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Countering Terrorism or Suppressing Dissent: A Critical analysis of the UAPA

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ABSTRACT

Post-Independence, various legislations have been enacted to counter terrorism in India. These statutes have dealt with aspects such as intelligence, preventive detention, apprehension, search, seizure, investigation, trial, rule of evidence and penalty. Legislations such as the Maintenance of Internal Security Act (MISA), the Terrorist and Disruptive Activities (Prevention) Act (TADA), and the Prevention of Terrorism Act (POTA) have been accused of being disproportionately draconian, stringent and prone to misuse for political gains. One common feature between these laws have been the wide and sweeping definition of 'Terrorism' or 'Terrorist Act'. This has resulted in widespread misuse of these laws by law enforcement agencies against opposition, politicians, journalists and activists who are merely exercising their right to protest against the policies of the government. The primary legislation for countering terrorism and currently in force in India is the Unlawful Activities (Prevention) Act, 1967, better known as the UAPA. Initially a preventive-detention legislation, after the repeal of POTA, it was amended in 2004 to make it a Counter Terrorism Legislation. The act has been further amended in 2019 to designate individuals as terrorist. The law has been consistently misused by the law enforcement agencies to target student activists and journalists who have raised their voice against the policies of the government. This paper is an attempt to critically and dispassionately analyze the provisions of stringent UAPA to determine its shortcomings and limitations.

Keywords: Terrorism, Protest, Misuse, Bail, Confession

I. INTRODUCTION

On 15th June, 2021, a bench comprising of Justice Siddharth Mridul and Justice Anup Jairam Bhambhani of the Delhi High Court granted bail to student activists in the Delhi riots conspiracy case. The bench observed that the allegations did not *prima facie* constituted offences related to terrorist activities under the UAPA. In its order, the bench said that “...*the right to protest is not outlawed and cannot be termed as a 'terrorist act' within the meaning of*

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the UAPA...” The Court also cautioned the police against applying ‘terrorist act’ to conventional offences falling under ordinary penal statutes such as the Indian Penal Code.² This incident is but one of many incidents where the law enforcement agencies have misused counter terrorism legislations against anyone who has dissented against the government of the day. This necessitated the need to carefully examine and critically analyze the provision of the UAPA and determine its effectiveness. The primary laws for countering terrorism in India are the Unlawful Activities (Prevention) Act, 1967³ and the National Investigation Act, 2008.⁴ These laws are applicable throughout the territory of India and can be said to be complementary to each other. The UAPA is a substantive law which lays down the definition of a ‘Terrorist act’ and provides the penalty for it and other allied offences. On the other hand, the NIAA can be said to be the procedural arm of the UAPA which provides for the investigation and prosecution of offences which affect the ‘*sovereignty, security and integrity of India*’.

II. THE ORIGINS OF THE UAPA

The Unlawful Activities (Prevention) Act, 1967 was passed by parliament in 1967 with the purpose and object of ‘*preventing unlawful activities*’. The act has been amended several times to make it more stringent and to incorporate provisions related to terrorist activities.⁵ The most recent amendment to the legislation was in 2019.⁶ Though initially a preventive-detention legislation, after the repeal of Prevention of Terrorism Act (POTA), the UAPA was amended in 2004 to make it a Counter Terrorism Legislation. It extends to the whole of India and applies to every person liable under the act in India as well as any person beyond India who commits an offence punishable under the act. Further the act also applies to citizens of India outside India, any person in the service of the government and persons on ships and aircrafts, registered in India irrespective of where they are.⁷

III. WHAT CONSTITUTES A TERRORIST ACT?

Chapter IV of UAPA which was inserted in 2004⁸ after the repeal of POTA deals with terrorist activities and related offences. Section 15 of the act defines a ‘terrorist act’. Any person

² Live Law News Network, “*Right To Protest Not 'Terrorist Act' Under UAPA*” : Delhi High Court Finds No Prima Facie Case Against Asif Iqbal Tanha, Natasha Narwal & Devangana Kalita’ (Live Law 15 June 2021) <<https://www.livelaw.in/top-stories/right-to-protest-not-terrorist-act-uapa-delhi-high-court-asif-iqbal-tanha-natasha-narwal-devangana-kalita-175736?infinite-scroll=1>> accessed 16 June 2021

³ Hereinafter referred to as ‘UAPA’

⁴ Hereinafter referred to as ‘NIAA’

⁵ Unlawful Activities (Prevention) Amendment Act 2004; Unlawful Activities (Prevention) Amendment Act 2008; Unlawful Activities (Prevention) Amendment Act 2012

⁶ Unlawful Activities (Prevention) Amendment Act 2019.

