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“Dharma is to protect the Needy”

Research Article on

**UNSCRAMBLING THE UNLAWFUL ACTIVITIES
(PREVENTION) AMENDMENT ACT, 2019:**

A TOOL AGAINST TERRORISM OR A POLITICAL FAÇADE

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ABSTRACT

The largest democracy of world is facing an outright violation of fundamental rights of people through obtrusive state violence. Unlawful Activities (Prevention) Act, 1967, an Indian law aimed at curbing terrorism has due to its draconian procedures become an instrument to curb fundamental rights. Over the years it has been amended several times for effective implementation, the latest on August 8, 2019. Democracy is about active recognition of rights of people, and right to speech and expression is one of the major rights guaranteed to the citizens of India and it is the very letter and spirit of our Indian Constitution. Depriving citizens through arbitrary authoritarian legislations to express dissent stands against the idea of a democratic sovereign. The Act not only questions the fundamental right to associate but also weakens the distinction between political dissent and criminal activity by questioning opposing voices and permits the government to ban political Organisations without providing a substantial reason. Due to which people opposing ideologies of government are designated as criminals. This act provides a broad spectrum to the Central government to delegate organisations and individuals as terrorist organizations and terrorist, respectively. However, the question the essay raises is whether we as citizens of the largest democracy of the world should subject ourselves to vague and draconian laws which infringe our fundamental right to life and decimate dissent for curbing the evil of terrorism and whether we should remain mute spectators to the detention of thousands without a fair procedure or trial. This essay begins with an introduction on the implementation and evolution of this act. Then we proceed with a detailed legal analysis of the violation of the various fundamental rights (Article 21, Article 19, and Article 14) and Principles caused by this stringent act. In the final section we summarize and suggest reforms.

INTRODUCTION

As we write this essay, thousands of people across the country have been detained under the Unlawful Activities (Prevention) Act, 1967¹ for their alleged involvement in terrorist activities which disrupt the sovereignty of India. The Indian legislature has often used national security as a plausible cause to make extraordinary laws and award the state excess power. The UAPA Act is regarded as the corner stone legislation of India to curb terrorism as it criminalizes unlawful activities and terrorist acts. In this essay we will be looking at several provisions of this act which due to vague phraseology and draconian procedures can be misused by the State to curb fundamental rights of citizens.

In 2019, 1226 UAPA cases were filed, a 33% increase since 2016. However the conviction rate was an abysmal 29.2%.² Many eminent people including poets, students and human rights activist have been arrested under the garb of controlling terrorism. Among those arrested are JNU alumnus Umar Khalid, Safoora Zargar a research scholar at Jamia Millia University, who was three months pregnant at the time of her arrest, alleged to be a key conspirator in the Delhi riots by Delhi police. Father Stan Swamy, 83-year-old, Tribal rights activist accused in the case of violence at Bhima-Koregaon in January 2018. Activists such as Gaur Chakraborty³, former spokesperson of West Bengal State committee of the Communist Party of India, was charged under UAPA and acquitted after 7 years because of inability of prosecution to substantiate the charges brought against him. Thirumurugan Gandhi⁴, Indian human rights activist and Geo-Political Commentator was charged for sedition case for his criticism of corporate influence in a Facebook video. He was kept in solidarity confinement where he was prevented from meeting his family and prevented from answering calls of nature.

The constitution enshrines within itself humanitarian treatment of even prisoners and UAPA denies it to those merely arrested under suspicion. Under unclear definition of unlawful activity, UAPA often surrounds a wide range of non-violent political activity and suppress

¹ Unlawful Activities (Prevention) Act, 1967(Act 37 of 1967).

² Niranjan Sahoo and Jibran Khan, 'UAPA and the growing crisis of judicial credibility in India'(Observer Research Foundation, 21 November 2020)<www.orfonline.org/expert-speak/uapa-growing-crisis-judicial-credibility-india>accessed 3 January 2021.

³'Maoist leader Gour Chakraborty acquitted of all charges' (Press Trust of India, 19 July 2016) <www.business-standard.com/article/pti-stories/maoist-leader-gour-chakraborty-acquitted-of-all-charges116071901681_1.html> accessed 12 January 2021.

⁴Tamizharasan, 'UAPA on Thirumurugan Gandhi for expressing Solidarity to Palestinian Struggle' (Human Rights, 24 August 2018) <<https://countercurrents.org/2018/08/uapa-on-thirumurugan-gandhi-for-expressing-solidarity-to-palestinian-struggle/>> accessed 12 January 2021.

contrary views, dissenting ideological or political perspectives. Absence of a chargesheet in most cases of arrests creates ambiguity with respect to the charges charged against the accused.

