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**FROM PREVENTION TO PERSECUTION: A CRITICAL ANALYSIS OF
THE UAPA'S COUNTER-TERRORISM MEASURES AND THEIR IMPACT
ON FUNDAMENTAL RIGHTS**

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ABSTRACT

Combating terrorism is one of the paramount functions of every nation in order to protect the sovereignty and territorial integrity of the nation. However, ensuring the same should not come at the expense of violating the human rights of the citizens. The question of whether anti-terrorism legislations such as the Unlawful Activities Prevention Act, 1967 serve exclusively the intended purpose of countering terrorism is often met with perplexity. Wide discretionary powers are given to the government to designate individuals/organisations as terrorists/ terrorist organisations. This, coupled with arbitrary powers to detain and prosecute the accused through such a legislation only adds weight to the question. For instance, by virtue of the 2019 Amendment, the Central government is empowered to notify any individual as a terrorist under Schedule 4 of the UAPA, 1967 as laid down in Section 35(2) of the Act. It is a popular contention that wanton use of such serious penal provisions would only trivialise them by extension, questioning its constitutionality. This paper primarily attempts to emanate the effect of such anti-terrorism legislations, especially the UAPA on the fundamental rights of the people, from the lens of the Indian judiciary. In light of this legislation being a departure from ordinary criminal jurisprudence, this paper also delves into the pertinence of speedy trial and the right to bail of the accused under them. Hence, a critical analysis is conducted on the provisions of the UAPA with a view to assess its far-reaching impact upon the prison justice system in India. The paper also proposes solutions to reform the UAPA so that its intended purpose is met and any transgressions committed on the part of the sovereign are forestalled.

Key Words: Terrorism, Unlawful Activities Prevention Act, Sovereignty, Constitutionality

INTRODUCTION

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Terrorism, a persistent threat in contemporary society, exacts a profound toll on individuals, communities, and nations worldwide..Terrorism transcends across borders and ideologies and its adverse effects permeate various aspects of life, extending far beyond the immediate physical harm caused by acts of violence. Dealing with terrorism effectively is one of the most important tasks of the government in a country like India. The Unlawful Activities Prevention Act of 1967 is a legislation that is now used for preventing and combating terrorism. The legislation is used by the ruling dispensation to attack and prevent terrorism.

Preventing terrorism is undoubtedly crucial for safeguarding the integrity of the nation. However, it is equally imperative to ensure that counter-terrorism measures do not infringe upon fundamental human rights of innocent citizens in the process. Upholding human rights not only reflects the core values of democratic societies but also strengthens the legitimacy and effectiveness of counter-terrorism efforts.

It is therefore a delicate balance that is to be struck by the government between security imperatives and human rights principles. The UAPA's stringent provisions to tackle terrorism has been quite contentious as there are numerous human rights violations that have allegedly taken place under the garb of protecting national security.

VIOLATION OF FUNDAMENTAL RIGHTS BY UAPA

Enshrined in Part III of the Indian Constitution lies the noble vision of bestowing upon its citizens the fundamental human rights that were tragically stripped away during the dark era of colonial rule spanning two centuries. The architects of the Constitution established a provision in Article 32, empowering individuals to demand justice before the Apex Court. Additionally, Article 226 offers another avenue for individuals to approach the High Court, thereby fortifying the avenues through which these rights can be rightfully claimed.

These rights were proclaimed to be the cornerstone of the very democracy for which millions fought for. In his last address in the constituent assembly while illuminating on political democracy in India, Dr. Ambedkar said, "it means a way of life which recognizes liberty, equality and fraternity as the principles of life."²

² B.R Ambedkar, Constituent Assembly Debates, (May 12, 2020, 8 : 57), https://www.constitutionofindia.net/constitution_assembly_debates/volume/11/1949-11-25.

TEST OF REASONABLE CLASSIFICATION

It is settled that classification founded on intelligible differentia is permitted provided the classification is made has a rational nexus with the object sought to be achieved. If the classification is shown to be arbitrary and unreasonable and without any substantial basis, the law would be contrary to the equal protection of laws by Article 14.³

Intelligible Differentia refers to the principle that a classification made by a statute must be based on a rational and relevant criterion, which distinguishes those included within the class from those excluded. This principle is essential to ensure that the classification is not arbitrary and is not in violation of the right to equality under Article 14 of the Indian Constitution.

The UAPA has given the central government unfettered power under Section 35 to classify any organisation or individual on the belief that they are involved in terrorist activities.

