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Assessing The Unlawful Activities (Prevention) Act, 1967 (UAPA) And Its Impact on India's Prison Justice System

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ABSTRACT

Despite falling under the category of anti-terror legislation the recent demise of Stan Swamy after a prolonged wait for justice, preceded by the incessant arbitrary arrests as per the NCRB Crime in India Report 2019 reveal how the Unlawful Activities (Prevention) Act 1967 (UAPA / 'the Act') gradually proceeds towards creating a human rights disaster in the name of national security. The provisions such as Sections 13, 15 and 43(D) of the Act restrict the freedom of Indian citizens and non-citizens in a participatory democracy as well as cause the inherent rights of a detainee or undertrial prisoner completely disappear from the context of criminal justice administration. In the present article, a critical analysis is hence conducted on the provisions of UAPA legislation with a view to assess its far-reaching impact upon the prison justice system in India.

Keywords: Legislative Analysis, UAPA, Terrorism, Unlawful Association, Protest, Constitutionality.

I. INTRODUCTION

Recently in February 2020, the Apex Court has delivered a significant verdict in *Union of India v. K.A. Najeeb*³ case which could be felt as a sigh of relief for the UAPA⁴ detainees and undertrials languishing in jails since ages. In this case, the Court expressly declared that Section 43-D(5) of the Act⁵ which stipulates certain restrictions on grant of bail shall not be able to supersede the powers of Constitutional courts to grant bail on ground of infringement of any fundamental right under Article 21 of the Constitution⁶. Despite the fact that the above judgment is a step ahead to re-igniting the debate on constitutionality and ambiguity of UAPA, revamping the legislation is still a far-fetched dream due to the other unfair provisions of the

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³ *Union of India v. K.A. Najeeb*, 2021 SCC Online SC 50.

⁴ The Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967 (India).

⁵ *Id.* at s. 43D(5).

⁶ INDIA CONST. art. 21.

Act operating in full force till date.

In India, the failure of such anti-terror legislation to maintain certainty, reasonableness in application as well as to protect the dignity of innocent citizens from the vice of terrorism was not a new phenomenon but an aged-old practice consistently followed by the former repealed statutes such as TADA⁷, MISA⁸ and POTA⁹ - all of which were repealed due to the rampant misuse of their arbitrary provisions to suppress the lawful protests against the failing government policies. The UAPA while enacted by the Indian Parliament in 1967 was mainly enforced for the purpose of bestowing the vast powers to the Central and State Governments to deal with riots and other illegal as well as anti-social activities of the terror groups. Until 2004 amendment, the Act was merely a budding tool in the context of warfare against all types of anti-social activities of an unlawful association. However, it was both the 2004¹⁰ and 2008 amendments¹¹ which changed the entire functioning of UAPA from being preventive to repressive in nature, and placed its status at par with TADA and POTA by way of introducing arbitrary provisions, conferring excessive powers upon the investigating authorities and strictly limiting the scope of reformation or rehabilitation of the detained persons.

Therefore, a critical analysis of the Unlawful Activities (Prevention) Act 1967 and its provisions has been conducted for the purpose of assessing the extent of arbitrariness, unconstitutionality (if any) and its impact upon the innocent citizens as well as prison justice administration in India.

II. CRITICAL ANALYSIS OF THE ACT

Enacted in 1967, the Unlawful Activities (Prevention) Act¹² was laid down for the purpose of serving as an effective tool of prevention against certain unlawful and terrorism activities of individuals as well as associations. In simple words, the Act was enacted to keep a constant check upon the terrorist or anti-social activities in the country. Further, on TADA and POTA being successively repealed in 1995 and 2004, there was a necessity felt by UPA Government to increase the strength of UAPA and its provisions not only to combat against any forms of terrorism but also to correct the errors of predecessor Acts in this context. As a result, from

⁷ The Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28, Acts Parliament (Repealed), 1987 (India).

⁸ Maintenance of Internal Security Act, 1971, No. 26, Acts of Parliament (Repealed), 1971 (India).

⁹ The Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament (Repealed), 2002 (India).

¹⁰ The Unlawful Activities (Prevention) Amendment Act, 2004, No. 29, Acts of Parliament, 2004 (India).

¹¹ The Unlawful Activities (Prevention) Amendment Act, 2008, No. 35, Acts of Parliament, 2008 (India).