⁷ Unlawful Activities (Prevention) Act 1967, s 1.

⁸ Unlawful Activities (Prevention) Amendment Act, 2004

commits a terrorist act if he, with an ‘...intent to threaten or likely to threaten the unity, integrity, security economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country...’ does the following acts:

“(a) using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause (i) death of, or injuries to, any person or persons; or (ii) loss of, or damage to, or destruction of, property; or (iii) disruption of any supplies or services essential to the life of the community in India or in any foreign country; or (iiia) damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or; (iv) damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b) overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c) detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or any other person to do or abstain from doing any act.”⁹

The above definition encompasses a wide range of activities within the scope of a ‘terrorist act’ and is much broader than the definition provided in repealed legislations such as TADA and POTA. A person who commits a terrorist act is punished with death or life imprisonment if his act results in death and punishable with imprisonment for a minimum of five year and extendable to life imprisonment in any other case.¹⁰ Further the act, criminalises a whole range of associated activities such as raising funds for terrorist acts¹¹; conspiring to commit or advocating, abetting or preparing for the commission of a terrorist act¹²; organising terrorist

⁹ Prevention of Terrorism Act 2002, s 15(1).

¹⁰ Unlawful Activities (Prevention) Act 1967, s 16.

¹¹ Unlawful Activities (Prevention) Act 1967, s 17.

¹² Unlawful Activities (Prevention) Act 1967, s 18.

camp¹³ and recruiting persons for the commission of a terrorist act¹⁴; harbouring or concealing a terrorist¹⁵; being member of a terrorist gang or organisation¹⁶; holding property derived from commission of any terrorist act¹⁷ and threatening a witness.¹⁸ In addition to offences pertaining to individuals, UAPA also prescribes punishment for offences committed by a company¹⁹ as well as by societies and trusts.²⁰

IV. TERRORIST ORGANISATIONS AND INDIVIDUALS

Until 2019, Chapter VI of UAPA laid down provisions related to terrorist organisations. However, the Unlawful Activities (Prevention) Amendment Act, 2019 brought individuals under its purview by inserting Schedule IV. After the 2019 amendment, UN designated global terrorists such as *Jaish-e-Mohammad* (JeM) chief *Masood Azhar*, *Lashkar-e-Taiba* (LeT) chief *Hafiz Saeed*, LeT chief commander *Zakir Rehman Lakhvi* and underworld don *Dawood Ibrahim Kaskar* are included in Schedule IV of UAPA.²¹ Section 35 of UAPA empowers the Central Government to add an organisation or an individual, which it believes to be involved in Terrorism, to the first and fourth schedule respectively. However, such organisation or individual can apply to the Central Government to be removed from the first and fourth schedule respectively and if the application is rejected then it/he can apply for a review to the Review Committee constituted under Section 37.²²

A person associating himself with a terrorist organisation is punished with imprisonment for up to ten years.²³ Further a person who invites support for a terrorist organisation, or arranges, *manages* a meeting to support the terrorist organisation or who addresses a meeting for the purpose of encouraging support for the terrorist organisation with the intention to further the activity of a terrorist activity, is punishable with imprisonment for up to ten years.²⁴ Also, a person who commits the offence of raising fund for a terrorist organisation is punishable with imprisonment which can extend to fourteen years.²⁵

¹³ Unlawful Activities (Prevention) Act 1967, s 18A.

¹⁴ Unlawful Activities (Prevention) Act 1967, s 18B.

¹⁵ Unlawful Activities (Prevention) Act 1967, s 19.

¹⁶ Unlawful Activities (Prevention) Act 1967, s 20.

¹⁷ Unlawful Activities (Prevention) Act 1967, s 21.

¹⁸ Unlawful Activities (Prevention) Act 1967, s 22.

¹⁹ Unlawful Activities (Prevention) Act 1967, s 22A.

²⁰ Unlawful Activities (Prevention) Act 1967, s 22B.