While Article 14 prohibits class legislation, it does not prohibit classification for the purpose of ensuring equality to those who, by virtue of nature, attainment or circumstances, are differently positioned. To elevate these, the State, through legislation, are entitled to make reasonable classification to treat different classes of people differently.⁴

The UAPA has time and again been used by the ruling dispensation for trivial purposes by using the National Security card. The provisions in such legislations are very stringent and it is rationally understood to be so for a purpose, to protect the national security and territorial integrity of the nation. But when the very same purpose is put to ridicule when it patently targets innocent people with no history of offence/violence just on the mere belief of the government that he or she is involved in terrorist activities.

RATIONAL NEXUS

It is observed in the case of *Asif Iqbal Tanha*⁵ that alleging extremely grave and serious penal offences under sections 15, 17 and 18 of the UAPA against people frivolously, would undermine the intent and purpose of the Parliament in enacting a law that is meant to address threats to the very existence of our Nation.

The requirement that crimes must be defined with an appropriate definiteness is a fundamental concept of criminal law and must be regarded as a pervading theme of our

³ Lachhman Dass v. State of Punjab 1963 AIR 222

⁴ State of Bombay v F.N. Balsara, AIR 318, 1951 SCR 682, 1951

⁵ Asif Iqbal Tanha v. State of Delhi NCT, CRL.A 39/2021

Constitution since the decision in *Maneka Gandhi*⁶ ; and that the underlying principle is that every person is entitled to be informed as to what the State commands or permits and the life and liberty of the person cannot be put on peril of an ambiguity.

Sec. 15 of UAPA⁷ defines terrorist acts and Section 15(1)(a) uses the “phrase by any other means of whatever nature” which is grossly misused by the government to make arbitrary arrests of innocent people.

The Delhi High Court in the case of *Natasha Narwal* held, "... These expressions, though they are difficult to define, do not elude a just application to practical situations. The use of language carries with it the inconvenience of the imperfections of language...". "...We must, however, utter a word of caution that since the concepts are not defined, undoubtedly because they are not capable of a precise definition, courts must strive to give to those concepts a narrower construction than what the literal words suggest ..."⁸

The test of reasonable classification and

TARGETING ACTIVISTS AND DISSENTANTS

Although the anti-terror statute was enacted with the stated objective of combating terrorism and ensuring national security, it is often weaponized by governments to target critics and silence dissent. UAPA has grown to have become a way of prosecuting people alleged to be involved in terrorist activities in a manner unimpeded by the checks and balances of the criminal justice system, and its ambit has been furthered substantially over the years. Activities such as giving speeches in the public and taking part in public meetings are criminalised, for intent has been given more importance than the act itself. The country has faced the ramifications of this issue in the last 20 years where the ruling dispensation targets the activists who are against them and conveniently puts them behind bars under UAPA.

The importance of the right of dissent was highlighted by the Hon'ble Supreme Court in the *Maqbool Hussain case*⁹, “The right to dissent is the hallmark of a democracy. In real democracy the dissenter must feel at home and ought not to be nervously looking over his shoulder fearing captivity or bodily harm or economic and social sanctions for his

⁶ *Maneka Gandhi v. Union of India* AIR 1978 SC 597

⁷ “by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause...”

⁸ *Natasha Narwal v State of Delhi* NCT CRL.A. 82/2021

⁹ *Maqbool Hussain v. State of Bombay*, 1953 AIR 325

unconventional or critical views. There should be freedom for the thoughts we hate. Freedom of speech has no meaning if there is no freedom after speech.”¹⁰

It is imperative for these words to be in existential reality in the country in order to have the citizens’ human rights secured.

PRESUMPTION OF GUILT UNDER UAPA

The cardinal principle of criminal jurisprudence is that every person is deemed to be innocent until duly tried and found guilty. In criminal matters, the law is that the prosecution has to prove its case beyond all reasonable doubt, whereas the burden or onus is much lighter on the defence.

V.R. Krishna Iyer, J had observed “The consequences of pre-trial detention are grave; that by being kept in custody, an undertrial accused, though presumed innocent, is subjected to psychological and physical deprivations of jail life; that the accused is also prevented from contributing to the preparation of the defence; and that the burden of pre-trial detention frequently falls heavily on the innocent members of the family”.¹¹

UAPA being a departure from ordinary criminal jurisprudence, does not presume innocence but in fact, presumes guilt. The onus of proof is upon the prosecution to prove (beyond reasonable doubt) the guilt of the accused but under the UAPA, the aforementioned principles and precedents, takes a toll by presumption of offence under Sec.15 of the Act. This can be substantiated by the Section 43E(b) of the UAPA, 1967 which states, "Unless the contrary is shown, the court shall presume that the accused has committed the offence".