The roots of the Unlawful Acts (Prevention) dates to 1908 under British India, where the concept of unlawful assembly was introduced for the first time through the Criminal Law Amendment Act.⁵ The UAPA was first passed in 1967 on the recommendations of the National Integration Council. The law came in the background of the 1962 Sino-Indian War and 1965 Indo- Pak War and in response to secessionist demands made by regional groups such as the Dravida Munnetra Kazhagam⁶ after which the government in 1963 introduced reasonable restrictions on fundamental rights through the 16th constitutional amendment⁷ on the recommendation of National Integration and Regionalization Committee.⁸

The first major change was introduced in 2004 when the Central Government performed a sleight of hand by incorporating most of the repealed POTA⁹ provisions which included definitions of

- i) Unlawful activity
- ii) Terrorist act (Section 15) and terrorist organisation [Section 2(m)]
- iii) Chapters of punishment and terrorist activities
- iv) Forfeiture of proceeds of terrorism

This amendment gave a new definition of 'terrorist gang' [Section 2(l)] which empowered authorities to investigate and arrest a group of people who are involved in unlawful activities.¹⁰

⁵ Anushka Singh, 'Criminalizing Dissent: Consequences of UAPA' (2009) 44(4) Economic and Political Weekly <www.jstor.org/stable/40278825> accessed 11 January 2021.

⁶Naorem Anuja, 'The Unlawful Activities (Prevention)Amendment Act' (Reader's Digest, 29 April 2020) <www.readersdigest.in/odds-and-ends/story-quickipedia-the-unlawful-activities-prevention-amendment-act-125599>accessed 24 December 2020.

⁷Abhimanyu Chauhan and Vasudha Singh, 'Unlawful Activities (Prevention) Act: A Rose By Any Other Name' (Awaaz-The Blog, 2 August 2020) <www.lasclc.in/2020/08/02/unlawful-activities-prevention-act-a-rose-by-any-other-name> accessed 10 January 2021.

⁸ 'A brief analysis of anti-terror of legislation (UAPA)' (All India Legal Forum, 5 October 2020) <<https://allindialegalforum.wordpress.com/2020/10/05/a-brief-analysis-of-anti-terror-of-legislation-uapa/>> accessed 20 December 2020.

⁹The Prevention of Terrorism Act, 2002 (Act 15 of 2002).

While TADA¹¹ and POTA were repealed after strong judicial rebukes to the government, the successive governments at the Centre have enlarged the scope of this once moribund law (the UAPA) to cover the key features of these repealed acts.¹² Thus UAPA, 1967 acts as an omnibus preventive detention law.

The 2008 amendment¹³ following the Mumbai terror attacks extended the time of custody to 180 days without a chargesheet. The 2012 amendment criminalizing the raising of funds from ‘legitimate and illegitimate sources’ was in cognizance with the obligation of the Financial Action Taskforce, an inter-governmental body responsible for setting global standards against money laundering and terrorist financing. In 2019¹⁴, the Parliament carried out amendments to the Act. The most significant change brought about by the Amendment was alteration of Section 35¹⁵ which gave the Central Government the power to notify an individual as a ‘terrorist’ under Schedule IV¹⁶ of the Act which was earlier restricted to organisations.

LEGAL BASIS OF THE ACT

Violation of Article 21, The Indian Constitution,1950.

The Unlawful Activities (Prevention) Amendment Act, 2019 (UAPA, 2019)¹⁷ has substantially modified Chapter VI of Unlawful Activities (Prevention) Act, 1967(UAPA, 1967).¹⁸Section 35 of the UAPA, 1967 authorized categorization of only Organisations as “*Terrorist Organisations*.” However, after the 2019 amendment this power of categorization has been extended to include individuals as well. Under the new section the Central Government is vested with the powers to categorize *any individual as “terrorist”* and add name of such a person in Schedule 4 of the impugned Act. However, the accused has little

¹⁰Ghanisht, ‘Everything you need to know about the Unlawful Activities (Prevention) Amendment Act,1967’(Ipleaders)<<https://blog.ipleaders.in/everything-you-need-to-know-about-the-unlawful-activities-prevention-amendment-act-1967/>> accessed 26 December 2020.

¹¹Terrorist and Disruptive Activities (Prevention) Act, 1987(Act 28 of 1987).

¹² Niranjan Sahoo and Jibran Khan, ‘UAPA and the growing crisis of judicial credibility in India’(Observer Research Foundation, 21 November 2020)<www.orfonline.org/expert-speak/uapa-growing-crisis-judicial-credibility-india/> accessed 3 January 2021.

¹³The Unlawful Activities (Prevention) Act, (Act 35 of 2008).

¹⁴The Unlawful Activities (Prevention) Act, (Act 28 of 2019).

