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Complications of Anti-Terrorism Law: The Unlawful Activities (Prevention) Act, 1967

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The Unlawful Activities (Prevention) Act, 1967 (UAPA), came into the picture when anti-terrorism legislation like the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and the Prevention of Terrorism Act, 2002 (POTA) were repealed due to their draconian provisions. UAPA was supposed to bring the balance between fighting terrorism and preventing the misuse of provisions in the hands of the executive. However, with subsequent amendments, the Act became nothing but a mirror image of the repealed Acts and the very reason for which this Act was introduced became obsolete. This article studies the scenarios which are consequences of the lacunae of UAPA. It looks into the effects of some of the provisions of UAPA on Federalism, The Rights of the Detainees, and the way the courts handle the complaints under the Act. It further discusses the biases that the judiciary has while deciding the case and how the same can be resolved. Lastly, recommendations are provided which could help in the betterment of the whole system that works towards abolishing terrorism and how the violation of rights of the detainees can be prevented.

Keywords: *UAPA, rights of detainees, judiciary, federalism.*

INTRODUCTION

The controversy of UAPA is not new. Anti-Terrorism Laws like UAPA have always been under the scrutiny of the public, academicians, and other scholars due to their very nature. It won't be wrong to say that, almost in every jurisdiction, their anti-terrorism laws have been scrutinized in terms of their procedural aspect (which takes a deviation from normal criminal legislation), limited rights of the accused, and un-inspected acts of the officials of the state under the scope of 'national security. Severe rigidity came to be seen in the anti-terrorism laws across the liberal democracies, after the incident of 9/11[1]. Countries alarmed by the actions of terrorists in one of the most developed nations saw this as an opportunity to bring forth the draconian law. During this time, not many oppositions were coming up against it as nations were horrified by this incident. Similar was the case for India[2] after 26/11. While the State must protect its citizens from those who can violate their rights, it should not be done by violating the rights of minorities of that country. Earlier anti-terrorism Acts were repealed for the reason that they gave immense power to the hands of the executive without providing any efficient safeguards[3]. The same hasn't changed in UAPA and thus with every amendment, abhorrence towards this legislation is also increasing in the public. UAPA was originally formed with lots of discussion amongst parliamentarians where the opposition parties questioned the need for it and its misuse in the hands of the authorities[4]. The question of an arbitrary ban on the association also came at that time and the government provided the argument that it won't happen because, under the Act, the government will have the onus of proof for proving the ban of an organization[5]. Thus original Act had constitutional safeguards[6]

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[1] Mark Pearson & Naomi Busst, 'Anti-terror laws and the media after 9/11: Three models in Australia, NZ and the Pacific' (2006) 12 (2) Pacific Journalism Review <https://www.researchgate.net/publication/27826847_Anti-terror_laws_and_the_media_after_911_Three_models_in_Australia_NZ_and_the_Pacific> accessed 23 June 2022

[2] Maeen Mavara Mahmood, 'The Conundrum of the Unlawful Activities (Prevention) Act, 1967: A Comparative Analysis with Analogous Legislations' (2021) 26 Supremo Amicus, 214

[3] Bhamati Sivapalan & Vidyun Sabhaney, 'In Illustrations: A Brief History of India's National Security Laws' (*The Wire*, 27 July 2019) <https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws> accessed 25 June 2022

[4] Maeen Mavara Mahmood (n 2)

[5] *Ibid*

[6] Sneha Mahawar, 'Terror of Unlawful Activities Prevention Act, 1967 (UAPA)' (2020) 21 Supremo Amicus, 103

but its amendments and continuous bans on certain minority organizations brought it under the scrutiny of the public and various academicians[7].

Talking about the statistics of conviction and arrest rates under UAPA, it's shown that with every amendment, the arrest rates have increased but the conviction rate has decreased[8]. The statistics are alarming as the rate of arrests have been increased in the previous years with various protests happening concerning*BhimaKoregaon*[9] and The Citizenship (Amendment) Act, 2019[10]. This not only shows that people's right to protest has been infringed but also that any kind of protest against the ruling party would be dealt with under the 'Anti-terrorism' Act which itself shows that democracy in the country is the veil of fog that will someday be cleared away. The Democracy Report, 2020 of the V-Dem Institute which is based in Sweden shows the coming reality of the country. The report has stated that India may lose its status of democracy while going towards autocracy at an increased pace[11]. The major reasons for this shift are violations of free speech and opposing dissent in the name of national security by using State forces[12].