¹² *Supra* note 4.

time to time, several amendments were passed in 2004¹³, 2008¹⁴, 2013¹⁵ and latest in 2019¹⁶ with an aim to widen the scope of this Act beyond any reasonable barriers. An analysis of the provisions will reflect such excessive application of the Act, as shown hereunder:

(A) Excessive Scope of ‘Unlawful Activity’: The definition of ‘unlawful activity’ as provided under Section 2(o) includes any action (by any act or verbally or in written form or through sign / visible representation or otherwise) which intends to create dissatisfaction against the country.¹⁷ The scope of ‘unlawful activity’ according to the definition clause also includes any such action which raises question to disrupt the nation’s sovereignty and territorial integrity¹⁸. The above words used in definition of ‘unlawful activity’, by no stretch of imagination, appear to be vague and covering almost every criticism against government or the country under its extremely broad ambit. Therefore, the fundamental rights of a citizen to free speech, expression and question / criticize government policies or to lawfully protect against arbitrary government policies tend to be eroded by the central government under this Act. Further under Section 2(p), not only those citizens who are actively taking part in lawful protests or criticism, but the persons or any other body of individuals can also be regarded as an unlawful association simply because of their indirect role or encouragement to the former category of persons in partaking the said activities.¹⁹

Therefore, such excessive ambit of the expressions ‘unlawful activity’ and ‘unlawful association’ shall easily benefit the Central Government to declare any association of persons or individual as unlawful under Section 3 of the Act²⁰. The Central Government shall also have the power to suspend all the inflow of funds of such unlawful association by virtue of Section 7²¹. Further, under Section 13 of the Act, a comparatively harsher punishment (I.e. up to 7 years punishment and fine) has been imposed upon the individuals whoever participates or commits or abets or incites or aids or follows the commission of any of the unlawful activities²² so provided under Section 2(o). Therefore, the Act makes sure that the rights of lawful assemble and protest as flowing from *Re: Ramlila Maidan Incident v. Home Secretary, Union of India*²³ and also, the freedom to speech and expression including any criticism as protected under

¹³ The Unlawful Activities (Prevention) Amendment Act, *Supra* note 10.

¹⁴ The Unlawful Activities (Prevention) Amendment Act, *Supra* note 11.

¹⁵ The Unlawful Activities (Prevention) Amendment Act, 2012, No. 3, Acts of Parliament, 2013 (India).

¹⁶ The Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019 (India).

¹⁷ The Unlawful Activities (Prevention) Act, *Supra* note 4, s. 2(o)(iii).

¹⁸ *Id.* at s. 2(o)(ii).

¹⁹ *Id.* at s. 2(p)(i).

²⁰ *Id.* at s. 3.

²¹ *Id.*, at s. 7.

²² *Id.* at s. 13.

²³ *Re: Ramlila Maidan Incident v. Home Secretary, Union of India & Ors.*, (2012) 5 SCC 1.

Article 19(1)(a)²⁴ are suppressed by the ruling government in power for their self-interest or self-sustainability. Instead of acting as a preventive tool to efficiently combat against the vice of terrorism, it is perceived from the texts of the above provisions that the Act is amended to attack the advocates of participatory democracy and establish the regime of a pseudo-democracy.

(B) Executive-led Adjudication: Under Section 5 of the Act, the Central Government has the power to establish the Unlawful Activities (Prevention) Tribunal appointing one person not other than a high court judge.²⁵ Such tribunal, as per Sections 3 and 4, decides the validity of Central Government's declaration of an association unlawful under section 3 of the Act. The Tribunal on receiving a reference of such declaration from Central Government shall order the service of notice and require the association to appear for within 30 days from such service to furnish show cause why it should not be regarded as unlawful association.²⁶ Now, the irony behind constitution of such tribunal is that the provision attempted to create a transparent procedure by conferring the power of inquiry as to validity of declaration of Central Government; but at the same time it is also to be noted that the ultimate power to determine the composition of such tribunal is in the hands of Central Government, thereby indicates the representation by a controlled judiciary.

(C) Overawe or Show of Criminal Force as a Terrorist Act : Moving ahead, under Chapter IV, Section 15 defines the expression 'terrorist act' and it appears from the text of Section 15 that the definition unnecessarily includes overawe or attempt to overawe or show or attempt to show criminal force towards any public functionary.²⁷ A bare reading of the definition of 'criminal force' under Section 350 of Indian Penal Code²⁸ refers to inclusion of any crime or attempt to crime under its ambit. Therefore, it is well evident that despite intending a comparatively less serious crime than that of terrorism as well as forming *mens rea* of lower amplitude, the word 'criminal force' is used to deliberately cover any peaceful protest and demonstration against a public functionary under the purview of terrorism. Section 15 hence reflects the arbitrary intention of legislature to utilize it as an easy tool of oppression upon citizens and non-citizens.