¹⁵The Unlawful Activities (Prevention) Act, (Act 28 of 2019).

¹⁶The Unlawful Activities (Prevention) Act, 1967 (Act 37 Of 1967).

¹⁷The Unlawful Activities (Prevention) Amendment Act, (Act 28 of 2019).

¹⁸The Unlawful Activities (Prevention) Act, (Act 37 of 1967).

legal recourse to expunge his record of such a label.¹⁹ It is necessary to draw a clear line of distinction between unilateral categorization of an organisation as terrorist organisation and unilateral categorization of an individual as a terrorist because the latter carries with itself far more prolonged consequences and repercussions for a person's liberty and to live freely with dignity.²⁰

Article 21²¹ of the Indian constitution grants the right to life and personal liberty. The right to reputation is an innate part of Article 21 of the Constitution and therefore tagging an individual as 'terrorist' even before commencement of trial, does not amount to following *procedure established by law*.²² It is averred that a person's reputation cannot be separated from his personality and therefore must not be allowed to be tarnished. Further reputation of a person is neither metaphysical nor a property in terms of mundane assets but an integral part of his sublime frame and a dent in it is rupture of a person's dignity, negates, and infringes fundamental values of citizenry right.²³

Article 21 also includes the right to live with freedom. The expression 'life' mentioned in the article provides a wider meaning to *inter alia* include within its ambit the right to live with dignity, basic needs and reputation. The Hon'ble Supreme Court in *Port of Bombay*²⁴ case upheld that an individual is entitled to preserve his reputation, and the authority under the law which traverses into the realm of personal reputation adversely affecting him must provide him with a chance to give his justification in the matter. However as per the amendment, the accused is to challenge the notification to the same Central government which has notified him as terrorist under section 36.²⁵ Whereupon an application is produced before a Review Committee (section 43²⁶) however, no provision for oral hearings has been provided at any stage.²⁷ This stands in violation of the two cardinal principles of natural justice, *Nemo Judex In Causa Sua and Audi Alteram Partem*. The act also does not specify any prescribed time

¹⁹Nivedhitha K, 'Analysis| UAPA: Updated anti-terror law is likely to weaken Indian democracy' (The Leaflet, 19August2019) <www.theleaflet.in/analysis-uapa-updated-anti-terror-law-is-likely-to-weaken-indian-democracy> accessed 1 January 2021.

²⁰*Sajal Awasthi v. Union of India*, W.P. (Criminal) 1076/2019.

²¹ The Constitution of India, 1950, Art. 21.

²²MayurSuresh, 'The slow erosion of fundamental rights' (SSRN,24 April2018) <<https://ssrn.com/abstract=3423999>>accessed 12 January 2021.

²³*Sajal Awasthi v. Union of India*, W.P. (Criminal) 1076/2019.

²⁴ *Board of Trustees of the Port of Bombay v. Dilip Kumar RaghavendranathNadkarni*, AIR 1983 SC 109.

²⁵The Unlawful Activities (Prevention) Act, (Act 37 of 1967).

²⁶The Unlawful Activities (Prevention) Act, (Act 35 of 2008).

²⁷Deepali Bhandari and DeekshaPokhriyal, 'The Continuing Threat of India's Unlawful Activities Prevention Act to Free Speech (Jurist 2 June 2020) <www.jurist.org/commentary/2020/06/bhandari-pokhriyal-uapa-free-speech> accessed 14 November 2020.

limit for the setting up of the Review committee once the application has been submitted; this enables a continued disregard for an individual's fundamental rights.²⁸

The Indian judiciary however, in the cases of Romesh Thapar²⁹ and Maneka Gandhi³⁰ in essence, collectively held that Fundamental rights of citizens can be curtailed only in the most extreme and in the rarest of the rarest circumstances, and that any statute, legislation or executive decision that aims towards curtailing said rights be held unconstitutional.³¹

Under Section 51A of the impugned act the Central Government can “*seize, freeze and prohibit the use of fund, financial assists or economic resource of individuals suspected to carry out terrorist activities under the definition of this act*”. The given provision has a very wide scope and hence can create situation where the individual's livelihood gets under threat.³²

The act under section 38³³ criminalizes any person who associates himself with a terrorist organisation with the intention to further its activities, commits an offence relating to membership of such an organisation. The apex court in Arup Bhuvan v. State of Assam³⁴ professed that a mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence and thereby disturbs public tranquillity and order. However, there is no definition of membership in the UAPA, which thereby allows investigating authorities to use even the flimsiest of excuses to book people as members of such organisations.³⁵ Prior to the amendment also the Centre was empowered under section 35 to categorize an organisation as terrorist organisation and to scrutinize individuals on the grounds of membership in such organisations under section 38, on providing support to such organisations under section 39 and for raising funds for the organisations under section 40.