This article would be divided into chapters: The first chapter will talk about the history of the legislation and how it came into being, it'll also mention some of the lacunae of the UAPA; the Second chapter would look into the aspect of federalism and how UAPA is affecting it; the Third chapter will look into the rights of the detainees charged under UAPA and how deprivation of the laws against torture in India is resulting in violation of basic human rights; the Fourth chapter will look into the role of the judiciary in terrorism cases and how biases of the courts can lead to the hardship of detainees who doesn't have any other options against

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[7] 'Banned Organisation' (*Ministry of Home Affairs,* 30 March 2015) <https://www.mha.gov.in/banned-organisations> accessed 23 June 2022

[8] 'Parliament proceedings | Over 72% rise in number of UAPA cases registered in 2019' (*The Hindu*, 9 March 2021) <https://www.thehindu.com/news/national/parliament-proceedings-over-72-rise-in-number-of-uapa-cases-registered-in-2019/article34029252.ece> accessed 23 June 2022

[9] 'How Shaheen Bagh Became Hub Of Anti-CAA Protests In 2019-20' (*Ooutlook*, 9 May 2022) <https://www.outlookindia.com/national/shaheen-bagh-demolition-row-how-it-became-hub-of-anti-caa-protests-in-2019-news-195713> accessed 23 June 2022

[10] *Ibid*

[11] *Ibid*

[12] *Ibid*

the acts of authorities; the Fifth chapter is provided for recommendations and the last chapter concludes the article.

HISTORY

The Unlawful Activities (Prevention) Bill was introduced in 1966 after setting up a National Integration Council to recommend matters of national integration by then Prime Minister Jawaharlal Nehru. The objective with which it was introduced was to curb communalism, casteism, regionalism, linguistic bigotry[13] and so on which were rampant explicitly during and after the war against China in 1962, to such an extent that it was considered a threat to the integrity and sovereignty of the nation. It required the constitution of a tribunal that would identify and then outlaw such groups/organizations indulging in unlawful activities as mentioned earlier, under the Code of Criminal Procedure (CrPC). But this Bill lapsed and another Bill was introduced, which was finally passed in 1967, retaining the same provisions with slight modifications. This Act was rarely sought as other preventive laws like Maintenance of Internal Security Act (MISA) 1971, National Security Act (NSA)1980, TADA, Maharashtra Control of Organised Crime Act (MCOCA) 1999, POTA, etc had taken a centre stage.

After the 9/11 terrorist act Chapter, VII of the Charter of the United Nations (UN) stated that all States should prevent and suppress the financing of terrorist acts and also called upon a better exchange of information between countries and conform to the protocols of resolutions like No. 1373/2001. To adhere to this India amended the UAPA in 2004 by substituting the earlier miscellaneous Chapter IV with 'Punishment for terrorist activities, and added Chapter V and VI to include forfeiture of proceeds of terrorism and terrorist organizations respectively[14]. With this amendment terms like terrorist acts, it's funding, its seizure, and freeze became important elements of the Act[15]. In the meantime since TADA and POTA were repealed the definitions of 'terrorist' contained in these Acts were merged in UAPA rendering it a substantive law as supposed to the earlier classification as preventive law. Only by the

[13] Bikram Jeet Batra, 'Review: Anti-Terror Law and 'Violence of Jurisprudence''(2007) 42 (52) Economic and Political Weekly, 43

[14] Niranjan Sahoo & Jibran Khan, 'UAPA and the growing crisis of judicial credibility in India' (*Observer Research Foundation,* 21 November 2020) <https://www.orfonline.org/expert-speak/uapa-growing-crisis-judicial-credibility-india/> accessed 23 June 2022

[15] 'South Asia Human Rights Documentation Centre & Ravi Nair, 'The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes' (2009) 44 (4) Economic and Political Weekly, 12

2004 amendment the word "terrorism" was included in the Act which was previously absent. Therefore, from its inception in 1967 till 2004, the UAPA was not a terror law.

Soon in 2008, it was amended again to include a preamble citing the UN Resolution along with many others which almost only pertained to the Middle East, Afghanistan, and sanctions against Taliban, Al-Qaeda Osama bin Laden[16]. Since then our procedural law saw a drastic change, the courts were to presume that the accused had committed the offense unless proved contrary, instead of the prosecution proved its case beyond all reasonable doubt. The onus on the defense became negligible. The defense has to only create a reasonable doubt in the mind of the court. Nothing more! The 2012 Amendment was to make it more effective in preventing unlawful activities and meeting commitments made at the Financial Action Task Force. The government added offenses that threaten the country's economic security in the definition of 'terrorist act'. Initially, it did not include terrorist acts but later in the 2012 amendment, its scope was expanded vaguely to include terrorist activities as well.