²¹ Shemin Joy, 'Azhar, Saeed, Dawood declared terrorists under UAPA law' *Deccan Herald* (New Delhi, 5 September 2019) <<https://www.deccanherald.com/national/azhar-saeed-dawood-declared-terrorists-under-uapa-law-759014.html>> accessed 22 May 2021.

²² Unlawful Activities (Prevention) Act 1967, s 36.

²³ Unlawful Activities (Prevention) Act 1967, s 38.

²⁴ Unlawful Activities (Prevention) Act 1967, s 39.

²⁵ Unlawful Activities (Prevention) Act 1967, s 40.

V. DEPARTURE OF UAPA FROM ORDINARY PROCEDURAL AND EVIDENTIARY SAFEGUARDS

Repealed counter terrorism statutes such as TADA and POTA established specialised Courts to try persons charged under those legislations and excluded the jurisdiction of ordinary criminal Courts. However, after the repeal of POTA and the amendments to UAPA, there is no provision related to special Courts in the act. This essentially means that the offences laid down under the UAPA can be tried by ordinary criminal Courts.²⁶ However, sections 11 and 22 of the National Investigation Agency Act, 2008²⁷ have empowered the Central and State Governments to establish Special Courts for the trial of scheduled offences. The schedule appended to the NIA act includes the UAPA and therefore, Special Courts constituted under NIAA can try offences under UAPA if the National Investigation Agency is investigating such offence.²⁸

- **Arrest**

Section 43A of UAPA provides that “*any officer of the designated authority who knows or has reason to believe from personal knowledge, written information or from any document, article or any other thing that any person has committed an offence can authorise any officer subordinate to him to arrest such a person.*” The person arrested has to be informed of the grounds for his arrest and without unnecessary delay has to be forwarded to the officer in charge of a Police Station who has to take measures according to the CrPC.²⁹ In fact, according to Section 43C, the provisions related to arrest, search and seizure provided under the CrPC (which is the general law governing criminal procedure in India) would apply to all arrests, searches and seizures under UAPA. Thus the safeguards provided under the CrPC with respect to arrest, search and seizure are applicable to arrests, searches and seizures under UAPA.

- **Pre Trial Detention**

Under UAPA, the Magistrate before whom a person arrested is forwarded can authorise the detention of such person in Police custody for the initial thirty days instead of the usual fifteen days prescribed by section 167 of CrPC. Further, if investigation cannot be completed within ninety days, then the Special Court could authorise the detention of the accused for a period of

²⁶ Kalhan (n 30) 166.

²⁷ Hereinafter referred as ‘NIAA’.

²⁸ Srijoni Sen and others, *ANTI-TERROR LAW IN INDIA; A STUDY OF STATUTES AND JUDGMENTS, 2001 – 2014* (Vidhi Centre for Legal Policy 2015).

²⁹ Unlawful Activities (Prevention) Act 1967, s 43B.

one hundred and eighty days.³⁰ Thus like POTA, an accused arrested under UAPA can be kept in custody for one hundred eighty days without charge sheet being filed.

- **Regular Bail**

A person arrested under UAPA cannot be released on bail or personal bond unless the Public prosecutor has been heard and if the Court, on the perusal of the case diary or the final report filed under section 173 of CrPC, is of the opinion that the accusations against such person is prima facie true then such person will not be released on bail or on his own bond. This provision can be said to be borrowed from POTA and has made obtaining bail considerably difficult than ordinary procedure under CrPC.³¹

- **Anticipatory Bail**

Repealed counter Terrorism legislations like TADA and POTA omitted the application of Section 438 (provision for 'Anticipatory bail') and precluded any person apprehending arrest under such legislations to apply for bail in anticipation of arrest. The UAPA also contains a similar provision under which Section 438 of the CrPC does not apply to UAPA and thus any person apprehending arrest is barred from obtaining an 'Anticipatory Bail' from the Courts of Sessions or the high Court.³²

- **Presumption by Courts**

Under Section 43E of UAPA, the presumption of innocence is reversed if certain facts are proved against a person who has been charged under Section 15. Thus, like TADA and POTA, UAPA also departs from well-established principles of evidence and puts the burden of proof on the accused under certain circumstances.

- **Confession to Police Officers**

The amendments to UAPA have removed the provision of POTA which made confession made to a Police Officer admissible before a Court of Law. This provision was considered to be against the basic principles of Criminal Justice administration and Human Rights norms as it increased the likelihood of Police using torture or other degrading treatment to obtain a confession or other information from a person under its custody.³³ Confessions under UAPA are governed by Section 164 of the CrPC and the bar of Section 25 and Section 26 of the Indian

³⁰ Unlawful Activities (Prevention) Act 1967, s 43D.

