
Unlawful Activities (Prevention) Act, 1967: A Double Edged Sword

Smt. Sheela Ganesh*

Ms. Nikita Susan Eapen**

ABSTRACT

Terrorism has over the past few decades emerged as the prime problem to the peace, security, unity, integrity and the stability of any nation. After the repeal of the Prevention of Terrorism Act, 2002 in the year 2005, the Unlawful Activities (Prevention) Act, 1967 (UAPA) had been the mainstay of the Indian anti-terror regime. UAPA derives its authority from Article 245 of the Indian Constitution, specifically Entry I of List I, which pertains to the “Defence of India”. It has attempted to balance counter-terrorism and human rights which have always been at paradox. The law enforcement agencies are vested with exorbitant power to tackle the exigencies of terror attacks. The irony is that the first and foremost impact of such measures is felt by law-abiding citizens on account of the inroads they make into individual liberties. The present paper makes reference to the 154th, 173rd and 262nd Law Commission Reports which have emphasized the importance of a legislation to fight terrorism. It also deals with regard to how UAPA violates the golden triangle of the Constitution by naming individuals as terrorists, length trial, curtailing the right to dissent, presumption of offence, stringent bail provisions, vague provisions and mere belief of the government is sufficient to prosecute. Reference to International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights and Human Rights Convention has been made with regard to analyse the conformity of the Act with human rights. Judicial remarks have also been encompassed within this Article.

Keywords: Law Commission, Human Rights, Dissent, Sanction, Terrorism.

* Assistant Professor, JSS Law College (Autonomous), Mysuru & Research Scholar, Department of Studies in Law, University of Mysore, Mysuru, Karnataka, India, Email: sheela_ganesh@yahoo.com; Mobile: 9483501606.

** Student, JSS Law College (Autonomous), Mysuru, Karnataka, India. Email: nikitasusaneapen28@gmail.com, Mobile: 8073441122.

I) INTRODUCTION

Terrorism has existed for centuries, with religion frequently serving as a potent motivator for extremist activities. The widespread nature of this menace makes it a formidable challenge for any nation to combat. The UN Global Counter-Terrorism Strategy, as well as other relevant resolutions of the General Assembly and the Security Council, have taken significant steps to reduce terrorism by demanding that member states take action against designated terrorist organizations, freeze their assets, prevent their entry and transit through their borders, and stop the supply of arms and ammunition. However, the controversial issue remains whether India's anti-terror laws violate the basic rights of its citizens and contravene established criminal justice norms.

II) SCOPE AND EVOLUNTIONARY TREND OF ANTI- TERROR LAWS IN INDIA

In the past, acts of terrorism were considered to be “law and order” issues and were dealt with under existing laws, such as the Indian Penal Code, Criminal Procedure Code, and Unlawful Activities Prevention Act. However, as terrorist activities became more widespread and involved external actors, it was realized that specific legislation was needed to address these issues. As a result, the Terrorists and Disruptive Activities (Prevention) Act, 1987 (TADA) was enacted after the assassination of Prime Minister Indira Gandhi. TADA allowed the government to detain suspects without charge for up to a year, and it assumed that confessions made to police officers were admissible under certain conditions. The harsh bail conditions and detention provisions of TADA were criticized and it was repealed in 1995, although some of its provisions were transferred to the Criminal Law Amendment Bill. However, the bill was not implemented.

In order to boost counter-terrorism efforts, the Indian Parliament passed the Prevention of Terrorism Act, 2002 (POTA) in 2002. The Act was passed as a result of multiple terrorist attacks occurring in India, particularly in retaliation for the attack on the Parliament in December, 2001. Even though its constitutional validity was upheld in *PUCL v. Union of India*¹, POTA, like TADA, was criticised for its laws regarding incarceration without a trial and an overuse of confessions gained through torture. In 2004, it was subsequently repealed.

¹ (2004) 9 SCC 580; 2005 SCC (Cri) 1905

After the shocking Mumbai attacks on 26/11, the Unlawful Activities Prevention Act of 1967 was revised in 2008 to include acts of terrorism. The amended act broadened the scope of what constituted a terrorist act, including the potential for an attack by any means. Additionally, the revised act allowed for pre-trial detention and granted expanded powers to law enforcement. The 2013 amendment further addressed the transnational aspect of terrorism and included economic offenses. The latest amendment to the act in 2019 was enacted to assist the National Investigation Agency in prosecuting cases related to terrorism while also ensuring alignment with international obligations.

India's anti-terror laws have evolved towards preventive rather than punitive measures. TADA, POTA, and UAPA bear similarity in this regard. However, the conviction rate for these laws has been abysmal, with TADA at 1.11%, POTA at 1.2%, and now UAPA following in their footsteps with a low conviction rate of 2.8%.² Nevertheless, the poor conviction rate suggests that there is a need to re-examine the efficacy of these laws and address underlying issues to ensure justice is served.

POTA and TADA had a sunset clause of two and three years respectively but the UAPA is devoid of one or the provisions for mandatory periodic review, the repeal of it will depend on mass movement. Section 43D (2) of UAPA and Section 20 of TADA are also in consonance where in it allows detention without a charge sheet for up to 180 days.

III) INTERNATIONAL EFFORTS

The UN General Assembly under a unique global instrument 'The UN Global Counter Terrorism Strategy' adopted measures to counter terrorism for which the Member States are obligated to provide cooperation at all levels.

