Page 1490 - 1508

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

India's Anti-Terrorism Laws: An Undying Threat

SOHAM VIJAYKUMAR JAGTAP[1] AND GARIMA SAXENA[2]

ABSTRACT

India's history of formulating anti-terror laws has been rather despondent since its independence. More often than not they're in breach of constitutional principles and intrinsic civil rights, despite the fact that the old ones are discarded and new ones are into place, as if spokes from the same wheel. These legislations often override the ordinary criminal code of the country and the rule of law in the name of protecting the sovereignty and integrity of India; in doing so we have failed to break the practices which the British had so often implemented in India in order to sustain their absolute control over the people. In a democratic India, we need to see let go of the ghosts of our past and usher the country into a bright future, however, anti-terror legislations such as the UAPA, NIAA and previously the POTA and TADA are one of the many reasons holding us back. They give unbridled power to the executive and allow the depravation of liberty to become an easy business. This paper will discuss how the Unlawful Activities (Prevention) Act, 1967, has stifled human rights in India and remains the most draconic legislation in present India with the excess of investigative authority and depravation of liberty it permits in the light of recent developments.

I. INTRODUCTION

The biggest question related to the discourse about terrorism is its very meaning. Despite the fact that we hear about terrorism on a daily basis, so much so that it grabs every headline, forms an aspect of every policy and security issue, it is quite difficult to define the term. If you ask a group of 50 people to describe the phenomenon, you would get 50 different responses. This is so because what is defined as terrorism is more often than not shaped by perspective, is tarnished by bias and diluted by self-interest. If we were to ask a government or any political entity to define the word, the definition would be inspired by a political motive. It has become a fad to treat a number of violent actions across the spectrum committed by certain groups of people as terrorist activities; since the narrative is driven by the ruling or the majority party, it

[1] Author is a student of Rajiv Gandhi National University of Law, India.
[2] Author is a student of Rajiv Gandhi National University of Law, India.

 [ISSN 2581-5369]

usually culminates into a situation where a certain group's violent activities though not necessarily constituting terrorism is termed such, pejoratively. This leads us to the cliché; one man's terrorist is another man's freedom fighter. Since the word terrorism is widely considered an extremely dangerous, volatile and unpredictable threat to security and general peace, the superstructure makes it certain that the narrative is driven to its advantage and certain groups, individuals or religions are ostracized from mainstream society. It's done by using the media, dramatizing the already attention-grabbing terminology associated with terrorism and in turn creating fear and hatred in the minds of the general public with regards to the groups associated or deemed to be associated with activities considered as inducing terror.

This leads to a situation where the word is used in an extremely sloppy manner, which is dangerous considering how incomplete the definition of the word already is. As postmodern language theories argue, language is hardly, if ever an accurate link to understand reality, and is usually a product of culture and social circumstances. In other words, if an influential political group labels a group as a terrorist organization, all its activities are perceived as furthering the goal of terrorism. This perspective is extremely myopic and negates in entirety the nuances and the true motivations of said groups. Essentially, if you are labelled as a terrorist, all your actions are unjustified, cruel and a threat to society, since terrorism is bad!

This arbitrary usage and labelling of certain groups and their activities as inducing terrorism, causes prejudice, alienation and hatred towards certain groups and the procedural aspects of enforcing anti-terror laws causes a tremendous fallout of human rights violations, encroachments upon fundamental rights to dignity, free speech, dissent and reputation. This leads us to the most important aspect of a government's response to terrorism: Anti-Terror Laws. Since India's independence in 1947, anti-terrorism or "security laws" have been in place in order to combat and provide for an exceptional procedure to deal with non-common crimes which pose deeper and more enduring threats to ordinary life. Several states in India have their own set of security laws working alongside the national security laws and naturally, the ordinary procedural and substantive criminal codes.

These security laws are often legitimized by Governments on the ground that ordinary criminal codes are not equipped to handle extraordinary dangers such as those posed by terrorism and organized crime, and therefore such threats require a specialized and a more proactive response. This in turn justifies the leeway in terms of adherence to criminal justice and the rule of law afforded to anti-terror laws as well as the extraordinary powers given to the law and order machinery to deal with cases perceived as a threat to national security.

 [ISSN 2581-5369]

This leads us back to the issue how governments and influential political groups shift the narrative surrounding security threats in their favour. In most of the anti-terror laws of India, the term 'terrorism' is defined in an extremely broad manner. For example, the UAPA[3], since its amendment in 2012, defines a "terrorist act" as any act done with an intent to threaten or *likely* to threaten the unity, integrity, security or sovereignty of India or with an intent to strike or *likely* to strike terror in the people. Under the ambit of "terrorist act" also includes damage to the monetary stability of India, using force against a public official or any individual to pressure the government or to disrupt "any supplies or services essential to the life of the community in India or in any foreign country."[4] Rand chronology defines terrorism as any act involving violence or threats of violence usually carrying a political motive designed to strike terror in the hearts of people and carrying objectives further than the effects of immediate physical damage.[5] Kent Roach, writing for the Human Rights Watch[6] has duly advised to limit the definition of terrorism to intentionally causing death or injury with the motive of intimidating the general public or pressuring a government or international body to act in a particular way. The UAPA, in contradiction to this, includes in the definition of terrorism, acts which harm the economic and monetary stability of India as well as acts causing property damage and disruption of supplies, not bound to the territory of India. This extremely wide ambit governing the *actus rea* of a terrorist act is in stark contrast to what it considers its *mens rea*. The word *likely* used in the definition of terrorism in the act makes it unclear whether only an act which intends to "threaten the unity, integrity, security or sovereignty of India" is considered a terrorist act, or whether it considers the very commission of said act illegal. If that is so, it remains uncertain whether an individual or an organization needs to act on basis of his intent or whether mere recklessness as to the consequences of his actions constitutes as offence under this act, similar to a case of strict liability.