³¹ Ibid.

³² Ibid.

³³ Anil Kalhan, 'Colonial Continuities: Human Rights, AntiTerrorism, and Security Laws in India' (2006) 20 *Columbian Journal Of Asian Law* <<https://ssrn.com/abstract=970503>> accessed 16 May 2021.

Evidence Act, 1872 applies to UAPA. This implies that any confession made to a Police Officer or to anyone in Police Custody will not be admissible in Court. This is a welcome change from previous legislations and would safeguard the rights of an accused to some extent.

VI. ASSESSMENT AND EFFECTIVENESS OF THE UAPA

The UAPA was passed in 1967 for preventing unlawful activities of individuals and associations. However, in the wake of the repeal of POTA in 2004, the act was amended to make it a Counter-Terrorism law. The act is a permanent statute and does not have clause declaring that the legislation will expire after a period of time. The legislation incorporates a wide definition of 'Terrorist Activities' and criminalises merely associating with, or being a member of a Terrorism organisation. Further, the schedules appended to the act include the name of designated terrorist organisations as well individual terrorists. Like previous counter Terrorism legislations, the UAPA departs from established principles of Criminal Procedure and Rules of Evidence. A person can be arrested or search and seizure can be made based on mere 'personal knowledge' of a Police officer which is a lower standard of knowledge than 'reasonable complaint' or 'credible information' under the CrPC. This gives the Police a wide discretion to arrest a person and has a potential for abuse. Further, an arrested person can be detained for a prolonged period without filing any charge-sheet. Obtaining bail under UAPA is made considerably more difficult than ordinary procedure under CrPC while Anticipatory bail is omitted. Also, like TADA and POTA, the presumption of innocence is reversed and if certain facts are proved, the Courts can draw adverse inferences against the accused. The act also provides for in-camera trials and also allows the identity of the witness to be confidential which goes against international standards of fair trial. The act is extremely stringent with respect to terrorist activities as it criminalises *merely being a member or attending a meeting* of a Terrorist organisation.

On the other hand, the act has omitted some stringent provisions of TADA and POTA such as those making admissible confessions made to Police Officers. Also arrest, search and seizures under UAPA are governed by the CrPC which means that the procedural safeguards laid down under CrPC are also applicable to arrests, searches and seizure made under UAPA.

According to the National Crime Record Bureau, in 2014, out of 33 cases disposed under UAPA, only nine persons were convicted with a conviction rate of 27%. In 2015, out of 76 cases disposed under UAPA, 11 were convicted with a conviction rate of 14.5%.³⁴ Further, in

³⁴ 'Rajya Sabha: UAPA Bill passed despite Opposition fears' *The Hindu Business Line* (New Delhi, 2 August 2019) <<https://www.thehindubusinessline.com/news/uapa-amendment-bill-gets-rajya-sabha-approval/article28796520.ece>> accessed 14 June 2021.

2016 the conviction rate for UAPA cases was 33%.³⁵ In the 2018 Crime in India report, the conviction rate for UAPA is 27.2%. Such a low conviction rate indicates that the legislation has proven to be ineffective in being viable counter Terrorism legislation in India as most of the accused charged under it are either discharged or acquitted.

The act has been criticised for giving unbridled executive power to the Police and for being used against political opponents and voices of dissent. Persons associated with organisation which are critical of the ruling dispensation have been booked under UAPA. For instance, *Imran Kirmani*, an aeronautical engineer from Kashmir was arrested for by the Delhi Police for alleged association with LeT (a banned organisation included in the First Schedule of the Act). He was kept in prison for five years before being acquitted.³⁶ Critics of the legislation have pointed out that UAPA criminalises the fundamental right to from association under Article 19 and also blurs the line between dissent and crime by bringing a wide variety of actions under the ambit of ‘terrorist act’.³⁷ The definition of a ‘terrorist act’ uses ambiguous, sweeping and open-ended phrases such as “*likely to strike terror in the people or any section of the people in India*’ and ‘*overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary*’³⁸ etc. which have a potential for misinterpretation and misuse by the investigating agencies. These elements of the definition are extremely subjective and can be used by the authorities to bring almost any ordinary criminal act within the ambit of the stringent provisions of the UAPA.