The United Nations Security Council through its various resolutions has made an effort to curb terrorism-

- The **1267 Committee** was established by resolution 1267 (1999) for the purpose of overseeing the implementation of sanctions on Taliban-controlled Afghanistan for its support of Usama bin Laden.

² National Crime Records Bureau's (NCRB) annual reports during 2015-2020

- **United Nations Security Council Resolution 1373**, at the backdrop of September 11, 2001 attack on the United States. The resolution established the Counter-Terrorism Committee, which comprises all 15 members of the Security Council, to monitor implementation of the resolution. Further, the Counter-Terrorism Committee Executive Directorate (CTED) was formed during March 2004 to assist the Committee. CTED's main role is to enhance the Committee's ability to monitor the implementation of resolution 1373 (2001), raise the counter-terrorism capacities of Member States by facilitating the provision of technical assistance, and promote closer cooperation and coordination with international, regional and sub-regional organizations.
- The resolution 1624 adopted in September 2005In September 2005 also any incitement pertaining to terrorist act.³
- Article 4 of **International Covenant on Civil and Political Rights** states that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.
- International law enforcement agencies such as Interpol and the International Criminal Police Organization are working to coordinate between countries and control terrorism.

IV) CONSTITUTIONAL BACKGROUND

The Unlawful Activities Prevention Act, 1967 (UAPA) derives its authority from Article 245 of the Indian Constitution, specifically Entry I of List I, which pertains to the "Defence of India." The terrorist are waging a domestic war against the sovereignty of their respective nations or against a race or community causing disorganisation in the society. Resultantly, the

³ Security Council Resolution 1624 (2005) further calls on all States, to deny safe haven to any persons with respect to whom there is credible and relevant information that they have been guilty of such conduct; prevent those guilty of the conduct in paragraph 1 (a) from entering their territory; continue international efforts to enhance dialogue and broaden understanding among civilizations and to prevent the subversion of educational, cultural, and religious institutions by terrorists and their supporters; ensure that any measures taken to implement this resolution comply with all of their obligations under international law, in particular international human rights law, refugee law and humanitarian law.

security and integrity of the countries concerned are at peril and the law and order in many countries disrupted.⁴

Therefore, the Unlawful Activities (Prevention) Act is an anti-terrorism law that was enacted by the Indian Parliament in 1967. It was amended in 2004, 2008, 2012, and 2019 to strengthen the law and make it more effective in combating terrorism. UAPA is an anti-terrorism law that restricts certain fundamental rights in the interest of national security and public order. The constitutional background of UAPA is rooted in Article 19. The freedom of speech and expression, the freedom to assemble peaceably and without arms and the freedom to form associations or unions which is encompassed in this Article can be taken away for a proper governmental objective⁵ and restrictions enshrined in Article 19(2).⁶ The law allows the government to ban organizations that are involved in terrorist activities and to prosecute individuals who support or are associated with such organizations. The UAPA provides for the creation of a list of banned organizations, which are prohibited from operating in India.

V) INSTANCES OF TERRORISM

Terrorism is a global phenomenon and its tremors are widely felt. It threatens the sovereignty and integrity of a country. Some of the instances of terrorism in India and across the globe are-

- Attacks of September 11, 2001 - Terrorists connected to the al-Qaeda organisation hijacked four commercial airliners and crashed them into the Pentagon in Virginia and the World Trade Centre in New York City, killing approximately 3,000 people.
- Bombings in London: In July 2005, a group of terrorists detonated bombs on multiple buses and trains as part of their attack on London's public transportation resulting in death of 22 and hundreds of people injured.
- 2008 Mumbai attacks: In November 2008, a number of targets in Mumbai, India, including the Taj Mahal Palace Hotel and the Chhatrapati Shivaji Terminal railway

⁴ Kartar Singh v. State of Punjab, (1994) 3 SCC 569

⁵ Unni Krishnan J.P v. State of A.P., 1993 AIR SCW 863

⁶ N.K. Bajpai v. Union of India, (2012) 4 SCC 653

station, were attacked by a coordinated gang of terrorists. 166 people lost their lives in the attacks, while hundreds more were injured.

- Attacks in Paris: The terrorist assault occurred in Paris, France in November 2015 in which the Bataclan theatre and the Stade de France stadium were among the targets. 130 people lost their lives in the attacks, and hundreds more were injured.
- 2019 Pulwama attack: At Pulwama, Jammu & Kashmir, a suicide bomber struck a convoy of cars transporting Indian paramilitary forces in February 2019, killing 40 soldiers.
- Easter bombings in Sri Lanka: In April 2019, a coordinated string of bombings that targeted hotels and churches across Sri Lanka left more than 250 people dead and hundreds more injured.
- Khorasan Province Kabul planned a missile attack and mass shooting took on March 6, 2020. Around 60 individuals suffered injuries, including over 60 fatalities, and both assailants were killed following a confrontation.
- 2023 Bombing of a mosque in Peshawar: On January 30, 2023, a suicide bomber blew himself up inside a mosque in the Police Lines area during afternoon prayers. 101 civilians lost their lives as a result, while more than 200 were wounded.