The 2019 Amendment to the UAPA[7] has allowed the government to declare 'individuals as terrorists,' increasing its scope from previously only being allowed to designate organizations as terrorists. This wide, unfettered power given to the government, courtesy of an anti-terror law gives unbridled power to the state's law enforcement to arbitrarily interpret and book individuals and organizations under said acts. Such labelling and detentions cause grave harm to the fundamentally guaranteed rights to dignity, reputation, free speech and dissent of an

[3] The Unlawful Activities (Prevention) Act, 1967, No. 37, Acts of Parliament, 1967 [hereinafter UAPA].
[4] UAPA, *supra* note 1, § 15.
[5] Brian M. Jenkins, *The Study of Terrorism: Definitional Problems,* TRC, Dec. 1980, at 1, 3.
[6] Kent Roach, *Defining Terrorism: The Need for a Restrained Definition,* OPATHR, 97, 98 (2008).
[7] The Unlawful Activities (Prevention) Amendment Act, 2019, No. 28, Acts of Parliament, 2019.

 [ISSN 2581-5369]

individual in the country. Moreover, such acts with an ambiguous scope give a hard time to the judiciary to determine whether the application of said laws do not breach constitutional principles and operate within the principles of rule of law.

As iterated earlier, governments and influential political groups often use these anti- terror and security laws in order to eliminate political threats, suppress dissent and to create a narrative against a particular group in order to achieve a political motive. In this process, several acts which should have been classified as terrorism or contributing to terrorist activity, aren't, since they don't suit the agenda of the government or the people involved are in the government's favour. Undoubtedly, such incidences are counterproductive to the very existence of anti-terror laws and it is needless to say that the application of such laws cause immense human rights excesses. This paper will try to assess the genesis of anti-terror laws in India and how more often than not they have been used by the ruling party as a political tool, leading to undemocratic processes, excesses of civil rights and abuse of executive power. Further, it will analyse certain cases of anti-terror laws used to suppress dissent or further a political goal in the past few years in India, while providing solutions so that these laws are in line with the principle of maximum certainty; so that the executive cannot abuse its power under the guise of national security.

II. GENESIS OF ANTI-TERROR LAWS IN INDIA

TADA can be considered as the first specific anti-terror legislation which was brought in the wake of secessionist activities that emerged after the assassination of then Prime Minister Mrs Indira Gandhi on October 31, 1984.[8] The Terrorist and Disruptive Activities (Prevention) Act (TADA) came into effect in 1987. It was till 1995 that it remained in force. For eight years, it was (mis)used by the governments to arbitrarily arrest, detain and torture political opponents and human rights advocates. Terrorist Affected Areas (Special Courts) Act, which was introduced by the government in 1984 and was later incorporated in TADA, gave central government the power to declare a part of the country as "terrorist affected." It also allowed the government to prosecute the defendant in that "terrorist affected" area. Under TADA, these powers were widened and new offences related to terrorist activity were also introduced. These offences were of general applicability, and the state governments were given the powers to prosecute throughout the country.

With the introduction of TADA, it became a crime to (1) commit a "terrorist act," (2) conspire,

[8] RAMANAND GARGE, JURISPRUDENCE OF ANTI-TERRORISM LAWS 20 (Vivekananda International Foundation, 1st ed. 2019)

 [ISSN 2581-5369]

attempt to commit, advocate, abet, advise or incite, or knowingly facilitate the commission of a terrorist act or "any act preparatory to a terrorist act," (3) "harbor or conceal, or attempt to harbor or conceal any person knowing that such person is a terrorist," or (4) hold property that has been "derived or obtained from commission of any terrorist act" or that "has been acquired through the terrorist funds."[9] Section 4 of the statute also made it a crime to commit "disruptive activity", which was defined "any action taken, whether by act or by speech or through any other media or in any other manner whatsoever, (1) which questioned, disrupted or intended to disrupt, "whether directly or indirectly, the sovereignty and territorial integrity of India"; or (2) which intended to bring about or supports any claim, "whether directly or indirectly, for the cession of any part of India or the secession of any part of India from the Union." TADA also differed from the ordinary rules of evidence and criminal procedure in numerous aspects. Under Section 15, the statute allowed admissibility of voluntary confessions made to "police officer not lower in rank than a Superintendent of Police" in the form of writing, audio, or video. In the case of *Kartar Singh v. State of Punjab*[10], the Supreme Court of India held Section 15 to be violative of Article 20 and 21 of the Constitution. According to Justice R.M. Sahai, it was "destructive of basic values of the constitutional guarantee" and was liable to be struck down.

A law which was originally introduced for "terrorist affected areas", especially Punjab, ended up being implemented in 23 states and two union territories. It was widely criticized, both within the country and internationally, for its gross abuse and violating fundamental rights and human rights. Justice Rangnath Mishra, the then Chairperson of National Human Rights Commission, held TADA to be a law "draconian in effect and character"[11] and "incompatible with our cultural traditions, legal history and treaty obligations", and appealed to the Parliament to bring to an end the "draconian legislation by not granting any fresh lease of life." In January 1997, the Supreme Court expressed concern about the continuing detention of persons under TADA and its misuse to detain those who should be charged under the ordinary criminal law.[12]

The controversial anti-terrorism legislation Prevention of Terrorism Activities Act, 2002 (POTA)[13], was passed in extraordinary joint sitting of both Houses on March 26, 2002. It was shortly introduced after the Parliament of India complex was attacked by a group of terrorists on December 13, 2001. The government cited international obligations and cross-border

[9] Anil Kalhan et al, *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India* 20 COLUM.J. ASIAN L. 93, 145 (2007).
[10] Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
[11] National Human Rights Commission, Annual Report 1994-1995, NHRC, 1995, at 17.
[12] Amnesty International, *If They Are Dead, Tell Us,* AI, Mar. 2, 1999, at 23.
[13] The Prevention of Terrorism Act, 2002, Act 15, Acts of Parliament, 2002 [hereinafter POTA].