Holding ‘presumption of innocence’ to be one of the major rights of an accused, the principle has been upheld several times by the Indian judiciary, specially seen in the landmark judgement of *Babu v. State of Kerala*.¹²

RESTRICTION ON BAIL UNDER UAPA, AN ABSOLUTE NECESSITY?

While under ordinary law, an accused is naturally entitled to default bail if a charge sheet is not filed within a period of three months and bail is the norm, not the exception, under special criminal statutes such as the UAPA, the period of incarceration without the filing of a charge

¹⁰ Maqbool Fida Hussain v. Rajkumar Pandey, (2008) Cri L.J. 4107 (SC).

¹¹ Moti Ram & Ors vs State Of M.P, 1978 AIR 1594

¹² Babu v. State of Kerala, CRL.A. 104 of 2009

sheet may be extended up to six months and a court of law can grant bail only where the allegations against the accused appear, on the face of it, false.¹³

Right to Bail under Article 21

One of the most stringent provisions of UAPA, Sub-section (5) of Section 43D was inserted in 2008 following the terrorist attack in Bombay. 43D (5) of The Unlawful Activities Prevention Act reads as follows.

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release

Sec. 43D(5) prevents the court from granting bail for an accused under UAPA if there are reasonable grounds to believe that the case against the accused is *prima facie* true based on the material provided by the police.

This restriction on the right to bail has been upheld by the Indian courts in several cases, including the Arup Bhuvan case¹⁴, wherein the Supreme Court held that the restriction on the right to bail imposed by the Unlawful Activities (Prevention) Act, 1967, was reasonable in the interest of national security.

The scope for granting bail for the accused under this legislation was made infinitesimal for courts of law by this provision. The intention behind having such a provision seems to be the risk that is involved in releasing a person who is charged with a crime that has the potential to shake the peace in the society.

In the case of ***Zahoor Ahmad Shah Watali***¹⁵, the Supreme Court held that the provisions of the UAPA restricting the grant of bail were valid and constitutional. The Court observed that the restrictions were necessary to ensure that the accused did not indulge in activities prejudicial to the security of the state while on bail.

¹³ Awstika Das, Father Stan Swamy Died As A UAPA Martyr; But Political Prisoners Continue To Suffer Without Bail, 8 July 2023 5:16 PM, [livelaw.in](https://www.livelaw.in)

¹⁴ Arup Bhuyan v. State of Assam, (2011) 9 SCC 567

¹⁵ Zahoor Ahmad Shah Watali vs Union of India, (2019) 8 SCC 272.

However, in *Union of India v KA Najeeb*¹⁶, the Hon'ble court observed that the presence of statutory restrictions like Section 43D (5) of UAPA per se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution.

The court famously held

“Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence”.

The Court has balanced security concerns under anti-terror laws with individual liberty. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

Similarly, in the *Jahir Hak case*¹⁷, bail was granted by the Apex Court to the UAPA accused petitioner after observing that delay in trial can be a ground for bail under UAPA. The petitioner Hak had been in detention for an unreasonably long period of eight years without being produced before the court. It is evidently clear that the right to speedy trial under Art. 21 was also violated in Jahi Hak's case as it is horrifying to think that a person can be kept without trial for 8 years straight. Abolition of the right of bail in such cases amounts to deprivation of personal liberty as enshrined in Article 21 of the Constitution.¹⁸

Restrictions on bail under the UAPA are deemed necessary to prevent individuals involved in terrorist activities from being released and potentially endangering public safety. However, it is crucial to implement checks and balances to ensure that the denial of bail is not arbitrarily applied or used as a means of unjustly prolonging detention. While the severity of terrorism-related offences justifies stringent measures, it is equally important to safeguard the rights of the accused and prevent the misuse of such provisions.

¹⁶ Special Leave Petition (Crl.) No. 11616 of 2019

¹⁷ Jahir Hak v. State of Rajasthan, (CRL.) NO(S). 605 OF 2022.

¹⁸ Gurbaksh Singh Sibbia v. State of Punjab 1980 AIR 1632

Right to speedy trial under Article 21

The right to a speedy trial is a right which has become paramount in the preservation of due procedure and individual autonomy. It received the status of fundamental right due to the liberal judicial interpretation of Article 21.¹⁹

The speedy trial of offences is one of the basic objectives of the criminal justice delivery system. Ample provisions have been made in the Code of Criminal Procedure and Police Act for expeditious disposal of matters at various stages.