The 2019 Amendment dealt with expanding the definition of "terrorist" to include individuals under Sections 35 and 36 of Chapter VI of the Act. It allows the Directorate General (DG) of the National Investigation Agency (NIA) to seize property from proceeds of terrorism[17] and the powers of officers with the rank of inspectors and above to investigate cases[18]. A Review Committee to 'denotify' the individual notified as a terrorist is also constituted by the Central Government thus removing all the chances of any institutional mechanism for judicial review[19]. Thus, making it a draconian law. Between 2016 and 2019, the period for which UAPA figures have been published by the National Crime Records Bureau (NCRB), a total of 4,231 FIRs were filed under various sections of the UAPA, of which 112 cases have resulted in

[16] Nehal Bhuta, 'Back to the future' (*Human Rights Watch,* 27 July 2010) <https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws> accessed 24 June 2022

[17] Unlawful Activities (Prevention) Act, 1967, s 25

[18] Unlawful Activities (Prevention) Act, 1967, s 43

[19] Deepali Bhandari & Deeksha Pokhriyal, 'The continuing threat of India's Unlawful Activities Prevention Act to free speech' (*Jurist,* 2 June 2020) <https://www.jurist.org/commentary/2020/06/bhandari-pokhriyal-uapa-free-speech/> accessed 22 June 202

convictions.[20] This repeated application of UAPA shows how often it is misused like other anti-terror laws in the past in India. So it is nothing but inevitable to say that UAPA is meant to meet the same end as TADA and POTA.

LACUNAE

1. Nebulous terms

UAPA's definition of a terrorist act is different from the definition given by the United Nations (UN) Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. According to the Special Rapporteur, a terrorist act will have all three elements present as mentioned below:

i. Deadly means are used

ii. The intent is to cause fear among the people or to force a government or international organization to do or abstain from doing something

iii. The ai is to promote an ideological goal

But UAPA states a very ambiguous and extreme definition of a terrorist act which includes the death of, or injuries to, any person, damage to any property, etc.

The principle of Maximum Certainty[21] says that the state should define its criminal offenses with the utmost clarity to avoid injustice. Every citizen is presumed to know the criminal law and if the law is not defined with maximum certainty there is no fair warning for citizens. Rule of Law[22], the fundamental principle ensures that people subjected to law, know the law and its practical implications. The UAPA violates these principles by not defining the essential terms of the Act like terrorist organization or what constitutes the membership of such a terrorist

[20] Prerna Dadu, 'Analysis of use of UAPA from NCRB Data' (*Centre for Law & Policy Research,* 1 July 2020) <https://clpr.org.in/blog/use-of-the-uapa-from-the-national-crime-reports-bureau/> accessed 23 June 2022
[21] John Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (*Research Gate*, 3 October 2002) <https://www.researchgate.net/publication/228244591_Rules_and_Principles_A_Theory_of_Legal_Certainty> accessed 23 June 2022
[22] P.K. Tripathi, 'Rule of Law, Democracy, and the Frontiers of Judicial Activism' (1975) 17 (1) Journal of the Indian Law Institute, 17–36

organization. Also, such vaguely defined terms put an extra burden on the courts while interpreting terms on a case-to-case basis and leave the citizens hanging as to what exactly constitutes an offense.

2. *Article 21*[23]

The presumption of innocence is a customary principle of Indian criminal law. Article 21 allows the State to breach the right to life and personal liberty only after following a fair, just, and reasonable legal procedure. The nexus between Article 21 and the presumption of innocence can be traced directly to the 'just, fair and reasonable' requirement. But under the UAPA, without even a charge sheet filed, those arrested under the UAPA can be detained for 180 days[24], which, openly violates Article 21 of the Constitution. It infringes the International Covenant on Civil and Political Rights, 1967, which identifies this principle as a universal human right. Compared to the international standards, the 180-day period is extravagantly long[25].

3. *Transparency*

The amendment has provided the Centre and the investigative agency-wide discretionary powers and also empowers the creation of special courts with the ability to use confidential witnesses and to hold closed-door hearings[26]. The UAPA provides a Review Committee to be constituted by the Central Government that consists of a Chairperson and not more than three other non-judicial members[27]. The Chairperson will be a sitting or retired judge of a High Court. The mere concept of a political executive being empowered to appoint the Chairperson of the Committee is a blatant disregard for judicial independence.