 [ISSN 2581-5369]

terrorism as reasons to introduce POTA, 2002. POTA incorporated TADA's enhanced police powers, limits on the rights of the defence, and special courts, with many of POTA's provisions reproducing verbatim the equivalent provisions in TADA.[14] It must be stated at the outset that laws like POTA work on the principle that crimes of terror cannot be proved in the normal course and they require therefore, extra-ordinary measures including admission of evidence which cannot otherwise be admitted under ordinary law.[15] The reason why POTA was considered a problematic statute was the lack of precision in various important definitions. For example, POTA, terrorism was defined as an act of violence to "threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people." Similarly, Section 3(7) of the Act criminalized violent threats, wrongful restraints or confinements, or "any other unlawful act with the said intent" against any person who was a witness or in whom such witness was interested, but failed to define what it meant by "said intent." The vagueness of such provisions led to arbitrary and selective enforcement of the statute on the basis of religion, caste, political opinion etc.

Under POTA, the government was also given the power to ban "terrorist organization", and criminalize numerous activities associated with such banned organizations. Section 21 of the Act dealt with the "offence relating to support given to a terrorist organization." Under this section, a person committed the offence if he (a) invited "support for a terrorist organization, and (b) The support was not, or was "not restricted to, the provision of money or other property within the meaning of section 22." Section 22 dealt with the offence of fund raising for a terrorist organization. Additionally, a person committed an offence if he arranged, managed or assisted in arranging or managing a meeting which he knew to (a) To support a terrorist organisation, or (b) To further the activities of a terrorist organisation, or (c) To be addressed by a person who belongs or professes to belong to a terrorist organisation. Also, a person committed an offence if he addressed a meeting for the purpose of encouraging support for a terrorist organisation or to further its activities. The statute failed to differentiate between ordinary criminal acts and terrorists act.

After the legislature passed POTA in March of 2002, the Indian media and human rights groups observed and criticized frequent abuses of the law, including hundreds of questionable and prolonged detentions with no formal charges filed.[16] The constitutional validity of POTA was

[14] Surabhi Chopra, *National Security Laws in India: The Unraveling of Constitutional Constraints,* ORIL, May 2014, at 9.
[15] Peoples Union for Democratic Rights (PUDR), *A Critique of the POTA court Judgment on the 13 December Case*, PUDR (Feb. 15, 2003), pudr.org/trial-errors-critique-pota-court-judgement-13-december-case.
[16] Christopher Gagné, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 BCTWLJ 261, 264 (2001).

 [ISSN 2581-5369]

challenged in the case of *People's Union for Civil Liberties v. Union of India*[17], wherein the Hon'ble Supreme Court upheld the validity of the Act, but the abuses under POTA were so widespread and serious that the then-opposition Congress Party called for the repeal of the law in the 2004 general election campaign, and swiftly moved to do so once in office.[18]

The first amendment to the Constitution of India was introduced in 1951. The amendment inserted the world 'reasonable' before the word restrictions and added public order as more ground for restricting fundamental rights. In 1963, Article 19 was further amended to add 'reasonable restrictions in the interest of the sovereignty and integrity of India' to Article 19(2). This amendment occurred in the immediate wake of the Indian army's defeat in the Sino-Indian War, as well as the threat posed by the DMK contesting elections in Tamil Nadu with secession from India being part of their manifesto.[19] The government enacted the Unlawful Activities (Prevention) Act, 1967 to prevent secession or activities directed against sovereignty and integrity of India.

Following the repeal of POTA, 2002, the UPA government amended UAPA, 1967 for the first time in the year 2004. This amendment amended the long title of the UAPA Act to read: "An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities and for matters connected therewith." The UAPA failed to 'remedy many of the deficiencies that resulted in the gross misuse of POTA.'[20] The amended act included 'verbatim provisions from the repealed POTA, provisions that were repeatedly misused under POTA.'[21] The terms 'terrorist organization' and 'terrorist act' were borrowed from the repealed POTA, and substantial changes were made to the definition of 'unlawful activities.' The amendment also introduced the concept of 'terrorist gang.' In fact, chapters IV, V and VI dealing with 'punishment for terrorist activities,' 'forfeiture of proceeds of terrorism' and 'terrorist organisations' respectively, were heavily borrowed from the repealed POTA.[22]

Another amendment was introduced in UAPA, 1967 after multiple brutal attacks in Mumbai in 2008. The government presented two anti-terrorism laws before the parliament. The

[17] People's Union for Civil Liberties v. Union of India (2004) 9 SCC 580.
[18] Human Rights Watch (HRW), *Back to the Future: India's 2008 Counterterrorism Laws,* HRW (Jul. 27, 2010), https://www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws.
[19] Arun Ferreira & Vernon Gonsalves, *Fifty Years of Unreasonable Restrictions Under the Unlawful Activities Act*, THE WIRE (Mar. 9, 2017), https://thewire.in/rights/uapa-anti-terrorism-laws.
[20] Commonwealth Human Rights Initiative, *Stamping Out Rights: The Impact of Anti-Terrorism Law On Policing*, CHRI, 1992, at 20.
[21] Human Rights Features, *The Reincarnation of POTA: Unlawful Activities (Prevention) Amendment Ordinance is POTA's Second Coming,* HRW, 2004, at 1
[22] *Id.* at 3.

parliament adopted amendments to the existing The Unlawful Activities (Prevention) Act, 1967 and also passed the National Investigation Agency Act (NIAA). Neither of these laws wereere made open to public discussion and were passed without significant feedback from the public and civil society associations. Through this amendment, 'more provisions similar to POTA and TADA regarding maximum period in police custody, incarceration without a charge sheet and restrictions on bail were incorporated into the UAPA.'[23] The amendment introduced in 2013 in the UAPA catered to the specific need of the hour by incorporating economic and financial offences bed. By way of Amendment Act, 2019, Section 35 was altered, which now gives Central Government the power to notify an individual as a 'terrorist' under Schedule IV of the Act. Prior to the Amendment, only organizations could have been designated this way and individuals were not covered.[24] The constitutionality of this amendment has been challenged in the case of *Sajal Awasthi v. Union of India*[25] and is yet to be decided by Supreme Court of India. The constitutionality of UAPA, 1967 was also challenged in the case of *Sri Indra Das v. State of Assam*[26], wherein the Court held Section 3(5) of TADA and Section 10 of UAPA violative of Article 19 and 21 of the Constitution.