²⁸‘Unlawful Activities (Prevention) Act, 1967: An anti-terror law’ (Finology Blog, 18 September 2020) <<https://blog.finology.in/protests-and-riots/unlawful-activities-prevention-act>> accessed 14 December 2020.

²⁹*Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

³⁰*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

³¹Arkadeep Pal, ‘An Analysis on the validity of the Unlawful Activities (Prevention) Act (2019) 1(1) International Journal of Law, Management and Humanities <www.manupatra.com> accessed 12 November 2020.

³² Nikita Khaitan, ‘New Act UAPA: Absolute power to State’ (Frontline 25 October 2019) <<https://frontline.thehindu.com/cover-story/article29618049.ece>> accessed 8 November 2020.

³³The Unlawful Activities (Prevention) Act, (Act 37 of 1967).

³⁴*Arup Bhuvan v. State of Assam*, (2011) 3 SCC 377.

³⁵Sarah Imran, ‘How effective is UAPA? Anatomy of an Anti-terrorism law against political dissenters’ (NewsClick, 14 September 2020) <www.newsclick.in/Effective-UAPA-Anatomy-Anti-Terrorism-Law-Used-Political-Dissenters> accessed 4 December 2020.

Therefore the 2019 amendment is unnecessary and acts as another loophole in an already draconian act.

VIOLETION OF ARTICLE 19, THE INDIAN CONSTITUTION,1950.

The Preamble to our constitution exhibits the ideals and aspirations of India that aims to shuffle liberty³⁶ and justice.³⁷ The government with the changing needs of the Indian society introduced reasonable restrictions to fundamental rights through amendments. This act de facto criminalises ideologies by criminalising the possession of any such unlawful organisation's literature. In such cases, even if there is absence of any violent act, these people are designated as offenders.³⁸ According to this, Crime is no longer commission or omission but thoughts that might influence others' thoughts. The freedom of speech and expression is of cardinal importance under democracy and must be preserved. Article 19(1)³⁹ promises freedom of speech and expression, freedom to assemble peacefully without arms, and freedom to form associations and unions.

This Act however absolves the government of its responsibility to provide a justification for any of the bans⁴⁰ thus violating the fundamental right of forming unions.

These freedoms are ways through which dissent can be expressed. Right to dissent is one of the most important rights of the citizens of India. Curtailing this right would be a major hindrance to our democracy and would be unconstitutional. If a person does not question the actions of the State, then it would not bring about change and no new paths would be discovered.

In the case of *Shreya Singhal v. Union of India*⁴¹, the court held that freedom of speech and expression is made up of three concepts, viz. discussion, advocacy, and incitement.

³⁶The Constitution of India, 1950, Preamble (Liberty of thought, expression, belief, faith, and worship).

³⁷The Constitution of India, 1950, Preamble (Justice, social, economic and political).

³⁸ Arun Ferreira and Vernon Gonsalves, 'First Years of Unreasonable Restrictions Under the Unlawful Activities Act' (The Wire, 9 March 2017) <<https://thewire.in/rights/uapa-anti-terrorism-laws>> accessed 11 January 2021.

³⁹ The Constitution of India, 1950, Art. 19(1).

⁴⁰ South Asia Human Rights Documentation Centre and Ravi Nair, 'The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes', 44(4) Economic and Political Weekly, <www.jstor.org/stable/40278825> accessed 29 December 2020.

⁴¹*Shreya Singhal v Union of India*, (2013) 12 SCC 73.

According to the court, until the third stage i.e., incitement is reached, Article 19(2)⁴² does not become applicable. This distinction has also been validated by *Arup Bhuyan v. State of Assam*,⁴³ wherein it was held that the expression, until it can be equated to ‘incitement’, remains mere ‘advocacy’ of a certain point of view and thus could not be truncated.

Right to disagree, right to have another point of view, inheres in every individual not only because of the constitution but because it is a human right to disagree. It is democracy that allows a citizen to dissent and express his views. UAPA thus violates constitutional credentials and democratic framework of our country.

THE ACT IS UNJUST, UNREASONABLE, AND MANIFESTLY ARBITRARY.

Article 14⁴⁴ of the constitution states that, the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. The doctrine of manifest arbitrariness, states that if a law is excessive or disproportionate in nature, the same is manifestly arbitrary and thus conflicts with the right to equality.