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[23] Constitution of India, 1950, art.21
[24]. Sanchita Kadam, 'What does it take to secure bail under UAPA?' (*CJP,* 6 October 2020) <https://cjp.org.in/what-does-it-take-to-secure-bail-under-uapa/>accessed 23 June 2022
[25] 'Siracusa principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights' (*ICJ,* 2 April 1985) <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> accessed 23 June 2022
[26] Surabhi Chopra, 'National Security Laws in India: The Unraveling of Constitutional Constraints' (2015) 17 (1) Oregon Review of International Law, 33
[27] Unlawful Activities (Prevention) Act, 1967, s 37

Though a High Court judge sits on the review committee for a so-called judicial review, the actual process in no way resembles anything judicial as there is no requirement to follow any statutory procedures or even call the organization to hear its case[28]. The absence of a fair trial goes against the natural justice principle *Audi alteram partem* which in turn results in arbitrariness and violates Article 14[29]. The use of the phrase "any other means of whatever nature" allows the Government to label any physical activity as a terrorist act which in turn allows the Government to use arbitrary methods to suppress dissent. This sets a very low standard for labeling any and every act as a terrorist activity.

UAPA AND FEDERALISM

Section 25 of UAPA provides for the investigation to be done by the officer of the NIA and the same need to be approved by the Director-General of the NIA and not of the Police of the state[30]. This has been substituted by the UAPA Amendment Act, 2019, and is one of the many provisions getting backlash over giving everything under the control of the center, even those matters where states' jurisdiction fall[31]. The scope of this Act is expanded with every amendment and this time it was done by taking away the powers of state police to have a say on the center's intervention. The argument given for this amendment is that terrorism and national security cannot be confined within a state's public order so tackling issues concerning this matter make the center's intervention valid[32]. Neglecting the authority of state police in terrorism cases has been validated by the Bombay High Court as it stated that it is equally competent to create an agency for the investigation of the offenses specified in List 1 of schedule 7 of the constitution and that entry 8 of the same provides for constituting an investigating agency at the national level to investigate and prosecute offenses affecting the

[28] Surabhi Chopra (n 26)
[29] Raeesa Vakil, 'Constitutionalising administrative law in the Indian Supreme Court: Natural justice and fundamental rights' (2018) 16 (2) International Journal of Constitutional Law, 10
[30] Unlawful Activities (Prevention) Act, 1967, s 25
[31] Unlawful Activities (Prevention) Amendment Act, 2019, s 3
[32] Abdul Khader Kunju S., 'Explainer: Here's How Handing Over UAPA Cases to NIA Affects the Federal System' (*The Wire,* 29 January 2020) <https://thewire.in/government/uapa-nia-act-centre-state> accessed 22 June 2022

sovereignty, security, and integrity of India, security of states, friendly relations with foreign states, etc.[33]

UAPA's scope also expanded in terms of economic security where monetary security, livelihood, and food security can also come under the definition of the terrorist act, and to top it all, the definition of the terrorist act also include terms 'likely to threaten' or 'likely to strike terror' which further expands the jurisdiction of the provision as any act can be brought under it[34]. Once the UAPA comes into the picture, state police would have no say over it and the center would be dealing through NIA. Not only in terms of federalism but this NIA has been questioned because of partiality in terms of political affiliation with the center. The 2008 *Malegaon blast* case is an example where NIA is said to have asked the public prosecutor to go soft on the accused as the NDA government came into power[35]. Swami Aseemanand, a former RSS activist being acquitted as many times as his name has come up in a series of terrorist blast cases[36]. When there are plenty of cases along these lines, it becomes important to take a look again as to whether such powers in the hands of the central agency alone would serve the purpose of protecting national security.