III. ISSUES

(A) AMBIGUOUS SCOPE AND DEFINITION

Over the years, India has introduced a number of anti-terrorism laws to tackle the issue of terrorism and achieve the goals of national security, public order and peace etc. But the legislations have failed to demarcate between the crime of terrorism and crime of ordinary nature. In addition to being broad, these pieces of legislations have failed to narrow down the important definitions, thus making it vague in nature. The problems begin with the definitional clause itself. The definition of "unlawful activities" includes "disclaiming" or "questioning" the territorial integrity of India, and causing "disaffection" against India.[27]

The definition of 'terrorist act' is laid down in under Section 15 of the Act and clause (a) includes "by 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

[23] Bhamati Sivapalan & Vidyun Sabhaney, *In Illustrations: A Brief History of India's National Security Laws*, THE WIRE (Jul. 27, 2019) https://thewire.in/law/in-illustrations-a-brief-history-of-indias-national-security-laws.
[24] UAPA, *supra* note 1, § 35.
[25] Sajal Awasthi v. Union of India (2019) 1076 WP(C).
[26] Sri Indra Das v. State of Assam (2011) 3 SCC 380.
[27] Gautam Bhatia, *Bhima Koregaon and the fault in our laws*, THE HINDU (Jul. 31, 2020, 12:02 AM) https://www.thehindu.com/opinion/lead/bhima-koregaon-and-the-fault-in-our-laws/article24305910.ece.

 [ISSN 2581-5369]

or by any other means of whatever nature." Clause (b) of the definition incorporates overawing the government "by means of criminal force or the show of criminal force" or attempting "to do so or causes death of any public functionary or attempts to cause death of any public functionary", whereas according to clause (c) detention, kidnaping or abduction any person and threatening to kill or injure such person or doing "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 organization or any other person to do or abstain from doing any act" amounts to terrorist act. Phrases such as 'by any other means of whatever means,' 'any other act,' 'likely to threaten' are open to interpretation, thereby making them prone to misuse. Similarly, the Act fails to define 'terrorist organization' and what constitutes 'membership of a terrorist organization,' and confers power on the government to declare any organization as a 'terrorist organization.'

The Bombay High Court, in the case of *Ms. Jyoti Babasaheb Chorge v. State Of Maharashtra,* interpreted Section 20 and Section 38 of the Act in light of freedoms and rights, and considered that, "inasmuch as the said clause imposes restrictions on the aforesaid freedoms and rights, the interpretation thereof has to be in consonance with the constitutional values and principles, and the concept of membership contemplated by the said section, is required to be interpreted in the light of the aforesaid freedoms and rights." In the instant case, the appellants were charged under various sections of UAPA, 1967, for being members of Communist Party of India, which is a banned organization, and were later discharged for under Section 38 of the Act.

Furthermore, the provisions are a threat to freedom of speech and expression, freedom of assembly and the freedom to form associations or unions. Under Article 19(1)(a), the citizens have been guaranteed the right to freedom of speech and expression, subject to certain "reasonable restrictions", which are found in Article 19(2). Similarly, freedom of assembly and freedom to form associations or unions are subject to Article 19(3) and Article 19(4) of the Constitution. These "reasonable restrictions" empower the government to curtail fundamental rights in the certain circumstances which may include security of State, the sovereignty and integrity of India, public order etc.

The Unlawful Activities (Prevention) Amendment Act, 2019 received presidential assent on 8th August, 2019 and introduced stricter provisions to an already severe and extreme legislation. The amendment empowers the government to designate an individual as a terrorist without any proof and the burden of proving innocence also falls on the individual. According to Section 35(2), the government can designate an organization or an individual as terrorist "only if it

 [ISSN 2581-5369]

believes that it is involved in terrorism." Under Section 35(3), an organization or an individual shall be deemed to be involved in terrorism, if it "commits or participates in acts of terrorism, or prepares for terrorism, or promotes or encourages terrorism, or is otherwise involved in terrorism." This confers excessive and arbitrary powers on the government and can be used to silence dissenters and activists, which could cause chilling effect on free speech, thereby violating Article 19(a) of the Constitution. The Amendment is also a threat to the right to reputation and dignity, which is an important facet of Article 21 of the Constitution.

Labelling an individual as a 'terrorist' on a mere belief is unreasonable, unfair and violative of due process. This gives the government full discretion to designate an individual howsoever tenuous an "involvement" in terrorism as it desires, without needing to disclose reasons.[28] Furthermore, if the individual's name is de-notified subsequently, he may face lifelong humiliation and ostracization. Besides the power to declare an individual as a terrorist, the power to de-notify also rests with the government. The designated individual's only recourse is to appeal to the government, and then to the review committee if the government rejects the appeal application "within one month from the date of receipt of the order of such refusal by the applicant."

It was pointed out by the Supreme Court of India in the case of *Kartar Singh v. Union of India*[29] that, "it is the basic principle of legal jurisprudence that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. It is insisted or emphasized that laws should give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning."