VI) LAW COMMISSION AND COMMITTEE REPORTS

Over the years, multiple suggestions and observations about terrorism have been issued by the Law Commission of India and various committees. They are as follows-

- The **154th Law Commission Report** on “The Code of Criminal Procedure, 1973 (Act No. 2 Of 1974) (Vol. I)”, 1996 recommended special procedures for terrorist crimes, stressing the need for a separate investigational strategy.
- The **173rd Law Commission Report** on “Prevention of Terrorism Bill, 2000” emphasized that a legislation to fight terrorism is today a necessity in India, while also acknowledging that the Indian Penal Code was not designed to combat organized crime.



-
- The **262nd Law Commission Report** on “Death Penalty”, 2015 recommended abolishing the death penalty for all crimes except for terrorism-related offenses, and emphasized the need for legal representation, fair trial, and protection against arbitrary detention.
 - The **Second Administrative Reforms Commission, 2007** in its 8th report recommended the Government to constitute Review Committees for periodical scrutiny of the cases registered and also to review the prevailing situation in the areas notified as ones affected by terrorist activities.
 - The **Rajya Sabha Parliamentary Standing Committee** on Home Affairs in its 205th report, on “Border Security: Capacity Building and Institutions” noted that the Committee was dissatisfied with the progress of the investigation and the National Investigation Agency (NIA) and urged for swift completion of the remaining cases.
 - The **Committee on Reforms of Criminal Justice System**, under the chairmanship of Justice V.S. Malimath, conducted a thorough analysis of the existing anti-terrorism laws and recommended the enactment of a central law to deal with organized crime, federal crimes, and terrorism, despite crime being a State subject. Additionally, the committee suggested the establishment of a Department of Criminal Justice to evaluate procedural and criminal law and a Presidential Commission to periodically review the functioning of the Criminal Justice System.
 - **National Human Rights Commission, Minorities Commission, International Human Rights Organisations** like Amnesty International and International Natural of Jurists have noted that the anti-terror law suppresses-
 - i. Innocent persons being proceeded against or arrested under the Act;
 - ii. Minorities being targeted under the Act;
 - iii. Bail was not easily obtainable as the provisions of Bill in the Act were illusory;
and
 - iv. Burden of proof was on the accused.

VII) UAPA AMENDMENTS AND ITS IMPLICATIONS

The main intention of any statute is to serve the ends of justice and to curtail rampant evil in society. Given this, it but obvious that there comes a time when the law needs to be looked at from the eyes of a “bad man”, i.e., the person who is before the Court as an accused or a wrongdoer as propounded by the American Jurist Oliver Wendell Holmes.⁷ Hence, main objective of enacting the Unlawful Activities Prevention Act, is to provide for the more effective prevention of certain unlawful activities of individuals and associations, and for dealing with terrorist activities.

7.1. Violation of established Constitutional Rights

The main aim of UAPA is to curb terrorism while ensuring it does not violate any constitutional mandate, but certain provision of UAPA has blatantly violated the golden triangle of the constitution.

In *K.S Puttaswamy v. Union of India*⁸, to check arbitrariness three fold classification has been given-

- i. Presence of a law
- ii. Legitimate aim
- iii. Proportionality, guarantees a fair relationship between the objects and the ways pursued to attain them

The Act is ambiguous and not proportional in the following ways-

- **Section 15 of UAPA** states “*with intent to strike terror or likely to strike terror in people*”, this Act fails to define the word ‘terror’. Since terror in simple words means to induce fear, its overbroad analysis can result to a malicious act. Strict interpretation of penal statutes is the rule and an undefined term with a wide scope of analysis will serve to against the legislative intent.
- The 2019 amendments reveals certain inbuilt mechanisms and rights. They are-

⁷Dr. N.V. Paranjape, “Studies In Jurisprudence & Legal Theory”, Central Law Agency, 9th Edition, 2019

⁸ (2017) 10 SCC 1

- a) Right to make an application to the Central Government for removal of names from the fourth schedule.⁹
- b) Right to have the application decided in 45 days.¹⁰
- c) Right to apply for review if the application is rejected, to the Review Committee.¹¹
- d) Right to ensure Review Committee acts in consonance with the principles of judicial review.¹²

Keeping these rights in mind, the government has classified “individual” terrorists into two categories- The first category includes individual whom the Central Government ‘believes’ to be involved in terrorist activities and have their names published in the Fourth Schedule. The second category includes individuals whose trial charges of being involved in terrorism has been “sanctioned” by the government but names are not published in the Fourth Schedule.¹³

Now, the aforementioned rights are available only to the first category of individuals while the second category of individuals are devoid of this, thus has to suffer a lengthy trial process. It is to ponder about the intelligible differentia while distinguishing grouped persons or goods from the left out ones of the group.¹⁴ The want of clarity and no guidelines for the same has led to a peril violating Article 14 and 21 of the constitution. This has also given rise to a situation where the government has given itself discretion to either publish or not publish names in the Fourth Schedule.

The definition of “unlawful activities” prohibits speech by threat of punishment and by casting a ‘wide net’. The ‘overbroad’ language and vagueness of this section also has a tendency to bring within its fold mere criticism of the government policies or actions of the day without any effect on security, sovereignty and integrity of India. It is an established

⁹ Unlawful Activities Prevention Act, 1967, S.35

¹⁰ Procedure for Admission and Disposal of Application Rules, 2004, Rule 2

¹¹ Unlawful Activities Prevention Act, 1967, S.36(4)

¹² Unlawful Activities Prevention Act, 1967, S.36(5)

¹³ Unlawful Activities Prevention Act, 1967, S.45

¹⁴ State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75

principle of law that ‘vagueness’ may invalidate criminal law¹⁵, and its indiscriminate use by authorities against those critical of the government has made it impossible to secure bail under Section 45(d) (5).