UAPA AND RIGHTS OF DETAINEES

Measures under anti-terrorism laws like UAPA is ordinarily shown as temporary measures but they can leave a permanent effect on those who are being charged under it, along with the never-ending trials. Those who are getting arrested under UAPA, have negligible safeguards against the officials and authorities who are given power under the same to investigate. There are many stories and interviews conducted, where people who were accused but got acquitted after spending long torturous years inside jail have revealed that every constitutional right of a

[33] *Pragya Singh Chandrapal Singh v 4 National Investigation Agency* (2019) Criminal Appeal No. 96/2018
[34] Unlawful Activities (Prevention) Act, 1967, s 15
[35] 'NIA asked me to go soft on Malegaon accused: Prosecutor' (*Hindustan Times*, 25 June 2015) <https://www.hindustantimes.com/india/nia-asked-me-to-go-soft-on-malegaon-accused-prosecutor/story-ycr4SAMMWz7XlR7xIGTyXI.html> accessed 23 June 2022
[36] 'Who is Swami Aseemanand?' (*The Hindu,* 16 April 2018) <https://www.thehindu.com/news/national/who-is-swami-aseemanand/article23556242.ece> accessed 23 June 2022

detainee is violated by the authorities in the name of national security. Their disclosures reveal the dark side of the authorities, then be it the police or the judges themselves.

In one such interview conducted, the interviewee revealed how the provisions relating to arrest and safeguards of those detained are drained in the gutter when detainees are taken away without telling them or their families, under which laws they are being arrested[37]. They are kept in undisclosed locations and aren't allowed to meet anyone. Police abduction and making stories in FIRs as to from where detainees are taken are also not so uncommon practices of the police[38]. When the detainee was brought before the judge and when he told about his rights being violated by the officer and asked for a lawyer to represent him, the judge made the sneering comment that he doesn't need the lawyer and rather than asking the officer about the violations, gave him the orders to send the detainee to police custody[39]. UAPA doesn't provide any obligations or liabilities of the authorities or officials concerning the treatment and safeguard of the detainee. Because of this void, the detainees suffer a lot even before they are proved 'terrorists' at the hand of these officials.

Torture under Police custody is another common way of derogating the rights of detainees. Not only do International Conventions[40] provide against it but it has become customary law[41] now that torture and inhuman treatment can't be used under any circumstances. India has neither ratified the Convention against torture nor has any specific provisions or laws for protection against torture, especially by the authorities. This could be the reason that authorities use it without any limits under the garb of 'national security and unlawful activity'. There have been cases where the detainees have been tortured under police custody and the

[37] Jatinder Singh, 'Democracy and Anti-terrorism Laws: Experience of UAPA, 1967 in Punjab' (2015) 50 (30) Economic and Political Weekly, 28
[38] *Ibid*
[39] *Ibid*
[40] Universal Declaration of Human Rights, 1948, art 5; International Covenant on Civil and Political Rights, 1966, art.7; See also, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
[41] 'The Legal Prohibition Against Torture' (*Human Rights Watch,* 11 March 2003) <https://www.hrw.org/news/2003/03/11/legal-prohibition-against-torture#laws> accessed 23 June 2022

courts have taken no stance against this cruelty[42]. Their interrogation assumes that detainees are part of the banned organizations and thus everything done under their custody is to validate their presumption[43].

Detainees go through a great deal of not only physical but mental pain because if they don't give any information to the officers, they would be treated harshly and if they give, they will be tortured more with the view that they would have more to give[44]. It's like there's no winning and it's a cycle that keeps on repeating unless they get bail (the probability of which is very low)[45] or get acquitted from charges (which happens after many years of them being tortured)[46]. Most of the time, it becomes difficult to prove the custodial torture and this becomes the reason that the court doesn't take into consideration the complaint of the detainee. It happens so because the interrogator knows how to torture and not leave any markings on the body[47]. Even the government doctors are said to have affirmed in favor of the police most of the time which further makes the case of detainees much more difficult to prove[48].

Various legal scholars have argued that the system and training in which the police operate should be updated and changed following the current system of constitutional and human rights[49]. It's this lack of proper training that makes the force indulge in orthodoxical and barbaric ways of interrogation[50]. Long periods inside the jail also affect the overall health of the detainee, especially in those cases where they are not granted bail. We have already seen how the rights of the detainees are the least concern of the authorities, so keeping them imprisoned

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[42] Jatinder Singh (n 37)
[43] *Ibid*
[44] John T Parry, 'The shape of modern torture: extraordinary rendition and ghost detainees' (2005) 6 (2) Melbourne Journal of International Law, 37
[45] Unlawful Activities (Prevention) Act, 1967, s 43D
[46] Jatinder Singh (n 37)
[47] Darius Rejali, *Torture and Democracy* (4th edition, Princeton University Press 2009) 121
[48] Aditi Patil & Sarthak Roy, 'Need for A Separate Anti-Torture Law: Probing India's Ethical Egoism on Torture' (2019) Special Issue IJLIA 109
[49] Upendra Baxi, *The Crisis of the Indian Legal System* (2nd edition, Vikas Publishing House Pvt. Ltd. 1982) 85
[50] Urmila Pullat, 'The Indian State and Its Counter-productive Counter-terrorism' (*The Wire,* 4 May 2016) <https://thewire.in/government/the-indian-state-and-counter-productive-counter-terrorism> accessed 23 June 2022

can affect their privacy and can also make them vulnerable to different forms of violence that take place inside the prisons[51].