According to the UN's special rapporteur on the promotion and protection of human rights while countering terrorism, "at the national level, the specificity of terrorist crimes is defined by the presence of three cumulative conditions - (i) the means used… (ii) the intent… and (iii) the aim, which is to further an underlying political or ideological goal."[30] The special rapporteur observed that without all three elements the prohibited act could not be considered a terrorist act because it fails to distinguish itself from an ordinary criminal act.[31]

[28] Nitika Khaitan, *The UAPA amendments: What it really means*, THE HINDU (Aug. 9, 2019, 7:24 PM) https://www.hindustantimes.com/analysis/the-uapa-amendments-what-it-really-means/story-9gOsDNk1syqxyYd0iFeHDN.html.
[29] *supra* note 8.
[30] Bureau of Police Research and Development, *The Indian Police Journal*, 61 TIPJ, Oct.-Dec. 2013, at 89.
[31] Ravi Nair, *Stop This Terror of Law*, NATIONAL CONFEDERATION OF HUMAN RIGHTS ORGANISATIONS (Feb. 6, 2009) https://www.nchro.org/index.php/2009/02/06/stop-this-terror-of-law-ravi-nair/.

 [ISSN 2581-5369]

(B) ENHANCED INVESTIGATIVE POWERS

Anti-terror laws in India have been prone to fall into the trap of diminishing the procedural rights of the accused as compared to the ordinary criminal code of the country, the Criminal Procedure Code of 1967. The National Investigation Agency was established in 2008, constituted by the National Investigations Agency Act, 2008.[32] The UAPA was added to its schedule, this meant that the central government had the power to usurp any investigation under the UAPA or any of its scheduled acts by the virtue of Section 6.[33] The Central government may also direct the NIA to take *suo moto* action to investigate a particular scheduled offence if it feels it should be investigated under the NIA act. This system erodes the federalist feature of our governance, which aims to bind the country into one political union constituting of several autonomous and distinct political and administrative units. Since policing is a component of the State List, the center's interference by the virtue of NIA in such matters and the Parliament's ability to make legislations which allow it constitute an agency for the *suo moto* investigation of offences draw serious questions of constitutional morality. The same question was put forth in *Pragyasingh Thakur v. State of Maharashtra, ATS, Mumbai, UoI and NIA.*[34] However, the contention was rejected on the by noting the entries in List-I and List-III simultaneously. This brings us to the next contention that the NIA, in its application, has been partial and has been used to protect political interests. For example, on June 25, 2016, Special Public Prosecutor Rohini Salian who was in charge of the 2008 Malegaon blast case allegedly carried out by Hindu extremists, was asked to ease on the investigation she was carrying out in the case.[35] This gives a clear indication that the NIA and UAPA could be and has been used selectively in order to protect political interests, while operating under the notion of protecting the interests of the nation.

The 2008 Amendment to the UAPA gives the law enforcement extraordinary powers to search, seizure and arrest. The provision allows "any officer of a Designated authority" to search any person or property, and seize any property or arrest any person where they have "reason to believe from personal knowledge or information given by any person and taken in writing … or from any document" or from anything that an offense is committed.[36] Despite the fact that the 2019 amendment to the UAPA has made it requisite to obtain prior permission of the Director General of Police or in case the NIA is conducting the investigation, the Director

[32] The National Investigations Agency Act, 2008, Act 34, Acts of Parliament, 2008 [hereinafter NIAA].
[33] NIAA, *supra* note 30, § 6.
[34] Pragyasingh Thakur v. State of Maharashtra, ATS, Mumbai, UoI and NIA (2011) 10 SCC 445.
[35] Rahi Gaikwad, *NIA told me to go soft in Malegaon 2008 blast case: Rohini Salian,* THE HINDU (Jun. 25, 2015, 4:18 PM) .
[36] UAPA, *supra* note 1, § 43A.

General of NIA before the seizure of any property that may be connected with terrorism,[37] the extraordinary powers provided to the security forces would be unlawful in accordance with the ordinary criminal code of the country, and the amendment works like a mere formality. Said powers are in blatant breach of Articles 19 and 21 of the Indian Constitution, and violate the Right to Privacy which was guaranteed by a nine-judge Supreme Court in the case of *Justice K.S. Puttaswamy (Retd.) v. Union of India*[38], which said, "Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian constitution…"

The UAPA makes it worse by adding a provision which allows authorities or security forces investigating an offence to compel information from third parties without the permission of the court. This gives the superintendent of police, the power to compel any agency, corporation, or "any other institution, establishment, organization or any individual" to furnish information which the officer has "reason to believe" will be relevant in the ongoing investigation.[39]

The Code of Criminal Procedure, 1973[40] makes it mandatory for the police to have "credible information" or "reasonable suspicion" before making an arrest without a warrant.[41] Similarly, search without a warrant is only authorized where the police officer has "reasonable grounds" to search in order to avoid "unreasonable delay."[42] The UAPA does not require any certainty to be established before carrying out search and seizure, as is discerned by the phrases, "reason to believe" and allowing such actions to be carried out on the basis of "personal knowledge." The difference in terminology might be slight, but it makes a huge procedural difference. This vague terminology coupled with subjective grounds puts the individuals booked under the act at great risk to be deprived of their personal liberty, privacy and dignity.

The International Covenant on Civil and Political Rights (ICCPR)[43] protects against unlawful and arbitrary interference with an individual's privacy and home.[44] Article 17 of the ICCPR requisites search and seizure to have been specifically allowed by a state authority empowered usually by a judicial authority.[45]

[37] UAPA, *supra* note 1, § 25(1).
[38]Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1.
[39] UAPA, *supra* note 1, § 43F.
[40] The Code of Criminal Procedure, 1973, Act 2, Acts of Parliament, 1973 [hereinafter CrPc].
[41] CrPc, § 41.
[42] CrPc, §§ 41, 165.
[43] International Covenant on Civil and Political Rights, 1966 (G.A. res. 2200A). [hereinafter known as ICCPR].
[44] ICCPR, *supra* note 41, article 17(1).
[45] ICCPR, *supra* note 41, article 17(2).