It was noted in *Sakal Papers v. UOI* that, “The freedom of speech and expression of opinion is of paramount importance under a democratic Constitution”¹⁶ and it is hallmark of democracy¹⁷, but these sections brings a curtailment of Article 19(1)(a).¹⁸ It is to be noted that the freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution can only be limited under the reasonable restriction by virtue of Article 19(2). However, the criticism of the Government and its policies or actions cannot be constituted as a fair ground to restrict the freedom of speech and expression.¹⁹

Section 2(1)(o) of UAPA can also find it’s resemblance it the age old archaic sedition law whose wide misuse has led to its hold in the Vombatkere judgement²⁰ but sedition only restricts hate speech but UAPA goes a step beyond by restricting all forms of speech. It is to wonder if certain provisions of UAPA have been enacted to stifle non-government conformists.

The iconic case of *Romila Thappar v. Union of India* is ideal to demonstrate the misuse of this law against dissenting voices. Three of the arrested people have previously been convicted for charges principally under the Penal Code of 1860, the Arms Act of 1959, and the UAPA Act of 1967. The court ruled that Arun Ferreira was acquitted in all eleven cases brought against him. Vernon Gonsalves was found not guilty in seventeen of the nineteen cases filed against him. Varavara Rao was acquitted in all twenty cases in which he was prosecuted.²¹

Terrorism creates a fragile situation in the country hence restrictions have been imposed as no rights can be absolute. Article 19(2) imposes restrictions for matters relating to the security of the state, friendly relations with foreign states, public order, decency and morality, contempt of court, defamation, incitement to an offence and sovereignty and integrity of

¹⁵ Shreyah Singhal v. Union of India, (2015) 5 SCC 1

¹⁶ AIR 1962 SC 305

¹⁷ Maqbool Fida Hussain v. Rajkumar Pandey, (2008) Cri L.J. 4107 (SC)

¹⁸ S. Khusboo v. Kanniamal, (2010) 5 SCC 600

¹⁹ S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574

²⁰ S.G. Vombatkere v. Union of India, (2022) 7 SCC 433

²¹ (2018) 10 SCC 753

India.²² Now, the line between permissible and impermissible forms is dissent is impossible to draw without referral to the values and social standards of the time.

7.2. Discretion to Name Individuals as Terrorists

The discretion to name individuals as terrorists has international law backing from which UAPA came into existence. The 1267 Committee was established by resolution 1267 (1999) for the purpose of overseeing the implementation of sanctions on Taliban-controlled Afghanistan for its support of Usama bin Laden. Subsequent resolutions provide sanctions including freezing of assets, travel ban etc. The Committee is supported by the United Nations Secretariat and the Analytical Support and Sanctions Implementation Monitoring Team.

The inclusion of names on the list is by-

- i. Alleged activities;
- ii. Supporting evidences;
- iii. Supporting evidence or documents that can be supplied; and
- iv. The details of any connection with a currently listed individual or entity.

UNHCR Statement on Article 1F of the 1951 Convention, commenting on the listing and delisting process had highlighted that although listing individuals and organizations for their involvement in terrorist activities might be a reasonable effort against terrorism, such procedures in order to comply with human rights must be fair and transparent as well as be based on clear criteria, uniform standard of evidence, independent review mechanism.

Article 4 of the *International Covenant on Civil and Political Rights of 1967* provides that nations may deviate from their commitment to protect peoples' civil and political rights only in cases of extreme emergency. In India, however, the central government has failed to demonstrate the urgency of departing from its main mission of providing civil and political rights to individuals. It has failed to meet the criteria of need in seizing anti-democratic

²²The Constitution of India, 1949

powers, like as labelling an individual as a terrorist and further classifying them into two types.

The recent amendments to UAPA alters Section 35(2) which enables the government to name an individual as terrorist only if it believes that such an individual is related to terrorism. This is irrational as there will be no F.I.R, no charge sheet filed, there will be no trial in a court and there is no conviction but merely because the government “believes” that a person is related to terrorism he will be named as a terrorist. This provision does not qualify the prerequisites of the golden triangle and puts immense danger on the rights of individuals thus is not “just, fair and reasonable”.

The criteria for labelling someone a terrorist are not well-defined, and there is no specified time frame for removing individuals from the list of terrorists. This means that unless action is taken by the individual or the government, the person could remain on the list indefinitely. In particular, if someone is convicted of unlawful activity, it is unclear when they will be removed from the list, unlike for unlawful organizations where a denotification period of five years is provided. This violates the principle of innocent until proven guilty and is contrary to the International Covenant on Civil and Political Rights of 1967. While Section 36 of the UAPA allows those labelled as terrorists to appeal, the process is difficult to implement. The reasons for arrest are not communicated to the individual, and there is no requirement for an oral hearing during the appeals process. It has been established by the courts that no arrest can be made because it is lawful for the police officer or the government to do so. The existence of the power of arrest is one thing and the justification for the exercise of such power is quite another.²³

The review committee under section 35 and 36 is required to apply judicial principles, no such standards are set for the authority granting sanction, thus reducing the independent review prior to grant of sanction to a mere administrative exercise, for which no yardstick are laid down. With 7 days given for this independent review it is a mere eye wash.

