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We firmly believe in setting out cutting edge research and analysis having high quality. For this issue we received over a hundred submissions of which a select few have been published after our review process. The focus is to ensure that the articles have contemporary relevance that add value to our readers.

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(Editorial Board)

PERSONAL LIBERTY VERSUS THE STATE

BY AMAN GARG¹

ABSTRACT

Personal liberty is an essential fundamental right and any incursion on this inalienable right is a crucial issue. Although reasonable restrictions can be imposed on these ‘fundamental rights’ by the government only when it is absolutely necessary, there has arisen a situation when even in normality these rights are curtailed by the government through various means. One of the most dominant means is Unlawful Activities Prevention Act, 1967.

UAPA is anti-terrorist law aimed at creating an efficacious deterrence of unlawful activities associations in India. Its main purpose is to make powers on hand for dealing with activities directed against integrity and sovereignty of India. The law been legislated to impose reasonable restrictions in interests of sovereignty and integrity of India on account of freedom of speech and expression, to assemble peaceably without arms and to form associations. This act has evolved over the years by a gradual but steady constriction of fundamental rights.

Power and corruption go hand in hand. This paper tries to analyse this act in terms of excessive power it entails with itself and also how this power has given rise to increased misuse of this act. This paper takes into consideration various provisions of this act and tries to identify numerous loopholes which engender its mishandling. It also discusses various instances when this act was used as a base to infringe personal liberty of people and whether the infringement was justified on account of natural justice. Towards the end it determines the success rate of the act and tries to answer the fundamental question whether this act is indispensable in the present time or not.

BACKGROUND & HISTORY

The Unlawful Activities (Prevention) Act (UAPA) was incorporated in 1967 as a legislation to introduce reasonable restrictions on the fundamental freedoms under Article 19(1) of the Constitution, such as freedom of speech, right to assemble peacefully and right to form associations.² The reason for making such restrictions was to safeguard nation’s sovereignty and integrity.

¹ 2nd Year B.A.-L.L.B Student at Gujarat National Law University, Gandhinagar.

² V. Sachdev, *What is the UAPA and why are Arrests under it so problematic?*, The Quint (Aug. 29, 2018), <https://www.thequint.com/explainers/uapa-provisions-terrorist-organisation-membership-activists>.

Over the years, terror-specific acts like Terrorist and Disruptive Activities (Prevention) Act (TADA) and Prevention of Terrorism Act (POTA) were rescinded after running into legal difficulty, and the UAPA become the major anti-terror legislation in India.³ Since 2004, many amendments have been made to UAPA, which includes adding up some of the provisions of TADA and POTA, which were repealed earlier.

At the start of the Sino-Indo Conflict on 20th October 1962, a state of Emergency was declared under Article 352 of the Constitution of India, on the grounds of external aggression.⁴ During the same time period, a domestic crisis was brewing with Mr C.N. Annadurai, leader of the Dravida Munnetra Kazhagam's (DMK) openly advocating his party's agenda of self-determination, including secession of Tamil Nadu from the Indian Union.⁵ The Central Government was in complete panic and wanted to put some restrictions on citizens' freedoms and consequently it introduced the Unlawful Activities (Prevention) Bill, 1967, before the Emergency was to lapse. Thus, amidst many vivacious debates marked by the need to uphold the sovereignty and integrity of India, the Unlawful Activities (Prevention) Act, 1967 (UAPA) was emanated. The UAPA fundamentally and largely dealt with "unlawful activity". Section 2(f), in simple words, defined unlawful activity, as any action by an individual or association which is aimed to bring about cession/secession or such action as to 'interrupt' or 'question' the sovereignty and territorial integrity of India.

On 23rd May 1985, the Terrorist and Disruptive Activities Act, 1985 was enacted supposedly to deter terrorism in Punjab and other parts of the country. The Act introduced exceptional provisions having overriding effect over the Criminal Procedure Code and the Constitution in many written and unwritten ways. Given the widespread allegations of abuse of the Act and the paucity rates of conviction, TADA was allowed to lapse under a sunset clause in 1995. However, on 24th December 1999 IC-814 was hijacked and on 13th December 2001 the Indian Parliament was attacked and due to these two events it was felt that there was a necessity to reinforce the anti-terrorism law and consequently the Prevention of Terrorism Act was passed by Parliament on 28th March 2002. But again, due to widely reported misuse of POTA

³*Id.*

⁴*Govt bans Khalistan Liberation Force under Unlawful Activities (Prevention) Act*, Competitive Aspirant (Dec. 29, 2018), <http://www.competitiveaspirant.in/dailyCA/title/govt-bans-khalistan-liberation-force-under-unlawful-activities-prevention-act> (hereinafter Competitive Aspirant).