The UAPA's low threshold of civil rights allows the police of the investigative agency to inform the arrested person of the grounds of arrest "as soon as may be."[46] This is in contrast to the much more specific provision in the CrPc which requires the police to inform the arrested person "forthwith" of the "full particulars of the offence for which he/she is arrested."[47] This puts the arrested individual under immense mental duress and at an immense disadvantage to take appropriate action. This is likely to cause great harm to the arrested person's dignity and reputation since the fact that he is labelled a "terrorist" by the authorities is likely to get widespread media coverage bathed in sensationalism.

(C) UNREASONABLE DETENTION

The UAPA, by the virtue of its malevolent procedural rules, ensures that even if a person is eventually acquitted, he/she suffers due to the procedural demands. Under the CrPc, the police require the permission of the magistrate to keep the custody of the arrested person for more than 24 hours without being charged.[48] Police custody is only limited to the first 15 days of the arrest, after which a remand must be granted by the magistrate, which is based on reasonable grounds. This process ensures that the arrested person's deprivation of liberty does not go without scrutiny and the court can make sure that the investigation is actually being carried out. Moreover, the CrPc limits the time for which the accused can be kept in detention during the investigation. The police are required to complete their investigation and show ample evidence against the accused within a period of 60-90 (depending upon the gravity of the alleged offence) of the arrest, failure to meet which would make the accused entitled to bail.[49]

This process makes sure that the accused person is only reasonably kept in detention and the depravation of liberty is not arbitrary. In sharp contrast to this, the UAPA blows all limits out of the water by allowing the accused to be kept in detention for 180 days without charge.[50] The provision for custodial remand is extended from 15 to 30 days for police custody, which can be claimed by the police at any time during the 180 days of investigation, severely increasing the chances for custodial torture.[51] The court can permit the detention to last for 90 days without taking into merit any grounds;[52] the same can be extended to 180 days only on the grounds that the investigation has made some progress.[53] Such extended periods of incarceration, with a

[46] UAPA, *supra* note 1, § 43B.
[47] CrPc, § 50(1).
[48] CrPc, § 151(2).
[49] CrPc, § 167.
[50] UAPA, supra note 1, § 43D(2).
[51] Law Commission of India, *152nd Report on Custodial Crimes*, LCI, Jun., 1994, at 20.
[52] UAPA, supra note 1, § 43D(2).
[53] *Ibid.*

 [ISSN 2581-5369]

portion of them being in police custody, without the police or the investigating authorities having a prosecutable case puts a severe risk on the accused's personal liberties to be violated without reason.

India has a history of using long periods of pre-trial incarceration as a means of overtly keeping persons deemed to be associated with "terrorist organizations" under detention. Under TADA, with provisions eerily similar to the UAPA, the government made 76,000 arrests who allegedly threatened the sovereignty, security and territorial integrity of India.[54] Despite TADA being repealed in 2002, persons convicted under TADA are still incarcerated.

(D) UNCONSCIONABLE PRESUMPTION OF GUILT

The provision with regards to bail in the UAPA makes for a detestable reading. In the CrPc, exists a provision known as "anticipatory bail," which gives any accused a tool to counter any malicious attempt to prosecute him arbitrarily. This provision seeks to protect against wrongful arrest, in its anticipation.[55] The UAPA does away with this provision not only for alleged terrorist act but all acts considered terrorist activity under the UAPA, including attending meetings and protests, giving speeches, reciting poems, extending loans and predictably, conspiring to do any of these.

In the case of *State of Rajasthan, Jaipur v. Balchand*[56], the Supreme Court elaborated on the idea of presumption of guilt, and gave birth to the adage, "bail not jail." The basic idea behind this principle is that a person is innocent before his guilt is proven beyond reasonable doubt. Hence, an innocent person should not face incarceration for a crime he's not convicted for yet. This principle has a practical application in the sense that the accused should be released on bail if he/she does not pose a flight risk and is not in a position to tamper with evidence.

The UAPA completely flips this principle on its head, as bail for an alleged offence committed can be denied if the court finds "that there are reasonable grounds for believing that the accusation against such a person is *prima facie* true."[57] This puts the accused under a tremendous disadvantage, as the prima facie case for the accused to even remotely or materially be involved in an activity deemed to be "terrorist" under the incredibly vague definition of the same under the UAPA is fairly easy to establish. Moreover, since the court is only required to consider police evidence, it makes it convenient for the police to hide, or tamper with details

[54] HUASSAIN ZAIDI, BLACK FRIDAY: THE TRUE STORY OF THE BOMBAY BOMB BLASTS 34 (Penguin Books, India, 2002).
[55] CrPc, § 438.
[56] State of Rajasthan, Jaipur v. Balchand AIR 1977 SC 2447.
[57] UAPA, *supra* note 1, § 43D(5).

which might make their case weak. Since the accused is disallowed from bringing in material to counter the allegations, which is allowed in ordinary bail hearings[58], it puts him/her at a severe disadvantage to prove his/her innocence.