Another aspect of UAPA which has been criticised is that after the 2019 amendment, an individual can also be designated as a terrorist simply if the government believes that such individual is involved in Terrorism.³⁹ Critics of the legislation fear that such a designation without a trial would result in violation of the right to life and personal liberty enshrined under Article 2 of the Constitution as the person would be designated a terrorist even before any investigation has been done or any trial has been concluded.⁴⁰

³⁵ Chaitanya Mallapur and Devyani Chhetri ‘Arrested activists: 67% ended in acquittal or discharge under UAPA Act’ *Business Standard* (Mumbai, 14 September 2018) <https://www.business-standard.com/article/current-affairs/arrested-activists-67-ended-in-acquittal-or-discharge-under-uapa-act-118090800801_1.html> accessed 15 June 2021.

³⁶ Anushka Singh “Criminalising Dissent: Consequences of UAPA” (2012) 47 *JSTOR* <www.jstor.org/stable/41720156> Accessed 24 May 2020.

³⁷ *Ibid.*

³⁸ Prevention of Terrorism Act 2002, s 15(1).

³⁹ Unlawful Activities (Prevention) Act 1967, s 35.

⁴⁰ Tarique Anwar ‘UAPA Amendment: Gateway to Misuse Anti-Terror Law, Say Critics’ *News Click* (New Delhi, 10 August 2019) <<https://www.newsclick.in/UAPA-amendment-gateway-misuse-anti-terror-law-critics>> accessed 24 May 2021.

An examination of the provision of UAPA, its low conviction rate together with reports of misuse of its provisions indicates that like TADA and POTA before it, UAPA has also proven to be an instrument of oppression in the hands of the government to silence critics and hound political opponents in the name of countering Terrorism and unlawful activities. It is interesting to note that almost all major counter Terrorism legislations have been introduced in haste and as a reaction to significant incidents of mass violence in India and abroad. The definitions of the primary offences in these statutes also have the common trait of being wide and sweeping which allows even ordinary criminal acts to fall under their ambit. Further, the low conviction rates of these legislations indicate that they are not effective in countering Terrorism and instead are being used for other purposes. Further, with each passing amendments the laws have been made more stringent and often in violation of principles of Criminal Justice Administration and international standards of fair trial.

VII. CONCLUSION

The UAPA is a substantive counter terror law which creates offences related to Terrorism act and prescribes punishment for the same. Legislations such as the UAPA have borrowed most definitions of substantive offences from earlier repealed laws and the Parliament has not made any effort to properly define them resulting in vague and open worded definitions which bring a wide range of activities and conducts within their ambits. These definitions have a potential for misinterpretation by the law enforcement agencies which can result in violating the liberty of an individual. Further, the stringent standards for obtaining bail as well as the fact that the presumption of innocence is reversed can be said to be in violation of basic principles of Criminal Justice Administration. It doesn't help that the conviction rate of UAPA is abysmally low and clearly indicates that the law is being misused. In the past few year, the judiciary has cautioned the law enforcement agencies multiple times against treating protests as a 'terrorist activity' but these warning have been falling on deaf years. In fact, according to the data provided by the Home Ministry in the Lok Sabha, there has been an increase of over 72% in the number of persons arrested under UAPA in 2019 compared to 2015.⁴¹ What makes things worse is the fact that getting bail under UAPA is rare and the investigating agency has up to 180 days to file a charge sheet. It is high time that the government pay heed to the caution of the judiciary and seriously consider its approach towards application of UAPA to activists and dissenters instead of actual terrorists. Possible suggestions include amending the definition of

⁴¹ 'Parliament proceedings | Over 72% rise in number of UAPA cases registered in 2019' *The Hindu* (New Delhi March 9, 2021) <<https://www.thehindu.com/news/national/parliament-proceedings-over-72-rise-in-number-of-uapa-cases-registered-in-2019/article34029252.ece>> accessed 12 June 2021

‘terrorist act’ under the UAPA to remove ambiguities and confining it strictly to activities which are considered terrorism under various international conventions. Further, it is recommended to omit activities from the said definition which can be dealt with by ordinary criminal laws. It is also hoped that the law enforcement agencies take care to differentiate between the right to protest and ‘terrorism’ before invoking the stringent legislation.