²³ Joginder Kumar v. State of UP, AIR 1994 SC 1349

7.3. Bail Not Jail

“*The basic rule is bail, not jail*” is a doctrine laid down by the Supreme Court of India in the landmark judgment of *State of Rajasthan vs. Balchand alias Baliya*²⁴. UAPA, however has made “jail, not bail” the rule.

Bail is considered to be an important facet under criminal jurisprudence but **Section 43D(2)** of the UAPA, 1967 increases the maximum length of incarceration for a person accused under this law to 180 days, as opposed to the 90-day statutory period allowed under Section 167 of the Criminal Procedure Code (CrPC).

Moreover, the proviso to sub-section (5) imposes a statutory duty on the court or judge not to release an accused booked for terrorist activities or terrorist organisations on bail if the court or judge determines, based on a review of the case diary or the report submitted by the police under section 173 of the Criminal Procedure Code.

In case of an individual whose name is not published in the Fourth Schedule, the mere accusation of having been involved in terrorism is sufficient to invoke Section 43D(5) and leads to denial of the individual's right to bail. Moreover UAPA is not a preventive detention law and there is no reason to deny a person the right to bail merely on the basis of an accusation.

The combined application of Section 43D sub-sections (2) and (5) makes it extremely difficult for anyone charged with terrorist acts and terror organisation to be released on bail. In light of this, the UAPA had evolved into the most formidable weapon in the government's arsenal for targeting dissenters and critics of the government at the time. The Supreme Court in *Union of India vs. K.A. Najeeb*²⁵ mentioned the rigorous bail provision under UAPA as another possible ground for the competent court to refuse bail. Recently the Karnataka High Court in *Muzammil Pasha v. National Investigating Agency*²⁶, has clarified the position of law on this aspect and have held that extending the time period for an investigation without hearing the accused person under the provisions of Section 43-D (2) is a gross violation of natural Justice, such an act is in grave contravention with the settled principles of law.

²⁴ 1977 AIR 2447

²⁵ (2021) 3 SCC 713

²⁶ 2021 SCC OnLine Kar 12688

Supreme Court in *State through C.B.I. v. Amar Mani Tripathi*, has observed the eight conditions to be followed for the grant of bail. However it is seen that Section 43D(5) is concerned, the existence of a prima facie case is all that is required to keep a person incarcerated without any consideration for the other 7 elements.

Thus indeterminate incarceration of the suspect and denial of bail is considered as an unjust law and prolonged incarceration of the suspect and if the same is to remain on a statute book, the person whose prolonged and indefinite incarceration is sought must be given every opportunity to challenge such incarceration, especially in accordance with abysmally low conviction rates. This action by the legislation definitely goes against the established norms of criminal justice.

7.4. Critical analysis with regard to certain Sections and Amendments of UAPA

→ **Section 37**

It's a citizen's constitutionally guaranteed right to stage a protest peacefully or express one's opinion responsibly. Giving details on the stringent UAPA, Union Minister of State for Home informed the Rajya Sabha, that as many as 4,690 people were arrested in different parts of the country under the anti-terror law in the past three years, out of which 149 persons have been convicted, as per government figures in 2020. A total of 35 people were convicted in 2018, 34 in 2019 and 80 in 2020, it is clear from this report²⁷ that the conviction is an outcome of an elaborate judicial process and is dependent on various factors, such as the duration of the trial, appraisal of evidence, examination of witnesses. The nature, scope and composition of the Review Committees have been defined under Section 37 of the Act which states that the Central Government can on the discharge of such review petitions, constitute a Review Committee with a maximum of up to three members, one being a chairperson for the committee with a prerequisite qualification of being a Judge of any High Court in India. The problem with an appeal under UAPA, 1967 is that firstly, it has tried well to remove the chances for the judiciary to interfere in the arrests of individuals, secondly, the composition of the Review Committee is arbitrary and the Government has absolute powers to appoint the members of the committee violating the principle of *Nemo Judex in Sua Causa* which also happens to be a Principle of Natural Justice as the qualification of the other two members is unknown which leaves the government with discretion to choose a person who is in their favour. Thirdly, the Committee is also not burdened to provide reason their verdicts.

²⁷ National Crime Records Bureau Reports, 2015-2020

→ **Section 18**

Sec. 18 of UAPA provides that-

“Whoever conspires or attempts to commit or advocates, abets, advises or incites, directs or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act shall be punishable with imprisonment which is not less than 5 years which may extend to imprisonment for life, and shall also be liable to fine.”

Since the specific commission of terrorist acts is covered in Sec. 15 and 16, it is clear that the scope of Sec. 18 covers the terrain of actions which are preparatory to or by way of incitement, abetment and conspiracy to commit a terrorist act. The offence of conspiracy is complete just with the “agreement” to commit the conspiracy and the “object” of the agreement itself need not have occurred. Such broad, sweeping and loosely worded provisions permit arbitrary use of its provision to rope in anyone the police want to implicate in any case. It is the corresponding provisions of “conspiracy” in TADA and POTA which were widely abused to arrest and implicate thousands of people who spent many years in jail. The dire situation eventually led to the Supreme Court formulating in *Shaheen Welfare Association v. Union of India & Ors*²⁸, a four-fold classification of TADA under trial prisoners. This was based on the specific role allegedly played by each person in the crime alleged against them so that only those classified to be ‘hard core’ alone were to be kept in jail as under trial and others could be released on bail.