The 2019 amendment to UAPA, 1967 is unjust, unreasonable, and manifestly arbitrary. The amendment is disproportionate and holds no rational nexus between the objectives and means adopted to meet the demand is inconclusive on the purpose achieved by designating an individual as terrorist. Under Chapter VI⁴⁵ of the given act without even providing a just and efficacious remedy to challenge his notification. Under section 35(3)⁴⁶ of the Act there is no mention of when an individual is deemed to have ‘committed’, ‘prepares’, ‘promotes’ or ‘otherwise involved in terrorism. Therefore, the given section suffers from vice of vagueness. Section 35 does not specify the stage at which an individual can be designated as a ‘terrorist’, whether the Central Government would be empowered to do so at the stage of registration of FIR, or whether power can be exercised only upon an individual’s conviction in a case related to terrorism.⁴⁷ Therefore, designating an individual as terrorist on a mere belief of the Government is arbitrary and excessive. Under chapter IV of this act, the physical element required to establish that an individual or organization is engaging in ‘terrorist’ activities is

⁴²The Constitution of India, 1950, Art. 19(2).

⁴³*Arup Bhuyan v. State of Assam*, (2011) 3SCC 377.

⁴⁴The Constitution of India, 1950, Art.14.

⁴⁵ The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

⁴⁶The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

⁴⁷ArkadeepPal, ‘An Analysis on the validity of the Unlawful Activities (Prevention) Act (2019) 1(1) International Journal of Law, Management and Humanities <www.manupatra.com> accessed 12 November 2020.

making use of bombs, dynamites, other explosive or inflammable substances, or by *any other means of whatever nature*, which is likely to cause harm to the population.⁴⁸

The phrase any other means of whatever nature suffers from vagueness which can be arbitrarily used. Though terrorism has not been under the Act, Section 15⁴⁹ of the Act defines ‘terrorist act’ and includes an act that is ‘*likely to strike terror in people*’ this phraseology gives unbridled power to the Government to scrutinize actions of Individuals without actual commission of the offence.⁵⁰

The act has constituted a significantly lower requirement to establish mens rea or guilty mind in relation to a terrorist activity as is defined under the act. To establish mens rea under this act, the government only must establish that the individual or organisation is ‘*likely*’ to strike terror in the people.⁵¹

Section 2(o)⁵² of the Act defines ‘unlawful activity’. Due to equivocal phrasing, it can curtail peaceful ideas and actions that have no proclivity disturbance of public order.⁵³ Further, sub section (iii) of section 2(o) which include “any action which causes or is intended to cause disaffection against India”, reiterates the offence of Section 124-A of the Indian Penal Code⁵⁴ relating sedition. However, section 2(o) is ambiguous on the difference between lawful activities and unlawful activities.⁵⁵

⁴⁸Ajay Kumar, ‘Unlawful Activities Act: India’s anti-terrorism law’s ambiguous nature gives unreasonable power to authorities’ (Firstpost 29 August 2018) <www.firstpost.com/india/unlawful-activities-act-indias-anti-terrorism-laws-ambiguous-nature-gives-unreasonable-power-to-authorities-5070151.html>accessed 10 December 2020.

⁴⁹The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 29 of 2004).

⁵⁰ Abhinav Shekri, ‘The UAPA amendment treats Indians as subjects of a colonial sovereign’(The Caravan 10 September 2019) <<https://caravanmagazine.in/law/the-uapa-amendment-treats-indians-as-subjects-of-a-colonial-sovereign>> accessed 7 January 2021.

⁵¹ Singh Anushka, ‘Criminalizing Dissent: Consequences of UAPA’ (2012) *Economic and Political Weekly*, vol 47, no.38, pp.14-18. JSTOR, www.jstor.org/stable/41720156.

⁵²The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

⁵³Ghanisht, ‘Everything you need to know about the Unlawful Activities (Prevention) Amendment Act,1967’(Ipleaders)<<https://blog.ipleaders.in/everything-you-need-to-know-about-the-unlawful-activities-prevention-amendment-act-1967/>> accessed 26 December 2020.

⁵⁴The Indian Penal Code Act, 1860.

⁵⁵Vakasha Sachdev,‘What is the UAPA and why are arrests made under it problematic?’(The quint 14 September 2020) <www.thequint.com/amp/story/explainers/uapa-provisions-terrorist-organisation-membership-activists> accessed 27 November 2020.

The said amendment has been necessitated to comply with various Security Council resolutions. The question is whether domestic constitutional rights should be subverted for the sake of compliance with international obligations.⁵⁶

The Security Council⁵⁷ has called on States to ensure that counter-terrorism measures comply with international human rights law, refugee law and humanitarian law of its resolutions and reports(S/2005/800). In addition to general obligations of States to always act within human rights framework, it should be noted that the universal treatises on counter terrorism expressly require compliance with various aspects of human rights law. Thus, the draconian the act aimed at strengthening national security violates the human rights and security of the very citizens it seeks to protect.⁵⁸

The Hon'ble Supreme Court in the case of *ShayaraBano v. Union of India*⁵⁹ dealt with the scope of challenging validity of an enactment on grounds of being manifestly arbitrary and observed the following effects.

“Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary and this can be done to negate legislation as well under Article 14.”

The Hon'ble Supreme Court in *Kartar Singh v. State of Punjab*⁶⁰ held that such acts can be used to trap the innocent without a fair warning and delegate the power to the concerned authority on a subjective basis which is arbitrary and discriminatory. UAPA stands against this judicial precedent.

VIOLATION OF ARREST PROVISIONS

⁵⁶*Sajal Awasthi v. Union of India*, W.P. (Criminal) 1076/2019

⁵⁷ UNSC ‘Security Council, Briefed by Chairman of Counter-Terrorism Committee, Stresses Need for All States to Report on Anti-Terrorism Efforts’ (15 April 2002) Press Release SC/7361.

⁵⁸ ‘Human Rights, Terrorism and Counter-Terrorism’, (Office of the United Nations High Commissioner for human rights 10 June 2019) <www.un.org/sc/ctc/focus-areas/human-rights> accessed 25 December 2020.

⁵⁹*ShayaraBano v. Union of India*, AIR 2017 SCC 1(SC).

⁶⁰*Kartar Singh v. State of Punjab*, AIR 1961 SC 1787.

The Indian Constitution has, under Article 22⁶¹, allowed preventive detention under certain circumstances, governments at both the centre and state levels have enacted several legislations on different accounts⁶².

The 177th Law Commission Report on the Law of Arrest⁶³ elucidates an arrest and detention procedure that is not arbitrary and opaque in nature. The commission relies on the DK Basu⁶⁴Judgement and suggests methods by which Government can make the process fairer, reasonable, and justifiable.

Provisions in UAPA are stricter than the domestic criminal law. The police under sections 43A and 43B of the impugned act⁶⁵ is empowered to warrantless arrest, seize, and search an individual and those arrested can be incarcerated for a period of up to 180 days as opposed to 60 to 90 days under criminal law without a chargesheet being filled. This 180 –day period is exuberantly high when compared to international standards. The UK terrorism act permits a detention of 28 days, while United States law of arrest allows for a detention of 7 days.⁶⁶These arrests can be done based on personal knowledge of the police officers with prior approval only from the Director General of Police, which means without any validation from a superior judicial authority. This interferes with the privacy which is an integral part of Article 21⁶⁷ of the constitution⁶⁸ and contravenes the Article 17 of International Convention of Civil and Political Rights (ICCPR)⁶⁹, which protects against unlawful interference with a person's privacy.⁷⁰

Bail is a security, provided by the courts for the release of an accused person from custody. As per section 43D (5)⁷¹, bail cannot be granted to a person accused of being

⁶¹The Constitution of India, 1950, Art.22.

⁶²Sanchita Kadam, 'What does it take to secure bail under UAPA' (2020) CPJ <<https://cjp.org.in/what-does-it-take-to-secure-bail-under-uapa/>> accessed 11 January 2021.

⁶³Law Commission, *Law relating to arrest* (Law Com No 177,2001).

⁶⁴D K Basu v. State of West Bengal, AIR 1997 SC 610.

⁶⁵The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

⁶⁶Arkadeep Pal, 'An Analysis on the validity of the Unlawful Activities (Prevention) Act (2019) 1(1) International Journal of Law, Management and Humanities <www.manupatra.com> accessed 12 November 2020.

⁶⁷The Constitution of India, 1950.

⁶⁸K.S Puttaswamy v. Union of India, 2017 10 SCC 1.

⁶⁹International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁷⁰ 'Injustice in the Courts the Courts: Four Indian Laws That Should Have Never Existed' (Amnesty International India, 6 May 2020) <<https://amnesty.org.in/injustice-in-the-courts-four-indian-laws-that-should-have-never-existed>> accessed 5 December 2020.

⁷¹The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

involved in terrorist activities if the Public Prosecutor has not been given a reasonable opportunity of being heard.⁷² This Act⁷³ infringes the constitutional rights of the citizens and makes it exceedingly difficult to secure bail.

The concept of presumption of innocence is enshrined under Article 20⁷⁴ of the Indian Constitution. The National Human Rights commission, while speaking on the concept of presumption of innocence, opined that- “*Breaching fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times.*” However, this provision fails to maintain the balance between interest of accused and that of the State at the stage of bail application. Dr. Ambedkar noted in the Constituent Assembly’s resolve that “to ensure that ‘rule of law as a basic tenant of constituent democracy’ must be preserved at any costs.”⁷⁵

Once *prima facie* guilt is established, it creates a presumption in favour of the State that the accused is a risk to the society and might jeopardise the trial.⁷⁶ Reasonable suspicion against a person and delegation of guilt are two far apart poles.⁷⁷ By circumventing the judiciary and labelling an individual a terrorist, the act is violating one of the primary tenets of the criminal justice system.