Justice P.N. Bhagwati, in the Supreme Court judgement in *Hussainara Khatoon v. Home Secretary, State of Bihar*²⁰, observed that Article 21 is violated when an accused is not given a speedy and just trial.

With regard to UAPA, the Court has balanced security concerns under anti-terror laws with individual liberty. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial.

This same decision cemented the right of undertrial prisoners to speedy trial, which made it a fundamental right and an essential part of criminal trial in India. In *Nimeon Sangama case*²¹, it stated that when an expeditious trial is not attempted as a result of which parties languish in jail, it becomes a point of breakdown for criminal justice. Here, the court even directed the State to give consent to release all such persons, who have been in custody for over a reasonable period, without any trial.

In the case of *Shaheen Welfare Association*²⁸ to hold that 'gross delay' in trial violates the right to life and personal liberty under Article 21. A fundamental right violation could be used as a ground for granting bail. Even if the case is under stringent criminal legislation including anti-terror laws, prolonged delay in a trial necessitates granting of bail.

PROCEDURAL SAFEGUARDS UNDER UAPA

Section 37 of the UAPA constitutes a review committee which has a sitting High Court Judge or retired Judge as its members as prescribed in Article 22 of the Indian Constitution.

The same review committee would review the detention that has been done and if no prima facie evidence is found that the particular individual or organisation was not involved in

¹⁹ S.N. Sharma, Personal Liberty under Indian Constitution (1991)

²⁰ Hussainara Khatoon v. Home Secretary, State of Bihar, (1979) AIR 1369

²¹ Nimeon Sangama v. Home Secretary, Govt. of Meghalaya, 1979 AIR 1518, 1979 SCR (3) 785

terrorism, the government will remove them from the Schedule with the power vested in Sec.15(2) of the Act

The review committee that is set up in Section 37 of the TAPA is wholly constituted by the Central government and therefore, the review committee is naturally pitted against the interests of the accused. It is opposed to the essential and intrinsic principle of ‘Nemo Judex in Causa Sua’ and thus renders it against the principles of natural justice

Moreover, Section 45 of UAPA establishes an independent review on the basis of the evidence gathered in due course. It is to be noted that apart from the advisory board that is prescribed in Art. 22(4)(a) of the Indian Constitution, UAPA has a procedural safeguard against arbitrary arrest in the form of independent review by a competent authority.

However, Section 45 mentions the purported ‘independent review of evidence gathered in the course of investigation’ for the purpose of according sanction which is vague and not specific in nature.

It was observed in the case of *McEldowney v. Forde*²² that the statute having vagueness, ambiguity, uncertainty, arbitrariness and having bona fide intentions, makes it unreasonable by all means.

OBSERVATIONS AND SUGGESTIONS

While the prevention of terrorism is of paramount importance, it's equally critical to strike a delicate balance between ensuring national security and protecting fundamental human rights. The UAPA must be designed and enforced in a manner that upholds democratic values and respects the dignity and rights of individuals.

The court in the case of *Asif Iqbal Tanha*²³ stressed that indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. An unreasonable delay in a trial would supersede stringent bail conditions and become a ground for granting bail.

Section 43-D of the UAPA allows for an extended period of detention without bail, which could lead to prolonged pre-trial detention. To address this, measures should be taken to ensure speedy trials for individuals accused under the UAPA. Setting specific time limits for

²² *McEldowney v. Forde*, (1969) 2 All ER 1039.

²³ *Asif Iqbal Tanha v. St of NCT of Dehli*, ICL 2021 (6) Del

the completion of trials and regular monitoring of case progress can help mitigate the risk of prolonged detention.

Enhancing procedural safeguards within the UAPA is essential to prevent potential abuse of power and ensure fair treatment of suspects. For instance, Section 43-A mandates the recording of reasons for arrest, which should be strictly adhered to and monitored to prevent arbitrary arrests. Additionally, provisions should be strengthened to guarantee access to legal counsel and protection against torture or ill-treatment during interrogation, in line with international human rights standards.

transparency and Accountability: There is a need for greater transparency and accountability in the implementation of the UAPA. Public reporting on the number of arrests made under the Act, along with reasons for detention and outcomes of trials, can foster accountability and build public trust. Additionally, mechanisms for independent oversight, such as parliamentary or judicial review, should be strengthened to scrutinise the application of the UAPA and address any potential abuses of power.

In conclusion, while the UAPA plays a vital role in combating terrorism, it is imperative to uphold the principles of justice, fairness, and human rights. By introducing measures to expedite trials, strengthen procedural safeguards, and enhance accountability, India can ensure that the UAPA serves its intended purpose without infringing on individual freedoms.