(D) Delaying the Right to Default Bail: Extending the application of this Act towards the actions not amounting to terrorism or unlawful activity was not the only illegality portrayed by

²⁴ INDIA CONST. art. 19(1)(a).

²⁵ The Unlawful Activities (Prevention) Act, *Supra* note 2, s. 5(1).

²⁶ *Id.* at s. 3, 4.

²⁷ *Id.* at s. 15(1)(b).

²⁸ The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India), s. 350.

the Central Government throughout the entire provisions. Scrolling down further, Section 43D (2)(b)²⁹ takes an unfortunate turn to ensure the obstruction in the pathway of speedy justice. It basically states that Section 167 of the Code of Criminal Procedure 1973³⁰ will be applied in case of offences falling under UAPA, with modifications to the extent that the maximum period to complete the investigation of offence and secure the detention of accused shall be 90 days which may also be extended to 180 days on satisfaction of the Court with the report of Public Prosecutor stating specific reasons.³¹

(E) Limiting the Scope of Right to be released on bail: While the rule ‘bail and not jail’ is recognized in *State of Rajasthan v. Balchand*³² and from time to time, reiterated in plethora of Apex Court and High Courts’ verdicts, limiting the possibility to obtain bail and conferring an authority to the court to reject bail is empowered under Section 43(D)(5) of the Act³³. A bare reading of Section 43(D) (5) clarifies a unique glorification of ‘bail rejection’ over the grant of bail which, in turn, expressly authorizes the Court with an unbridled discretionary power.

Apart from the above provisions, it can also be perceived from the text of Section 45(1) of the Act that any Court, for the purpose of taking cognizance of any offence under this Act, shall require to obtain prior sanction of the Central Government or any other authorized officer in this context³⁴. The fact that the requirement of the sanction of a ruling government with respect to unlawful activities or dissatisfaction or protests against their policies itself is sufficient enough to draw an inference of capricious intention associated with enactment of this legislation.

III. CURRENT RELEVANCE OF THE ACT

With the draconian nature and limitless scope of the UAPA Legislation existing in force, the nation witnesses its large-scale abuse by dragging the lawful protests and criticism of the innocent citizens as well as human rights activists under the purview of terrorist and unlawful acts. Delving deeper into the realtime scenario, the impact of UAPA in the context of prison justice is summarized as follows:

(A) Increasing rate of arrests under the Act: A bare reading of the NCRB 2019 Crime in India report portrays a total number of 1226 cases registered³⁵ under the Unlawful Activities

²⁹ The Unlawful Activities (Prevention) Act, *Supra* note 4, s. 43D(2)(b).

³⁰ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India), s. 167.

³¹ The Unlawful Activities (Prevention) Act, *Supra* note 29.

³² *State of Rajasthan v. Balchand*, AIR 1977 SC 2447.

³³ The Unlawful Activities (Prevention) Act, *Supra* note 4, s. 43D(5).

³⁴ The Unlawful Activities (Prevention) Act, *Supra* note 4, s. 45(1).

³⁵ The National Crime Records Bureau, *The Crime in India Report 2019*, The MINISTRY OF HOME AFFAIRS, GOI, Vol. II, p. 846 (2020), <https://ncrb.gov.in/sites/default/files/CII%202019%20Volum e%202.pdf>.

(Prevention) Act 1967 or UAPA. However, while comparing the records since 2015, the data available with Ministry of Home Affairs as per a Lok Sabha Proceeding reflects a sharp increase of 72% reported in respect of the arrests made under the Act, in the sense that at least 1948 arrests were made under 1226 UAPA cases in 2019 as against 1128 arrests in 2015³⁶. At the same time, the data presented by Ministry of Home Affairs in a Rajya Sabha Proceeding also represents that out of all the registered cases under UAPA during 2016-2019, only a minuscule 2.2% cases resulted in conviction³⁷ - which undoubtedly showcase a stark reality of all the possibilities ranging between arbitrary arrests, prolonged incarceration without trial or pending trial and a long wait for justice to be served. Such possibilities are also supported from the facts that a person arrested under UAPA can be detained for an extended period of 180 days with the Court's permission and without filing any chargesheet.³⁸ The Home Ministry in response to an Unstarred Rajya Sabha Questionnaire, expressly stated that NCRB does not have any data with regard to persons detained in judicial custody by virtue of Section 43D(2)(b) of the Act. Further, in the same Questionnaire, it was also replied that there is no comprehensive data maintained by NCRB with regard to list of detainees and undertrial prisoners under the UAPA legislation³⁹.