This provision under the UAPA makes the denial of bail a fairly easy process, making room for unreasonable custodial detention, prosecutorial and police abuse of law. This undermines Indian criminal law and International law as well. The ICCPR says, "it shall not be a general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial."[59]

(E) Special Courts

The National Investigation Agency Act of 2008 gives power to the NIA for the creation of special courts to try scheduled offences. This includes all offences under the UAPA. According to India's judicial structure, the High Courts of each state exercise supervision over the trial courts within their jurisdiction.[60] However, special courts created by the NIA to try scheduled offences evade such oversight as lines between the executive and judiciary are blurred. The power to appoint judges and determine the jurisdiction for such courts rests with the executive, indicating a likely occurrence of bias. India's record indicates that governments tend to choose judges for special courts who would favor the prosecution.[61]

The provision to allow for special courts gets worse as draconic procedural barriers are put in place to attack the rights of the accused. POTA empowered special courts to hold proceedings "at any place" when it is "expedient or desirable" to do so. The NIAA borrows the same draconic provision, which allows trials to be held at a detention facility, which would undoubtedly put the accused under immense pressure and mental duress.[62] Special courts have to pass no metric of transparency as they are allowed to, if they "so desire," to hold closed proceedings or *in camera* proceedings.[63] Moreover, the accused case can be tried in his absence as well, if the NIA "thinks fit," which is in stark contrast and unlawful according to the CrPc.[64]

Human Rights Watch is completely against the notion of trying security crimes in special courts and the creation of them for this purpose. It has observed, "National security courts are frequently authorized by law to conduct trials in a manner that restricts the rights of defendants

[58] Mayank Singhvi v. State (2019) Crl.MA 656.
[59] ICCPR, *supra* note 41, article 9(3).
[60] INDIA CONSTI. art. 226.
[61] Pradyumna K. Tripathi, *Preventive Detention: The Indian Experience*, 9 TAJCL 219, 230 (1960).
[62] NIAA, *supra* note 30, § 102.
[63] NIAA, *supra* note 30, § 17(1).
[64] NIAA, supra note 30, § 16 (5); POTA, supra note 11, §§ 29(5), 30.

beyond what is permissible under international human rights law."[65] Despite the fact that the functioning of an NIAA Special Court is yet to be seen, the record of various countries over the years has evidenced that the creation of such special courts and trying of offences perceived as a threat to national security more often than not take away the very intrinsic civil rights of the accused and are procedurally biased in the favor of the prosecution.

IV. CONCLUSION

The Home Minister, Mr. Amit Shah, while introducing the legislation in Lok Sabha had remarked that, "And then there are those who attempt to plant terrorist literature and terrorist theory in the minds of the young. Guns do not give rise to terrorists. The root of terrorism is the propaganda that is done to spread it, the frenzy that is spread." While replying to a Member of Parliament, the Home Minister had also disclosed the intention of introducing the amendments by stating that, "those who work for the Urban Maoists will not be spared." The Bill was passed in the Lok Sabha amid high drama and also received President's assent on 8th August, 2019, thus making it an Act.

Over the years, the Unlawful Activities (Prevention) Act, 2019, has been constantly misused by various governments in the name of fighting terrorism. The law which gives unparalleled powers to the State, is being used by the current government, arbitrarily and irresponsibly, to silence dissent and target ideological opponents. Most recently, the government has used these powers to arrest and intimidate civil society members, academicians, activists, students, journalists etc. who are against the Citizenship Amendment Act, 2019.

Akhil Gogoi, Krishak Mukti Sangram Samiti (KMSS)- a peasant organization in Assam, was first detained in 2017, which was held illegal by the High Court. He was targeted again when he organized anti-CAA protests in Assam. Amidst the anti-CAA outcry, he was arrested on December, 2019, from Jorhat as "preventive measure", and was booked by NIA under the infamous UAPA. But he was granted bail on March 17 by the NIA Special Judge as the NIA had failed to charge sheet him within the mandatory period of 90 days. After a series of arrests and bails, on May 29, the NIA filed the charge sheet against Gogoi and three of his colleagues for sedition and terror activities.[66] He has been granted bail in three cases related to anti-CAA protests, except two NIA cases. To add to the misery, The Krishak Mukti Sangram Samiti leader has also been tested positive for Covid-19.

[65] Human Rights Watch, *supra* note 16.
[66] Draksha Sharma, *Akhil Gogoi Gets Bail In 3 Cases Lodged By Assam Police*, NDTV (Jul. 16, 2020, 8:28 PM), https://www.ndtv.com/india-news/akhil-gogoi-gets-bail-in-3-cases-lodged-by-assam-police-2264071.

 [ISSN 2581-5369]

On the eve of his arrest, Anand Teltumbde penned down his thoughts in form of an open letter, wherein he said, "The jingoist nation and nationalism have got weaponized by the political class to destroy dissent and polarize people. The mass frenzy has accomplished complete de-rationalization and inversion of meanings where destroyers of the nation become *desh bhakts* and selfless servers of the people become *deshdrohi*s." Teltumbde, belongs to league of progressive intellectuals and had a stellar career as a writer and civil right activists, who tirelessly advocated the rights of the oppressed. On 14 April, 2020, he had turned himself to the investigation agencies on court orders, in connection with the Bhima Koregaon case. Anand, along with 10 ten other activists, was booked under the UAPA, 1967, for instigating caste violence at a Dalit rally in Bhima Koregaon village in the western state of Maharashtra on 1 January 2018.[67]

Gautam Navlakha, who was also booked by the government under UAPA for allegedly fomenting violence in the Bhima Koregaon case, is a human rights activist and a journalist.