Thus, the abuse of UAPA is symptomatic of the problems arising out of having such blurred and nebulous lines of defining something as serious as terror activity and the attendant law criminalizing it.

→ **Section 35(2)**

Right to Reputation is an intrinsic part of the fundamental right to life with dignity under Article 21 of the Constitution of India and terming/tagging an individual as ‘terrorist’ even before the commencement of trial or any application of judicial mind over it does not adhere to procedure established by law. The well-defined amplitude of Article 21 of the Constitution

²⁸ 1996 (2) SCC 616

includes the right to live with human dignity and to live a life which is free from exploitation. It also includes the right to reputation.

A petition filed by the *Association for Protection of Civil Rights (APCR)* contended that the new Section 35 allows the Centre to designate an individual as a terrorist and add his identity in Schedule 4 of the Act while earlier only organizations could be notified as terrorist organizations. The amendment does not specify the grounds for terming an individual as a terrorist and that “conferring of such discretionary, unfettered and unbound power upon the Central government is an antithesis to Article 14.”

In *Subramanian Swamy v. Union of India*²⁹, the court while deciding over the matter considered various landmark judgments including the *Gian Kaur v. State of Punjab*³⁰, *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others*³¹ to come to the peroration of inclusion of the right to reputation under Article 21.

The Court in *Sri Indra Das v. State of Assam*³² read down Section 10 of UAPA and Section 3(5) of TADA, both of which made mere membership of a banned organization, criminal. The Court held that a literal interpretation of these provisions would make them violative of Articles 19 and 21 of the Constitution. This was in line with the previous decision in *Arup Bhuyan's case*³³ where the Court had held that ‘mere membership of a banned organization will not make a person a criminal unless he resorts to violence or incites people to violence or creates public disorder by violence or incitement to violence’.

Therefore, proper constitutional is of utmost important when a person’s fundamental rights are at stake and the law enables preventive detention.

→ **Section 20 and Section 38**

In *Thwaha Fasal V. Union of India*³⁴ and *Union of India V. Allan Shuaib*, in these appeals, the main concern is with the offences punishable under Sections 20, 38 and 39 of the 1967 Act. The person committing an offence under Section 38 may be a member of a terrorist organization or he may not be a member. If the accused is a member of terrorist organization which indulges in terrorist act covered by Section 15, stringent offence under Section 20 may

²⁹(2016) 7 SCC 22

³⁰ (1996) 2 SCC 648

³¹ (1983) 1 SCC 124

³² (2011) 4 SCR 289

³³ *Ibid* at 19

³⁴2021 SCC OnLine SC 1000

be attracted. If the accused is associated with a terrorist organization, the offence punishable under Section 38 relating to membership of a terrorist organization is attracted only if he associates with terrorist organization or professes to be associated with a terrorist organization with intention to further its activities. The UAPA already insufficiently distinguished between the different offences of membership (Section 20), support, and association with banned terrorist organizations the Court in *Thwaha Fasal* has opened the doors to further confusion. In the long run, the Court's reading of the membership crimes in *Thwaha Fasal* might prove detrimental precisely because of how close it unwittingly brings these offences with that of conspiracy.

Section 20 and section 38 reads as follows:

Section 20: Punishment for being member of terrorist gang or organisation.—

Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.

Section 38: Offence relating to membership of a terrorist organisation.—

(1) A person, who associates himself, or professes to be associated, with a terrorist organization with intention to further its activities, commits an offence relating to membership of a terrorist organization:

Provided that this sub-section shall not apply where the person charged is able to prove—

(a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

There is an overlap between sections 20 and 38 of UAPA and it is unclear under what circumstances sections 20 or 38 are to be invoked. Both Section 20 and 38 provides punishment for being a member of terrorist organizations. There is no clear distinction which separates Section 20 from section 38. This results in unnecessary ambiguity and variations in punishments under both sections are without any rationale.

→ **Section 45**

As per Section 45 of the UAPA, no court can take action against offences under Chapters III, IV, and VI without prior sanction from the competent authority. The Supreme Court has held that if there is a want of a proper sanction, the designated court is forbidden from taking cognizance of any offence under the provisions of the act, and any proceeding before the court would be without jurisdiction. Recently, the Supreme Court stayed an order of the Bombay High Court discharging Professor G.N. Saibaba in an alleged Maoist links case under UAPA, as the High Court did not decide the case on merits but rather granted relief to the accused on purely procedural grounds (i.e., want of a valid sanction to prosecute under UAPA). The Apex Court seeks to examine whether an appellate court can discharge the accused on the ground that there did not exist a valid sanction to prosecute the accused under UAPA and therefore the prosecution conducted before the trial court is void ipso facto. It is submitted that if there is want of a valid sanction, the prosecution cannot be sustained, and the court cannot be termed a court of competent jurisdiction. Section 465 of Cr. P.C deals with curable defects in prosecution, but it cannot cure the defect in the grant of sanction when there is no valid sanction at all, and the court proceeds with taking cognizance anyway. The law around sanction and its effect on the prosecution is simple: if there exists a sanction to prosecute, the court can legally and validly take cognizance of the offences, however, the prosecution cannot be sustained if there is want of a valid sanction.