⁵ R. M. John, *Understanding The Unlawful Activities (Prevention) Act, 1967*, Live Law (Sept. 29, 2018), <https://www.livelaw.in/understanding-the-unlawful-activities-prevention-act-1967/>.

including the arrest of Vaiko, the MDMK leader from Tamil Nadu under POTA, the Act was eventually repealed on 21st December 2004.⁶

AMENDMENTS

THE 2004 AMENDMENT:

In 2004, amidst public outcry against the exploitation of the Prevention of Terrorism Act (POTA), the government repealed it, but amended the UAPA at the same time. The revocation of POTA was an election promise of then newly elected Congress government. The amended UAPA made considerable changes to the definition of ‘unlawful activity’, incorporated the definition of ‘terrorist act’ and ‘terrorist organisation’ from the repealed POTA, and also introduced the concept of a ‘terrorist gang’. In fact, chapters IV, V and VI dealing with ‘punishment for terrorist activities’, ‘forfeiture of proceeds of terrorism’ and ‘terrorist organisations’ respectively, were profoundly borrowed from the rescinded POTA. The schedule to the POTA of ‘terrorist organisations’ was also incorporated into the UAPA verbatim.⁷ A “sunset clause” that was earlier part of anti-terror acts like Terrorist and Disruptive Activities (TADA) and POTA was dropped from UAPA.⁸

THE 2008 AND 2012 AMENDMENT:

On December 17, 2008, another amendment of the UAPA was stirred and adopted following the attack by armed gunmen in Mumbai on November 26, 2008. Most of the provisions of POTA and TADA related to maximum period in police custody, indictment without a charge sheet and limitations on bail were included into the UAPA. The 2012 amendments to the UAPA further expanded the already indistinct definition of “terrorist act” to include offences that threaten the country’s economic security.⁹

DRACONIAN PROVISIONS OF THE ACT AND ITS “INFRINGEMENT ON CIVIL LIBERTIES”

1. ‘UNLAWFUL ACTIVITIES’ & ‘DISAFFECTION’ (SECTION 20) –

“Section 2(o) of UAPA as it stands today, defines “unlawful activity”,

⁶*Id.*

⁷ F. Arun & G. Vernon, Fifty Years of Unreasonable Restrictions under the Unlawful Activities Act, The Wire (Mar. 9, 2017), <https://thewire.in/rights/uapa-anti-terrorism-laws>.

⁸*Id.*

⁹Competitive Aspirant, *supra* note 3.

2(o). “unlawful activity”, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),— (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India;”¹⁰

A bare perusal of the section would signal the reader that the terms used in this section are very ambiguous and exposed to multiple interpretation. The definition of “unlawful activities” includes “disclaiming” or “questioning” the territorial integrity of India, and causing “disaffection” against India. These words are staggeringly vague and subjected to multiple understandings, and come close to establishing a regime of thought-crimes.¹¹ So tomorrow, if a person says that the Doklam standoff was a victory for China, then, under such vague definition, he or she can be said to be carrying out an unlawful activity. The word ‘disaffection’ is very problematic in this context. If one expresses his opinion to another regarding the inefficiency of the Indian government he arouses ‘disaffection’ in the minds of other people. This ‘expression of opinion’ can result into his arrest under this act.

2. MEMBERSHIP OF A GROUP (SECTION 10):

Section 10 of UAPA criminalises “membership” of an unlawful association (introduced vide the 2004 amendment).

It criminalizes ideologies and association. By virtue of declaring an organization ‘unlawful’ or ‘terrorist’ and banning it, these acts *de facto* criminalizes their ideologies. For example, Maoist organization is deemed to be unlawful in India. According to their ideology one has to take up arms to overthrow the government. If any person believes in their ideology, though he hasn’t taken up any arms, he can still be charged under this section.

Possession of any literature of such organization can also be held as a crime under this act. There was a case in which a girl from Pune named Jyoti Chorge was kept in prison for almost

¹⁰ The Unlawful Activities (Prevention) Act, 1967, § 2(1) (o), No. 37, Acts of Parliament, 1967 (India).

¹¹ G. Bhatia, *The Unlawful Activities (Prevention) Act must be cleansed of its vast discretionary powers*, The Hindu (July 2, 2018), <https://www.thehindu.com/opinion/lead/bhima-koregaon-and-the-fault-in-our-laws/article24305910.ece>.

a year, before she was acquitted, just because she possessed a literature that supported Maoist ideology. Does such indictment justify compromise on Article 19 of the Indian Constitution?