Another journalist who was recently booked under UAPA is a 26-year-old Kashmiri freelance female photojournalist, Masrat Zahra. She was booked under the Section 13 of UAPA and Section 505 of the IPC for her allegedly "anti-national" social media posts. While section 13 of UAPA lays down punishment for unlawful activities, Section 505 of the IPC refers to statements conducing public mischief. The Srinagar Cyber Police said that it "received information through 'reliable sources' that one Facebook user namely 'Masrat Zahra' is uploading anti-national posts with criminal intention."[68] Although the police didn't specify which posts of Zahra's were unlawful, police officials cited a picture post she tweeted from her 2019 article in *The New Humanitarian*.[69]

The list of people booked under UAPA is not limited to activists and journalists; students, too, have been implicated under the draconian legislation for protesting against the Citizenship Amendment Act, 2019. In April, 2020, former JNU student Umar Khalid, along with two Jamia Milia students- Safoora Zargar and Meeran Haider, were booked for sedition, promoting enmity between different groups and inciting violence in the north-east area of the capital in February, 2020 during the anti-CAA protests. According to the FIR, the communal violence was a 'premeditated conspiracy' which was allegedly hatched by Khalid and two others.[70]

[67] British Broadcasting Corporation (BBC), *Anand Teltumbde: Cards and letters for jailed India scholar as he turns 70*, BBC (Jul. 15, 2020), https://www.bbc.com/news/world-asia-india-53400138.
[68] Azaan Javaid, *I'm speechless, says J&K journalist Masrat Zahra after being booked for 'anti-national' posts,* THEPRINT (Apr. 20, 2020, 5:03 PM), https://theprint.in/india/im-speechless-says-jk-journalist-masrat-zahra-after-being-booked-for-anti-national-posts/405195/.
[69] *Id.*
[70] NHS Bureau, *Those booked by police under draconian laws: Umar Khalid*, NATIONAL HERALD (May. 17, 2020,

While Umar Khalid was not arrested, Safoora Zargar was arrested on April 10. She was granted bail three days later but was again arrested on the basis of another FIR. A Delhi Court, while dismissing her bail plea, had commented, "W*hen you choose to play with embers, you cannot blame the wind to have carried the spark a bit too far and spread the fire. The acts and inflammatory speeches of the co-conspirators are admissible u/s 10 of the Indian Evidence even against the applicant/accused.*" Zargar was later granted a conditional bail by the Delhi High Court on humanitarian grounds on 23rd June, 2020.

The unfortunate series of accusations and arrests by the government has led to violation of basic human rights and fundamental rights. The prisoner or detenu has all the fundamental rights and other legal rights available to a free person, save those which are incapable of enjoyment by reason of incarceration.[71] Article 21 of the Constitution guarantees the right to life and personal liberty to the citizens of India, of which right to reputation is a facet. Being condemned as "anti-national" or "terrorist" on baseless allegations hampers the reputation of an individual in the society. In addition to that, right to health and right to speedy trials are also a part of right to life. A classic example of violation of the right is that of senior poet Varavara Rao. The poet's family had filed a writ petition seeking urgent on medical grounds. It was only after much public outrage that Varavara Rao was taken to hospital by the jail authorities. Similarly, in Safoora Zargar's case, an expectant mother was granted bail after being denied several times.

Recently, the United Nations, in a statement issued from Geneva, urged immediate release of "human rights defenders who have been arrested for protesting against changes to the nation's citizenship laws."[72] Human Rights Watch has also urged the Indian government to uphold the rights to freedom of expression, association, and peaceful assembly and called for the repeal of the Unlawful Activities (Prevention) Act as well as of the colonial-era sedition law.[73] The use of UAPA by the government was also called out by Amnesty International where Avinash Kumar, Amnesty India's executive director, said that, "Amnesty International India believes that these new cases under UAPA, along with previous arrests of eleven other activists in relation to the Bhima Koregaon incident, are politically motivated actions that are aimed at

8:00 PM), https://www.nationalheraldindia.com/india/those-booked-by-police-under-draconian-laws-umar-khalid.

[71] Francis Coralie Mullin v. Administrator, Union Territory of Delhi, AIR 1981 SC 746.

[72] Mary Lawlor et al, *UN experts urge India to release protest leaders*, UNITED NATIONS HUMAN RIGHTS COUNCIL (UNHRC) (Jun. 26, 2020), https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26002&LangID=E.

[73] Human Rights Watch (HRW), *India: Activists Detained for Peaceful Dissent: Counterterrorism Law Politicized in Bhima Koregaon Case*, HRW (Apr. 15, 2020, 11:20 PM EDT), https://www.hrw.org/news/2020/04/15/india-activists-detained-peaceful-dissent.

silencing those seeking state accountability." The organization has also previously falsified the government's claim of the Amendment Act of 2019 in consonance with international standards.[74]

Justice Jackson in the case of *American Communications Association v. Douds*[75] had observed that, "thought control is a copyright of totalitarianism, and we have no claim to it. It is not the function of our Government to keep the citizen from falling into error; it is the function of the citizen to keep the Government from falling into error. We could justify any censorship only when the censors are better shielded against error than the censored."

Intolerance is as much dangerous to democracy as to the person himself[76], and India boasts of being the world's largest democracy. But has certainly failed to abide by the principles of one; free speech being the lifeblood of it. The Hon'ble Supreme Court of India in one of its earliest cases on freedom of press had remarked, "…freedom of speech and of the press lay at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular government, is possible."[77] However, the legislature has time and again introduced and amended enactments that aim that curbing free speech. The reckless slapping of sections on activists, human rights defenders, journalists and students not only suggests intention of the government to silence those who dare to speak but also causes "chilling effect" on speech of general public. In case we attempt to stifle criticism of the institutions whether it be the legislature, the executive or the judiciary or other bodies of the State, we shall become a police State instead of a democracy and this the founding fathers never expected this country to be.[78]

*****

[74] Amnesty International India, *Central Government Claims On New UAPA Bill Misleading*, AMNESTY INTERNATIONAL (Jul. 19, 2019, 2:10 PM), https://amnesty.org.in/news-update/central-government-claims-on-new-uapa-bill-misleading/.
[75] American Communications Association v. Douds, 94 L.Ed. 925, 1026 (1950).
[76] S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574.
[77] Romesh Thappar v. State of Madras, (1950) SCR 594.
[78] Deepak Gupta, *The Right to Dissent is the Most Important Right Granted by the Constitution: Justice Gupta*, THE WIRE (Feb. 24, 2020), https://thewire.in/law/right-to-dissent-constitution-justice-deepak-gupta.

 [ISSN 2581-5369]