→ **Section 43E**

Presumption of innocence is a kind of restatement of the rule that is applied in criminal matters the public prosecutor has the burden of proving the guilt of the accused in accordance to be convicted of the crime of which he/she is charged. Section 43E of UAPA creates a strong presumption against the accused as mere possession of weapons is sufficient and the law does not consider any other intentions. This would deter any accused from proving that the unauthorized possession of weapons was unrelated to any terrorist activity.



The Supreme Court in the batch of petitions titled *Vijay Madanlal Chaudhry v. Union of India*³⁵, under the Prevention of Money Laundering Act, 2002 (PMLA) there is a presumption of guilt against the accused. Section 24 of PMLA, places the burden of proving their innocence accused was challenged as violating the right to life, liberty and fair procedure guaranteed by Articles 21 and 14 of the Constitution.

Based on the analysis provided, it can be concluded that the amendments made to the Unlawful Activities (Prevention) Act, 1967 (UAPA) are problematic and may violate certain fundamental rights guaranteed by the Constitution of India. The amendments, which include the expansion of the definition of terrorism and the power to designate individuals as terrorists, may lead to arbitrary and disproportionate use of state power against individuals, and may also undermine the principle of presumption of innocence. While the government may argue that these amendments are necessary for national security, it is important to ensure that they do not come at the cost of fundamental rights and the rule of law. Therefore, there is a need for a critical examination of the UAPA amendments and their implications for human rights and civil liberties in India.

VIII) UAPA: HUMAN RIGHTS CONCERN

It is important for the government to ensure that any law enacted to combat terrorism does not trample upon the fundamental rights of its citizens. The government must strike a balance between national security and individual rights, and ensure that any law is in line with international human rights standards.

A new age of terrorism has dawned upon us where acts of terrorism are no longer an unforeseen possibility. The major terrorist incidents in India include the 1993 Mumbai bombings, the 2001 Parliament attack, 2005 Ram Janmabhoomi attack in Ayodhya, 11 July 2006 Mumbai train bombings, the 26 November 2008 Mumbai attacks and the Pulwama attack. These close to panic reactions could have serious implications for international and human rights law, as well as humanitarian law. It is essential to distinguish derogations from limitations to human rights, and gross violations of human rights are seen as a necessary effect of most counter-terrorism measures.

³⁵ (2022) SCC OnLine SC 929

The Human Rights law takes its birth from the United Nations Charter forms the basis of modern international human rights law identifying the respect for human rights and fundamental freedoms as one of the prerequisites for stability and peace.

Article 3 of the **Human Rights Convention** places an absolute bar on subjecting someone to torture or inhuman or degrading treatment and there is no right to detain a suspected terrorist without trial. Article 5 of the Human Rights Convention provides that “no one shall be deprived of his liberty, save in certain specified circumstances, the most material being lawful detention after conviction by a competent court”. This has been violated under Section 43D of UAPA, where there is no trial and a lengthy trial period especially for individuals whom the government sanction under Section 45 of UAPA.

International Covenant on Civil and Political Rights, 1967 states that no derogation is possible for Articles-

- i. Right to life (Art. 6)
- ii. Prohibition on torture, cruel, inhuman or degrading treatment or punishment (Art. 7)
- iii. Prohibition on slavery and servitude (Art. 8)
- iv. Prohibition on imprisonment for contractual obligation (Art. 11)
- v. Prohibition on retrospective criminal punishments (Art. 15)
- vi. Right to recognition as a person before the law (Art. 16)
- vii. Right to freedom of thought, conscience and religion (Art. 18)

The recent amendments made to the Unlawful Activities Prevention Act (UAPA) have raised serious human rights concerns under the aforementioned conditions. The provision that allows the government to designate individuals as terrorists without a trial or due process is a blatant violation of the right to a fair trial and the presumption of innocence. It also enables the government to target dissenting voices and restrict freedom of expression, which is a fundamental right guaranteed by the Constitution.

The provision that allows the government to seize property without a court order is also a violation of the right to property. The UAPA amendments have been criticized by human rights activists and organizations for their potential to be misused and abused. The use of UAPA against activists, journalists, and peaceful protestors has been on the rise, leading to a chilling effect on free speech and assembly.



Terrorism and human rights are two concepts that are often in tension with each other. On the one hand, terrorism poses a significant threat to human rights, such as the right to life, liberty, and security of person, as well as the right to freedom of expression, assembly, and association. On the other hand, counter-terrorism measures taken by states in response to terrorism can also pose a threat to human rights if they are not implemented in accordance with international human rights law. The challenge is to find the right balance between protecting individuals from terrorist attacks and safeguarding their human rights. The international community must work together to ensure that counter-terrorism measures are effective and proportionate while upholding human rights standards.

IX) JUDICIAL REMARK

The Unlawful Activities (Prevention) Act aims at preventing unlawful activities and associations in India. Over the years, there have been several judicial decisions on terrorism. Some of the notable judicial decisions are-

→ *Kartar Singh v. State of Punjab*³⁶, the Supreme Court upheld the constitutional validity of Terrorist and Disruptive Activities Act.