UAPA AND JUDICIARY

Supreme Court orders tried to limit the inherent derogations of UAPA, especially with regards to the provisions of bail where it observed the bail shouldn't be denied where it's known that the case won't be completed within a reasonable time period and where the detainee might suffer from an extended period of confinement[52]. While the executive is doing everything to keep every act under its scope, the judiciary on other hand is trying to limit that scope and trying to clear the smog of vagueness.[53] While the activism of the judiciary deserves to be lauded, not every court can be said to have taken the same path while deciding under the Act. Former Supreme Court judges have also shown concern with respect to the scenarios of violations of human and constitutional rights during the past couple of years.[54]

While the UAPA provisions for incriminating the person if he/she's associated with the banned organizations were questioned and balanced with Article 21 in the 2011 judgment[55], in 2019 the court took a U-Turn observing that the person associated with the organization, even if no violence was inflicted by him/her, could be kept in police custody during trials[56]. In the ***Indra Das*** case, the court rejected the argument of guilty by association.[57] Though the recent judgments[58] have again come back to the track of protecting constitutional and human rights, non-uniformity in the precedents can further confuse courts in deciding a case as uniform

[51] Graham Durcan & Jan Cees Zwemstra, 'Mental health in prison' (*Euro WHO*) <https://www.euro.who.int/__data/assets/pdf_file/0017/249200/Prisons-and-Health,-11-Mental-health-in-prison.pdf> accessed 23 June 2022

[52] *Union of India v K.A. Najeeb* (2021) Criminal Appeal No. 98/2021; See also, *Angela Harish Sontakke v State of Maharashtra* (2021) 3 SCC 723

[53] Devika Sharma, 'Delhi HCI Crucial Aspects of 'Terrorist Act' and Right to Protestl Everything about Asif Iqbal Bail Order' (*SCC Online,* 19 June 2021) <https://www.scconline.com/blog/post/2021/06/19/terrorist-act/> accessed 23 June 2022

[54] Niranjan Sahoo & Jibran Khan (n 14)

[55] *Sri Indra Das v State of Assam* (2011) Criminal Appeal No. 1383/2007

[56] *National Investigation Agency v Zahoor Ahmad Shah Watali* (2019) Criminal Appeal No. 578/2019

[57] Sri Indra Das (n 55)

[58] Angela Harish Sontakke (n 52)

precedents provide a better persuasive value in a case[59]. There's a dire need for the judiciary to decide the cases under UAPA on legitimate grounds because the government has made it its political front where minorities are targeted. The organs of the State are supposed to work under the principle of equality and equitability and when the legislature and executive go haywire, the judiciary needs to come as a protector of the constitution and the principles which make our democracy. Thus in the wake of political authoritarianism, the judiciary needs to come forward[60].

A judge consists of multiple personalities, being affiliated as a citizen, political person, and as an important part of the judicial system while analyzing the case and in those cases where the accused (from the minority community) has been charged under the provisions other than relating to terrorism or secession, personal and political biases are less to come up[61]. But why is that so? Why do their biases emerge whenever the charges are formed under anti-terrorism legislation? The answers to these are not simple. The reasons could be, unlike in any other national security issue, terrorism can directly affect the citizens, unlike something like a war where the line of defense are soldiers and many other things are known already as compared to an attack of terrorist/s[62]. Another reason could be that if one organ goes against the government and other organs of the State that could bring its image as anti-national and could degrade the same[63]. Therefore the courts don't reject the draconian laws of legislators as importance is given to national security over civil rights with the rationale that legal rights can be violated under the scenario of national security[64].