Under the UAPA act, the period of detention can be increased after a period of 90 days, if the prosecutor of government proves that the given investigation is proceeding following which the judge would sign off a detention order for another 90 days. However, under the general rules the prosecutor must prove that there is a substantial risk in letting the person out of custody, not only that the investigation is proceeding.⁷⁸

⁷²Abhinav Gupta, ‘Critical appraisal of Bail law under §43d (5) of the Unlawful Activities (Prevention) Act, 1967’ (CCLS NLUJ, 28 July 2020) <<https://criminallawstudiesnluj.wordpress.com/2020/07/28/critical-appraisal-of-bail-law-under-%C2%A743d5-of-the-unlawful-activities-prevention-act-1967/>> accessed 11 January 2020.

⁷³ The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

⁷⁴ The Constitution of India, 1950.

⁷⁵CONSTITUENT ASSEMBLY DEBATES, Vol. VIII. 122-4 (quoting M.K. Gandhi, My Experiments with Truth, 224 (1993).

⁷⁶Abhinav Gupta, ‘Critical appraisal of Bail law under §43d (5) of the Unlawful Activities (Prevention) Act, 1967’ (CCLS NLUJ, 28 July 2020) <<https://criminallawstudiesnluj.wordpress.com/2020/07/28/critical-appraisal-of-bail-law-under-%C2%A743d5-of-the-unlawful-activities-prevention-act-1967/>> accessed 11 January 2020.

⁷⁷The Terror of Law, UAPA and the Myth of National Security” (2012) CRDO <<https://pudr.org/sites/default/files/2019-01/terror%20of%20law.pdf>> accessed 2 January 2021.

⁷⁸‘Back to the future’ (Human Rights Watch, 27 July 2010) <www.hrw.org/report/2010/07/27/back-future/indias-2008-counterterrorism-laws> accessed 10 December 2020.

In relation to the question of law of arrests and the powers of executive to implement the same, the Supreme Court in the landmark judgment of *Joginder Kumar v. State of UP*⁷⁹ held 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.'*⁸⁰

The UAPA act clearly violates the precedent as the government does not need to give substantial justification for arrest of individuals.⁸¹

Further section 43A of the act permits the police officer to inform the suspect of the charge against him '*as soon as maybe*'. This phrase thus provides no statutory time –limit hence the designated authority can abuse their power to detain an individual for a period which can be much above the time provided under normal criminal law.⁸²

The landmark judicial precedent laid down in *DK Basu v. state of West Bengal*⁸³ set forward the guidelines the police and the state ought to follow while arresting and detaining an individual.⁸⁴ The guidelines specify clauses regarding notification of the arrest to close friends and family of the accused, however UAPA fixes no such obligation on the designated authority to make any such notification. Thus, the UAPA also violates the precedent laid down in *Maneka Gandhi v. Union of India*⁸⁵ which laid down that – any procedural law must be just, fair, and reasonable. Any person guilty or not is to be provided with protection in procedures related to arrest and detention in a civilized society. Criminal justice system can't be subject to caprices of arbitrary acts.

INFRINGES THE FEDERAL STRUCTURE

⁷⁹*Joginder Kumar v. State of U.P*, AIR 1994 SC 1349.

⁸⁰B D, 'Judicial analysis of the Constitutional and Procedural Safeguards Against Arbitrary Arrest and Detention' (2013) 2 Christ University Law Journal.

⁸¹Arkadeep Pal, 'An Analysis on the validity of the Unlawful Activities (Prevention) Act' (2019) 1(1) International Journal of Law, Management and Humanities <www.manupatra.com> accessed 12 November 2020.

⁸²NitikaKhaitan, 'Why the harsh bail Provisions of UAPA have lived on' (Mint, 22 June 2020) <www.livemint.com/opinion/online-views/why-the-harsh-bail-provisions-of-uapa-have-lived-on-11592815371132.html> accessed 7 January 2021.

⁸³*D K Basu v. State of West Bengal*, AIR 1997 SC 610.

⁸⁴Arkadeep Pal, 'An Analysis on the validity of the Unlawful Activities (Prevention) Act (2019) 1(1) International Journal of Law, Management and Humanities <www.manupatra.com> accessed 12 November 2020.

⁸⁵*Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

The federal system defined in the Indian Constitution binds the country into a single union of various autonomous and distinct entities. The distribution of legislative powers between the Centre and the states is the core, of any federal system. The essential feature of the federal system is enumerated in three lists: The Union List, the State List and the Concurrent List that come under Seventh Schedule of the Constitution.⁸⁶ Encroaching upon the dominion of one another destabilizes the federal structure.