In addition to that any ‘membership’ with any such banned organisation is a crime under this act. What is the definition of membership? Now here comes the twist. This act nowhere defines the term ‘membership’. There were incidents when friends of an individual, who was associated with a banned organization, were also charged under the ‘membership’ clause.

In 2011, the Supreme Court of India tried to limit the scope of these provisions, holding that “membership” was limited to cases where an individual occupied in active incitement to violence. Anything more than that, it ruled, would violate the fundamental rights of freedom of speech and of association. The application of this ruling, however, has been erratic and random: one judge of the Bombay High Court invoked it to grant bail to some members of the Kabir Kala Manch music troupe, while another judge ignored it and refused bail to other members of the same troupe (they were ultimately granted bail by the Supreme Court).¹²

3. EXTENDED PERIOD OF CUSTODY & DETENTION FOR 180 DAYS. (SECTION 43D(2)):

“A bare perusal of Section 43D can easily reveal the loopholes in the law. According to sub-section 2(b), detention without filing of a chargesheet can be stretched upto 180 days. Even more deplorable is sub-section 5 which allows the Court to, on a perusal of the case diary or the report made by the police, refuse bail to the accused if the Court believes there is a reasonable ground for believing that the accusation against such person is ‘prima facie’ true. The simple logic that runs against this provision is that the report of the police which could be ‘influenced’ based on their prejudice in which the accused will be decorated guilty.”¹³

UAPA is as a matter of fact a warrant for unending imprisonment without trial. There have been cases in which terror accused have been acquitted after spending over a decade in jails though they had no relation to the crime they were charged for. Police can very easily keep a person behind bars by appealing that they need more time for investigation. This further makes it problematic for the accused to get bail. This is not to insinuate that the state always, or even often, misuse its power. The purpose of a Constitution, however, is to establish a “culture of justification” where the state cannot take advantage of its power. Civil and political rights are

¹²*Id.*

¹³ R. Pandey & N. Bist, *Vague definition of a terrorist, several ad hoc amendments make Unlawful Activities (Prevention) Act a draconian law*, Firstpost (Aug. 30, 2018), <https://www.firstpost.com/india/vague-definition-of-a-terrorist-several-ad-hoc-amendments-make-unlawful-activities-prevention-act-a-draconian-law-5075031.html>.

based upon the perceptive that at no point should so much power, and so much discretion, be given to the state that it utterly overwhelms the individual. The men and women who occupy the high offices of the state shall have the best of intentions, but they are human like the rest of us, and therefore not impeccable. The Constitution exists to protect us from the consequences of those imperfections.¹⁴

NOTABLE ARRESTS UNDER ‘UAPA’

1. KK SHAHINA CASE:

Shahina was a journalist working for *Tahulka* in Karnataka. She was assigned duty to question the accused of the Bangalore Bomb blast in 2008. She was charged with UAPA by the Karnataka police on the contention that she had been trying to influence and manipulate the accused of the Bomb blast though in fact she was just endeavouring in helping the man realize his mistake. The fourth pillar of democracy was directly threatened through this incident.

2. GN SAIBABA CASE:

Saibaba was a professor in Delhi University. He had 90% of his body paralysed and was physically disabled and used a wheel chair to travel from one place to another. He criticized Indian government on their blatant and violent methods to kill the Maoists in the villages and proposed ideologies of supporting adivasis in central India’s mineral-rich corridor. In 2014 he was charged under UAPA by the Delhi Police. Police alleged that he was linked to maoist people and was their ‘urban line’. Although no strong evidence was found against him he was held guilty by the Trial Court ‘under UAPA’. Who knew that cost of criticizing the government then?

3. JYOTI CHORGE:

Jyoti was a 19 year old girl living in Pune. She was charged under UAPA on the sole reason that a maoist literature had been retrieved from her house. This case is a blatant slap on the face of any student. Everyone has the right to read whatever he or she desires. The government cannot control the learning of the individuals. Diverse reading has always been an imperative step in the life of a student. It gives one diverse views of thinking. If I read ‘Mein Kamph’, it doesn’t mean that I admire Hitler for killing millions of people. Surely this act has failed to understand this!

¹⁴ G. Bhatia, *supra* note 10.