(B) A Tool for Suppression of Dissent: As analyzed earlier, the words used to define an unlawful activity or a terrorist act, such as 'disclaims' or 'questions' or 'dissatisfaction' or 'overawes' or 'show of criminal force' etc. are such nature so as to create an unbridled scope, resulting to criminalizing all forms of dissent - criticism - lawful protests against the arbitrary government policies. Thus, the Act often is misused as a tool to contract the scope of fundamental right to free speech and expression guaranteed under Article 19(1)(a) of the Constitution of India. .

For instance, in 2014 one cultural activist group named Kabir Kala Manch who were engaged in musical campaign and skits against the caste-based violence was arrested under UAPA on the ground of having connection with Maoist. The chargesheet was filed in 2013 however even

³⁶Special Correspondent, *Parliament Proceedings | Over 72% rise in number of UAPA cases registered in 2019*, THE HINDU, (March 9, 2021, 19:55 IST), <https://www.thehindu.com/news/national/parliament-proceedings-over-72-rise-in-number-of-uapa-cases-registered-in-2019/article34029252.ece>.

³⁷Special Correspondent, *Parliament Proceedings | 2.2.% of cases registered under the UAPA from 2016-2019 ended in court conviction*, THE HINDU, (February 10, 2021, 22:550 IST), <https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece>.

³⁸Ministry of Home Affairs, *Rajya Sabha Unstarred Question No. 356 : Convictions under Terrorism-related Laws*, GOVERNMENT OF INDIA, February 6, 2019, <https://www.mha.gov.in/MHA1/Par2017/pdfs/par2019-pdfs/rs-06022019/RS356.pdf?hLDf=false&hLDf=false&hLDf=false&hLDf=false&hLDf=false&hLDf=false&hLDf=false>

³⁹*Id.*

after languishing 4 long years in judicial custody, trial was not completed. The Apex Court while granting bail to them in 2017, observed that there was hardly any witness examination conducted in the trial during such long period.⁴⁰

(C) Large-scale Violation of Tribal Rights: A news report published by Hindustan Times in 22nd September 2020 highlights the sad state of tribal affairs in India and fate of 120 tribal citizens arrested in connection with Burkapal attack hanging on the thread for the past 3 years. In 2017, as a response to killing of 25 CRPF personnel in a Maoist attack in Burkapal, the country within next few days of the attack witnessed the arrests of at least 120 tribal villagers from 6 villages under the UAPA and Indian Penal Code. Such arrests were made based on a rough presumption of the villagers who were present at the day of attack in those 6 villages and not on the basis of real identification of the perpetrators. Such presumption was further proved with the fact that the villagers working in other cities were excluded from the list of arrested persons, thereby taking a mere chance over corroboration. Further, as the news report stated that even after a passage of 3 years, neither bail was granted to any of them nor their trial was constituted till that date.⁴¹ This example is not an isolated incident and many a times, the tribal communities are often suspected with Maoist links and arrested without a valid ground under the Act and thereafter, kept in a prolonged detention in prison.

Besides, not only the innocent tribal villagers, but also the human rights activists working to uphold their interests are often slapped with charges under the Act alleging their links with Maoist network. In November 2020, an article published by *The Wire* revealed the arrests of at least 67 human rights activist by the Andhra Pradesh Police under UAPA alleging their link with Maoist network.⁴² Another infamous example can be the death of human rights activist and priest Stan Swamy in 2020 after awaiting for 9 months to be released on bail. Stan Swamy, being a tribal rights activist was protesting to uphold the rights of Adivasi Dalits. He was arrested along with 15 other activists, advocates and professors alleging his Maoist link with respect to Bhima Koregaon incident.⁴³ The death of 84 years old Stan Swamy in prisons while waiting for bail slaps the ideals of criminal justice system with inordinate delay, denial and

⁴⁰ Leah Verghese, *Dark Truth About Undertrials: No Legal Aid & Inhumane Treatment*, THE QUINT, (February 17, 2017, 08:59 PM IST), <https://www.thequint.com/voices/blogs/dark-truth-about-undertrials-no-legal-aid-and-inhumane-treatment-ncrb#read-more>.

⁴¹ Ritesh Mishra, *120 tribals in jail under anti-terror law for 3 years, trial yet to begin*, HINDUSTAN TIMES, (September 22, 2020, 06:09 PM IST), <https://www.hindustantimes.com/india-news/120-tribals-in-jail-under-anti-terror-law-for-3-years-trial-yet-to-begin/story-uRDQr8ClO5XhjXysqZJbnL.html>.