As per the Code of Criminal Procedure, the power to investigate into an offence is vested with the station house officer to whom the information regarding the commission of a cognisable offence is reported.

And, in either case, According to Section 154 and 155⁸⁷, whether it is a cognisable or non-cognisable case, if the information is given to such officer, it is his duty to enter it into a register prescribed by the state government.

Though Indian federal model has a powerful Centre, yet the autonomy of states is well recognised.⁸⁸ States are supreme within the spheres allotted to them and the Centre cannot tamper with their powers.⁸⁹

The decision of entrusting the investigation of offences to National Investigating Agency by the Central Government and not consulting the State Government is unfair and unreasonable. 'Police' and 'Public Order' are State subjects under the Seventh Schedule to the Constitution of India. Therefore, it is the primary duty of the State Governments to prevent and detect the crime and prosecute the criminals.⁹⁰

In *Pragya Singh Thakur v. State of Maharashtra*⁹¹, it was upheld that the parliament lacks competency to constitute an agency for the investigation of offences as policing stands in the State List of the Seventh Schedule to the Constitution. Thus the given amendment by circumventing the powers of the states stands against the essence of the doctrine of federalism.

⁸⁶ The Constitution of India, 1950.

⁸⁷ The Code of Criminal Procedure, 1973.

⁸⁸ *Why is opposition called Anti-national*, July 24 2019, available at <<https://youtu.be/W999kK5wsjg>> (Last visited on January 3 2021).

⁸⁹ *State of Rajasthan & Ors. Etc. Etc v. Union of India*, AIR 1977 SC 1361.

⁹⁰ Ministry of Home Affairs, 'Managing Law and Order in the Country' (Government of India, 17 May 2018) <www.mha.gov.in/commoncontent> accessed on 11 January 2021.

⁹¹ *Pragya Singh Thakur v. State of Maharashtra*, (2011) 10 SCC 445.

CONCLUSION –WHERE DO WE GO FROM HERE?

The UAPA act provides sweeping powers of arrest and detention to the state to designate individuals' as terrorist without due process. The act with its vague provisions and wide scope curbs the right to dissent and the right to life and personal liberty. Thereby it goes against the idea of India enshrined in the constitution which was written after three years of serious debate in the constituent assembly and which gave as a fundamental premise enshrined in it access to historically inalienable set of freedoms.⁹² These freedoms are not just embedded in the letter but in the spirit of the Indian Constitution and into the lived experience of India and India's people. The impugned act curtails the freedom to choose what kind of convictions you can resonate with and express in protests in the streets.

A democratic Country is not only about an elected electorate but also about the various independent organs employed to check its actions. But the most important aspect of any country is the rights it provides to its citizens. The right to dissent and express oneself is the core of any democratic country as dissent helps not only in keeping a check on the unbridled powers of the State and other machineries but also creates scope for restructuring these institutions according to changing needs of the country without falling foul of its constitutional credentials.

UAPA through its provisions does not only curb the rights of an individual alone but also puts a spanner in the evolution of India's civil society. The given act also questions federal structure which is a basic principle of the constitution, states have a certain degree of sovereignty and the act goes against the very grain of this principle. While the intention of the government to fight the evil of terrorism is noble, it is imperative to address the misuse of such laws and provide for adequate safeguards as the life and liberty of a person is endangered through the operation of this law.

Having identified the problem, the next step is to consider what can be done to redress this. This is a question to which we don't have any convincing answers. However we would suggest a few plausible steps.

⁹²Big Democracy Debate:2020: Shashi Tharoor Vs Swapan Dasgupta, December 25 2020, available at <https://youtu.be/gXJ_a27bptA> (Last visited on January 2 2020).

The review committee set forth to address the arrest of the individual must be an independent judicial body comprising of lawyers, jurists, and judges independent of the government. The person should be notified as terrorist only after the review of evidence has been done by the Court and therefore, we suggest section 35 of the amended Act be repealed. The bail provisions must be in conformity with that of normal criminal law and international standards and section 43D must be amended for the same. The definitions of unlawful activity, terrorist act, terrorist literature must be made specific as many times mere political dissent can be regarded unlawful. The procedure for extension of arrest without duly producing evidence must be repealed under section 43A and 43B and no detention should be allowed without cogent evidence against the accused. A human rights committee must transparently keep track of the treatment of the accused within detention and make sure the state adheres to its international humanitarian obligations and constitutional credentials.

Thus, effective statutory institutional mechanism must act independently and impartially to curb the evil of terrorism without the odious deprivation of human rights.