4. HUBLI CONSPIRACY CASE:

In 2008, 17 Muslim men in Karnataka were arrested under UAPA. They were alleged to have some jihadi literature which later turned out to be Quran. Case collapsed but they suffered 7 years of imprisonment. Misunderstanding on the part of police had cost these people 7 valuable years of their life. Isn't the cost of a simple misunderstanding exponentially high?

5. BHIMA-KOREGAON CASE:

On 28 August 2018, police across the country entered the homes of prominent human rights advocates and activists and conducted raids, saying these people were responsible for instigating the violence in Bhima-Koregaon in January 2018. Five of them – advocate Sudha Bharadwaj, lawyer and author Arun Ferreira, revolutionary poet Varavara Rao, as well as activists Gautam Navlakha and Vernon Gonsalves – were arrested and taken into custody. In the name of evidence police only had a letter and that too did not explicitly prove their involvement (Police seems to 'infer' a lot from just a piece of paper nowadays). They were under house arrest for almost 2 months. What is worth noticing is that all these five people were active in expressing their disapproval of the government. None of them has been granted bail as it is almost impossible to get a bail under UAPA. The case has been going on in the Delhi High Court.

These are just a 'bird's view' of the problem. There have been a numerous cases under UAPA that had failed to comply with the basic elements of a crime but still punishes individuals.

PENDENCY OF CASES

"Approximately 925 cases were filed under UAPA in 2016, according to the data of National Crime Records Bureau. More than 2,700 cases have been registered within three years ending in 2016. Of the 3,962 cases slated for investigation in 2016, the police was laden with a backlog of almost 77 percent cases. As many as 3,548 cases had pending investigation at the end of 2016, with a pendency rate of 89.6 percent."¹⁵

"In 2016, over 1,490 cases had pending trial. Among these, 232 came in for trial that year, the remaining were lay-over cases. Out of these, trials were completed in 33 (22 acquitted/discharged and 11 convicted) cases. The conviction rate for cases under UAPA in

¹⁵ C. Mallapur & D. Chhetri, Arrested activists: 67% ended in acquittal or discharge under UAPA Act, Business Standard (Sept. 14, 2018), https://www.business-standard.com/article/current-affairs/arrested-activists-67-ended-in-acquittal-or-discharge-under-uapa-act-118090800801_1.html.

2016 stood at 33 percent while the pendency percentage in these cases was 97.8 percent in 2016.”¹⁶

“The UAPA is not meant for convicting people, it is used to detain them,” alleged Mihir Desai, senior counsel at Bombay High Court. “Eventually, acquittals may happen but a substantial amount of time passes and the person’s life is dilapidated. The burden of proof in standard matters falls on the police but under UAPA, the burden shifts to the accused to prove his innocence.”¹⁷

CONCLUSION

Justice DY Chandrachud had said, "Dissent is the safely valve of democracy. If you don't allow dissent, the pressure valve of democracy will burst." It appears to me that the valve of Democracy has started showing signs of bursting. Civil rights are based upon the consensus that at no point should so much power, and so much discretion, be given to the state that it utterly overwhelms the individual. In the present context UAPA has been vested with much power that if any individual expresses his dissent against the ruling government, he could be easily arrested for it by being charged under UAPA. The women and men who occupy the prominent offices in the state may have the best of intentions, but they are human like the rest of us, and therefore imperfect. The Constitution exists to protect us from the consequences of those imperfections but this act takes away the fundamental values and rights that defines each and every one of us. According to backers of UAPA - The state must be given a strong hand to control terrorist and other violent and disruptive activities. But this reasoning subordinates every other constitutional value — freedom of speech, personal liberty, the right to a fair trial — to the overarching concern of order. Such an attitude can be justified only in times of war or Emergency (and even then, subject to safeguards) and UAPA has normalized such attitude in times of peace. It is high time that the provisions of the act must be subjected to change. Fundamental rights are ‘fundamental’ when they are protected irrespective of what the circumstances are. Let’s not a bunch of people decide what needs to be spoken or heard.

¹⁶C. Mallapur & D. Chhetri, BhimaKoregaon arrests: UAPA has poor conviction rate; roughly 75% cases end in discharge or acquittal, Firstpost(Sept. 14, 2018), <https://www.firstpost.com/india/bhima-koregaon-arrests-uapa-has-poor-conviction-rate-roughly-75-cases-end-in-discharge-or-acquittal-5142711.html>.

¹⁷C. Mallapur & D. Chhetri, Crackdown on Activists: 67% UAPA Cases End In Acquittal/Discharge, The Quint(Sept. 14, 2018), <https://www.thequint.com/news/india/activists-arrests-high-acquittal-rate-uapa>.

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