According to the Supreme Court, the Acts fell within the purview of "Defence of India" and were within the purview of Parliament's legislative authority. The Court also maintained the legality of a number of measures, such as the Central Government's authority to designate a region as a "terrorist impacted area," Sections 3 and 4 of the TADA Act's obligation, and Section 8 of the TADA Act. The Court, however, struck down Section 22 of the TADA Act as it violated the fair and reasonable procedure under Article 21 of the Indian Constitution.

The Court suggested several guidelines to the government, such as ensuring that Judges nominated to Designated Courts have a proper tenure of service, and allowing the court to decide on the identification, names, and addresses of witnesses before the initiation of trial. The High Court has the authority to consider bail applications under Article 226 of the Indian Constitution.

³⁶ (1994) 3 SCC 569

- In *Sri Indra Das v. State of Assam*³⁷ and *Arup Bhuyan v. State of Assam*³⁸ where the Court had held that ‘mere membership of a banned organisation will not make a person a criminal unless he resorts to violence or incites violence.
- In *National Investigation Agency v Zahoor Amhad Shah Watali*³⁹, it was noted that the Bench cannot venture into the merits and demerits of the case while assessing bail. Only on circumstances where the accused can prove that there does not exist a “*prima facie*” case against him, bail can be granted
- The Supreme Court in *Union of India vs. K.A. Najeeb*⁴⁰ mentioned the rigorous bail provision under UAPA and established that the presence of statutory restrictions like Section 43-D (5) of UAPA will melt down when the trial does not take place within reasonable time and even after undergoing incarceration of a substantial duration. Such an approach would safeguard against the possibility of provisions like Section 43-D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.⁴¹

The law continues to be a subject of debate and controversy, with many civil society groups and human rights activists calling for its repeal, citing concerns over its misuse and abuse by the state authorities. Hence, the constitutional validity of UAPA has been challenged in the ongoing case of *Sajal Awasthi v. Union of India*⁴².

X) CONCLUSION

Terrorism is a widespread menace that is bigger than the nation itself and veils across the spans of the Earth. Collecting effort of the government as well as the citizens is the need of the hour to curb terrorism. The anti-terrorism laws in India were created as a response to a specific event, with the Unlawful Activities (Prevention) Act, 1967 being one of them. The Act was amended in 2019, which led to concerns about its constitutionality and adherence to international human rights standards. It was contended that the Act violated the rights guaranteed to individuals under the Indian Constitution through Article 14, 19, and 21, as well as contravening international conventions such as the International Covenant on Civil

³⁷ (2011) 4 SCR 289

³⁸ (2011) 3 SCC 377

³⁹ (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383

⁴⁰ (2021) 3 SCC 713

⁴¹ (2021) 3 SCC 713

⁴² 14 WP (C) 1076/2019

and Political Rights and the Universal Declaration of Human Rights. From the above discussion we arrive to a conclusion that though UAPA enactment is considered to be an efficient tool to unlawful activities including terrorism, it has to be invoked judiciously with utmost care and caution.

References:

Books Referred

1. D.D. Basu, "Constitution of India", Lexis Nexis, Nagpur, 14th Edn. (2009).
2. Dr. N.V. Paranjape, "Studies In Jurisprudence & Legal Theory", Central Law Agency, 9th Edition, 2019
3. Glanville Williams, "The Proof Of Guilt", Stevens & Sons Ltd., London, 3rd Ed., 1963
4. H.M. Seervai, "Constitutional Law of India", Universal Law Publication, 25th Edn. (Rep 2012).
5. Jain M.P., "Indian Constitutional Law", Wadhwa And Company, Nagpur, 5th Edn. (Rep. 2005).
6. Ujjwal Kumar Singh, "The State, Democracy And Anti-Terror Laws In India", Sage Publications India Pvt Ltd, 2007
7. V.N. Shukla, "Constitution of India", Eastern Book Company, 12th Edn. (2013).
8. Vijay Kumar Dewan, "Laws Relating To Terrorists" Capital Law House, 4th Revised Edn, 1992

Dictionaries and Law Lexicons

1. Black Henry Campbell, Black's Law Dictionary 6th Ed., 1990.

Statutes and Rules Referred

1. Criminal Procedure Code, 1973
2. Indian Evidence Act, 1872
3. Indian Penal Code, 1860
4. The Constitution of India, 1950.
5. Unlawful Activities (Prevention) Amendment Act, 2019.

Articles Referred

1. Prajjwal Tyagi And Ishita Yadav, "The Spirit Of Democracy And Rule Of Law In India: An Analysis Of The UAPA & NIA Amendment Bills (2019) With Context To Misuse Of Power Under The Garb Of Anti-Terror Legislations," ILR (2020) 235

COMMITTEE REPORTS

1. 173rd The Law Commission Report On "Prevention Of Terrorism Bill, 2000"
2. 177th Law Commission Report on the Law Relating To Arrest (2001).
3. Second Administrative Reforms Commission, Fifth Report Titled 'Public Order', June 2007

4. Second Administrative Reforms Commission, Eighth Report Titled 'Combatting Terrorism: Protecting By Righteousness, June 2008
5. Dr. Justice V.S. Malimath Committee Report On Reforms Of Criminal Justice System, 2003

LIST OF WEBSITES REFERRED

- <http://www.cdjournal.com>
- <http://www.ebc-india.com>
- <http://www.livelaw.com>
- www.lexisnexisadvance.com
- www.manupatrafast.com
- www.sconline.com