⁴² Gali Nagraja, *Tribal Rights Activist Among 67 Slapped with UAPA Over 'Maoist Link' Suspicion*, THE WIRE, (November 29, 2020), <https://thewire.in/rights/andhra-pradesh-telangana-uapa-maoist>.

⁴³ Prabhaskar K Dutta, *Decoded | Spotlight on terror law UAPA after Stan Swamy's death*, INDIA TODAY, (July 6, 2021, 23:36 IST), <https://www.indiatoday.in/india/story/decoded-terror-law-uapa-st-an-swamy-death-1824443-2021-07-06>.

arbitrariness. Like the tragic case of Stan Swamy, it is also evident that thousands of Stan Swamy are still languishing in jails without any access to justice and on their way to embrace death.

Such rise of tribal arrests and a sheer absence of maintaining comprehensive database by NCRB in this regard was further deduced from the response of Tribal Affairs Ministry on 29th July 2021 to a question asked by Karnataka INC member in Rajya Sabha.⁴⁴

(D) Recent Judicial Decisions: Since 2017 onwards there has been an increasing trend of judicial activism portrayed by the Supreme Court and High Courts to prevent the gross human rights violation taking place under the various draconian provisions of UAPA Legislation. Although several cases pending for trial under the Act still exist far away from the close watch of Constitutional Courts, the judicial efforts reflected in certain UAPA cases led to increase a hope for defeating the autocratic legislation in near future. In a recent case of *Fakhrey Alam v. State of Uttar Pradesh*⁴⁵, the Apex Court while dealing with a case under Section 18 of UAPA⁴⁶, granted default bail to the detainee under Section 167 of the Code of Criminal Procedure⁴⁷ and held that the right to default bail as per Section 167 is a fundamental right and hence, shall be applicable to persons arrested under the UAPA Act. Therefore, the states cannot misuse the provision of 180 days' extension period for the purpose of filing any supplementary chargesheet. Besides as discussed earlier, in *Union of India v. K.A. Najeeb*⁴⁸ the Supreme Court encountered the excessive restriction on statutory bail under Section 43D(5) by declaring the bail granted by Constitutional Courts on grounds of fundamental rights to be prevailed over the said provision.

In *NIA v. Zahoor Ahmad Shah Watali*⁴⁹, the Supreme Court while setting aside the High Court order, refused to grant bail considering the prima facie truth of accusation supported by the evidence. However, later the Bombay High Court in *Surendra Pundalik Gadling v. Senior Inspector of Police, NIA*⁵⁰ refused the applicability of Watali Judgment as an excuse to oppose the grant of bail on any humanitarian ground, thereby attempting to reduce the harshness of

⁴⁴Express News Service, *Arrest of tribals under UAPA on the rise, reveals reply on Ministry of Tribal Affairs*, THE NEW INDIAN EXPRESS, (July 30, 2021, 08:42 AM), <https://www.newindianexpress.com/nation/2021/jul/30/arrest-of-tribals-under-uapa-on-the-rise-reveals-reply-of-ministry-of-tribal-affairs-2337540.html>.

⁴⁵ *Fakhrey Alam v. State of Uttar Pradesh*, Criminal Appeal No. 319 of 2021 (arising out of SLP(Crl.) No. 6181/2020).

⁴⁶ The Unlawful Activities (Prevention) Act, *Supra* note 4, at s. 18.

⁴⁷ The Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India), s. 167(2).

⁴⁸ *Union of India v. K.A. Najeeb*, *Supra* note 3.

⁴⁹ *NIA v. Zahoor Ahmad Shah Watali*, AIR 2019 SC 1734.

⁵⁰ *Surendra Pundalik Gadling v. Senior Inspector of Police, NIA*, Criminal Appeal No. 220 of 2021.

Section 43D(5) of the Act.

IV. CONCLUSION

While on one hand, the Constitutional Courts in India have been adopting a proactive role in upholding the fundamental right to lawfully protest and dissent in the cases concerning anti-CAA student activists Natasha Narwal, Asif Iqbal Tanha, Debangana Kalita and Delhi Riots accused Safoora Zargar; on the other hand, the cases like Hathras journalist Siddique Kappan and thousands others are still miles away to receive access to basic justice at least. Further, despite the higher judiciary paying a considerable amount of attention upon the draconian nature of UAPA legislation, it is the legislature which ultimately requires to replace the arbitrary and pseudo-democratic provisions for the purpose of revamping the spirit of rule of law and participatory justice in consistent with the Constitution of India.