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[59] Francesco Parisi & VincyFon, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (*George Mason University, Antonin Scalia Law School,* 2004) <https://www.law.gmu.edu/pubs/papers/04_15> accessed 23 June 2022

[60] Shylashri Shankar, 'Judicial Restraint in an Era of Terrorism: Prevention of Terrorism Cases and Minorities in India' (2015) 11 (1) Socio-Legal Review, 113

[61] Shylashri Shankar, *Scaling Justice: India's Supreme Court, Social Rights, and Civil Liberties* (1st Edition, Oxford University Press, India 2009) 91

[62] *Ibid*

[63] *Ibid*

[64] Aditi Patil & Sarthak Roy (n 42)

Talking about the scope of UAPA, it has been ever-extending. In the ***Ram Manohar***[65] case, the court had explained three concepts- public order, national security, and law & order. It also noted that anti-terrorism laws should only be implemented when there's a threat to national security but just because the law and order and public order are affected, it won't give the government, the right of using the anti-terrorism laws. We've come so far since then as for now, everything that questions the government is put under the provisions of UAPA. The acts of terrorism are prohibited and separate legislation for the same is formed for a reason. Not every criminal act could come under its scope and if one is to bring it to the level of a terrorist act, there needs to be a high level of acuity while deciding the same.

Gopal Subramanium in his lecture mentions that just because certain people like terrorists have stopped believing in the Constitution, doesn't mean their rights under the same could be violated by the State. These people are the ones whose voices haven't been gone into the government's ears, so the path they sometimes choose is extremism. Even in those cases where silent protests are taking place, it has been seen that State actors opt for violence against the protestors[66]. These responses of State actors not only break the trust of people in the government but also force them to react in a way that could harm the public at large. The government can provide the excuse of the doctrine of 'margin of appreciation' and to balance that out it's the responsibility of the lawyers and judges to judicially review the case that has come before the court and not to start the proceedings with the assumption of accused being a threat to the society.[67]

Many times, the government is unable to provide information about the case to the public because of its nature, but the same can be produced before the court, and this power of reviewing confidential information can be put under judicial scrutiny. This power is nothing but the trust of those people whose rights are getting violated and who cannot speak for

[65] *Ram Manohar Lohia v State of Bihar* (1966), AIR 740
[66] Rajini Vaidyanathan & Dilnawaz Pasha, 'Nupur Sharma protests: The police brutality video that shocked India' (*BBC News,* 17 June 2022) <https://www.bbc.com/news/world-asia-india-61822271> accessed 23 June 2022
[67] Miriam Gani & Penelope Mathew, *Fresh Perspectives on the 'War on Terror'* (1st edition, ANU E Press 2010) 42

themselves and thus it becomes the duty of the court to exercise such power while keeping in mind these people[68].

Gopal Subramanium also mentions his experience in the lecture where he talks about the times of emergency and how very few legal professionals would stand against the preventive detention laws at that time and those who were appearing for the detainees would be treated as if they are doing something wrong[69]. This shows that in times like this even judges and lawyers can form an opinion based on their biases. Not only accused/detainees but lawyers representing them go through various harassment and beatings that's why the court appoints amicus curiae for those who can't find the lawyers to defend themselves[70].

RECOMMENDATIONS

There was a need for effective and complex legislation to deal with terrorism after the 26/11 attacks in Mumbai but the government brought those provisions into UAPA which were already redundant. Not only, all the draconian provisions were taken from the previous laws but those provisions which provided for review and withdrawal were not brought into the UAPA. The review in this Act is quite narrow as it only provides the review committee for de-notification of the terrorist organizations and not for monitoring the working of this legislation[71]. These holistic reviews of legislation are made part of the anti-terrorism Acts under various jurisdictions to look into their effect on human rights and violations of other rights[72]. So review mechanism of the entire legislation is necessary.

Judiciary hasn't given enough interventions to review the executive and even if the courts take up the cognizance, it will have to take permission from the center first[73]. The question did arise about the misuse of power by the executive, and the same was answered by P. Chidambaram,

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[68] *Ibid*
[69] B Anuradha, 'How 'Unlawful' I Was! An Experiential Lesson on the UAPA' (2014) 49 (15) Economic and Political Weekly, 27
[70] Poulomi Banerjee, 'Defending the doomed: Lawyers who stand up for terror accused, Maoists' (*Hindustan Times*, 13 March 2016) <https://www.hindustantimes.com/india/defending-the-doomed-lawyers-who-stand-up-for-terror-accused-maoists/story-3roGxXmlQeBIlwfOVVmuFO.html> accessed 23 June 2022
[71] Unlawful Activities (Prevention) Act, 1967, s 37
[72] South Asia Human Rights Documentation Centre & Ravi Nair (n 15)
[73] Unlawful Activities (Prevention) Act, 1967, s 45

the then Union Minister that Act does provide the safeguard for the same[74]. But if we look into that provisions, the authority appointed by the center would decide whether the case can proceed[75]. Provisions like these don't provide judiciary independence and the protection of citizens is compromised because of the unchecked power of the executive. So judiciary independence must be there in this regard. Sunset Clause[76] is another requirement for anti-terrorism laws which provides for the limited time period under which the legislation would work and after that, its renewal would need to be made. UAPA doesn't have it and thus it's in the hands of the government to review it.

