and Latin America 53, 68

Grounds for preventive detention can nonetheless be drawn for ordering detention from the previous tendencies and inclinations of the person to determine if one would act in a prejudicial manner.[46] However, there ought to be a reasonable nexus with the necessity of the detention, and the authority has to satisfy the grounds either through past conduct or antecedent history. Similarly, the mere apprehension that a person may be released by way of bail is not a valid ground to detain under the National Security Act.[47]

In order to ascertain the validity of restrictions, the Apex Court employed the Proportionality test in the case of *Anuradha Bhasin v. Union of India*. Restrictions would have to be tailored according to their *territorial extent*, *stage* and *nature* of the emergency, and the *duration* and nature of restrictive measures.[48] Furthermore, the restriction would have to be appropriate, necessary, and with the use of the least restrictive force.

Factors such as mode of expression, context, and extent of free speech abuse are now viewed as essential contours to determine whether the restriction was apt according to *Amish Devgan v. Union of India & Ors*.[49] Security of the State under Article 19(2) is exclusive to acts that threaten the foundation of the state and attempts to overthrow it but does not concern itself with local disturbances and annoyances. Matters of local significance in turn fall under the term "public order" listed as a reasonable restriction. However, the viability of such classification remains questionable as enforcement mechanisms are more concerned with the context of the speech, the speaker, and its tendency to incite its local audience.

CONCLUSION

Legislations as overarching as the UAPA require a greater degree of care during implementation with little to no scope for uncontrolled use. The nation has had a long term history with regard to the abuse of security legislation to suppress those against the majority causing a grave violation of their fundamental rights in addition to social isolation. Instances,

[46] *Ujagar Singh v State of Punjab* AIR 1952 SC 350
[47] *Yumman Ongbi Lembi Leima v State of Manipur* (2012) 2 SCC 176
[48] *Anuradha Bhasin v Union of India* (2020) 3 SCC 637
[49] *Amish Devgan v Union of India & Ors* 2020 SCC OnLine SC 994

as enunciated above, show the ground reality of the real world application of a statute so severe, without any accountability or lucidity. The low conviction rate of UAPA in 2019 reveals the number of accused who were acquitted but had to suffer a tarnished image and prolonged periods in prison without the aid of the law. The legislation that was formerly enacted into the system in the name of National Security has eclipsed the right to dissent and freedom of speech and expression of the common man. A review of the legislation with close scrutiny needs to be performed to balance the citizens' right to dissent and the fundamental character of national security. Dissent has always been the way in Indian democracy in order to maintain a status of dynamicity. It cannot be curbed if it does not incite violence or seek to overthrow the ruling government unlawfully. Unquestionably, in the clash between national security and dissent, the former has gained precedence as India has been constantly subject to various external aggressions in addition to internal disturbances caused by radical groups. Detractors have the freedom to be vehement, outspoken, raise slogans, protest peacefully, and express their discontent with the ruling government. However, present day affairs have placed the onus on those dissenting to be cautious to an extent in the form of contents of the speech and its intended audience as charges of arrests and detentions under security legislation are still formed on the basis of its outcome. The use of legislation such as the MISA, TADA, POTA, and the UAPA have cast brazen marks on the extent of free speech by imposing a cost on the speaker based on the subjective satisfaction of authorities.

At this point it becomes pertinent to mention that India is not intolerant of dissent but this idealistic principle has been forsaken through incessant use of national security legislation, leaving the fate of most dissenters in the hands of the executive.