Combating impunity is the other major flaw with the Act as there's no way to get legal recourse against wrongful detention or imprisonment by state officials[77]. It's not that this isn't talked about, various courts have decided in favor of compensation for wrongful detention or imprisonment[78] along with the Law Commission in its 2018 report[79]. The background for the same has been set long ago but authorities are sitting idle on it which needs to be changed. When we talk about the violation of rights of the detainees, the police force is one such authority that misuses its power the most. Safeguards from corruption, custodial brutality, and systematic discrimination by the police need to be provided and for this, a police commission or authority needs to be set up in every state who'll take care of the grievances of the citizens[80]. Though the same can be of no use if these authorities or commissions don't work on these grievances but if implemented properly then these illegal activities can be stopped.

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[74] Unlawful Activities (Prevention) Act, 1967, s 45(2)

[75] Unlawful Activities (Prevention) Act, 1967, s 45(2); See also, Manoj C G, 'When UPA defended UAPA's stringent bail rule: 'nothing unusual'' (*The Indian Express*, 7 July 2021) <https://indianexpress.com/article/india/when-upa-defended-uapas-stringent-bail-rule-nothing-unusual-7392377/> accessed 23 June 2022

[76] South Asia Human Rights Documentation Centre (n 15)

[77] Chander Uday Singh, 'It's time victims of UAPA demanded restitution, justice' (*The Indian Express*, 14 July 2021) <https://indianexpress.com/article/opinion/columns/uapa-cases-india-supreme-court-anti-terror-law-7403398/> accessed 23 June 2022

[78] *Babloo Chauhan @ Dabloo v State Govt. of NCT of Delhi* (2018) 247 DLT 31; See also, *Bilkis Yakub Rasool v State of Gujarat* (2020) 13 SCC 733

[79] Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (Law Com. No. 277 2018) 65 <https://lawcommissionofindia.nic.in/reports/Report277.pdf> accessed 23 June 2022

[80] South Asia Human Rights Documentation Centre (n 15)

CONCLUSION

India's democracy, as indicated with the help of using multiple international reviews and studies, is heading toward a huge catastrophe. A developing custom of indiscriminate use of draconian anti-terror legal guidelines by way of means of governments to silence dissenting voices and the judicial indifference to those gross violations of freedom is quickly eating away India's democratic credentials. Acts like TADA, POTA, and UAPA repeatedly throw out the simple fixed virtuous ideas of the criminal justice system, for instance, TADA departed from the precept of procedural equity while it allowed the admission of confessions made to cops admissible in front of the Court. The Rule of Law principle presupposes that the judicial procedure is simple and honest and the Constitution of India which is the very best record envisaging the rights and freedoms of residents precisely adheres to it. But in the case of UAPA, the legislature, government, and judiciary have quite simply used rule of law without adhering to Constitution at all.

The UAPA establishes an alternative criminal justice system in which CrPC does not apply and the accused has little protection. Under the Act, an accusation is as good as a conviction and allows the State to penalize people without exposing them to a fair trial. It criminalizes the basic right of association, but there is little or no distinction between political objections and criminal hate speech. Political objections are a fundamental right. Given the complexity surrounding terrorism, it is understood that strict and sometimes arbitrary measures are being taken which are necessary but having a law that gives the government absolute, unchecked freedom to deal with political dissidents is not the way to go. The method they desire does not achieve the goal of protecting national security. The war on terrorism is a high goal, but lawmakers are making mistakes in pursuing terrorism at the expense of human rights. The proposed changes violate the obligations of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

It is crucial that to redesign the present legal order we should stop viewing those reforms as a "second-order" issue. There is a want for a bi-fold alternate inside the criminal justice system. First, a mechanism must be institutionalized for a goal evaluation of credible and harmless

claims. For this purpose, it's very crucial to internalize a person's rights and provide a grain of doubt to the accused. Second, the criminal justice system side of the archaic legal guidelines must be reviewed to keep away from wrongful convictions.