

A Weapon to Stifle Dissent: Unlawful Activities (Prevention) Act, 1967

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Abstract

In contemporary times, rather than acting as harbinger of liberty and dignity, many legislations have become instruments of oppression. One such law is the Unlawful Activities (Prevention) Act or UAPA. This act has been in the limelight recently due to many reasons. Two of those reasons being the death of Father Stan Swamy who was repeatedly denied bail despite his deteriorating health conditions and due to the Delhi High Court order while granting bail to three college students charged with UAPA in connection with 2020 Delhi riots case. In this article, the author endeavours to throw light on the stringent provisions of this act. In addition, the author seeks to highlight some of the recent cases under UAPA against several civil rights activists, students, academicians, journalists etc. It will also be discussed that how this law has been misused to trample the constitutional morality.

Keywords: UAPA, Unlawful activity, Unlawful organisation, Terrorist act, 2019 Amendment.

1. Introduction

The history of UAPA can be traced back to the Criminal Law Amendment Act of 1908 during the British Empire which was being used during colonial period to dismantle Indian freedom movement by prosecuting the leaders. After independence, a committee was constituted on National Integration and regionalisation by the National Integration Council to recommend on the restrictions which can be put in place to safeguard the integrity and sovereignty of India. To implement the recommendations, Sixteenth amendment was brought in the Constitution which paved the way for Unlawful Activities (Prevention) Bill, introduced in Parliament and was passed in 1967 during the fifth Lok Sabha. It bestowed the power on the Central Government to ban any organisations which was being done by the Criminal Law Amendment Act of 1908 till then.

The UAPA was enacted in 1967 to prevent unlawful activities which aim to pose threat to the integrity and sovereignty of India (Bhandari et al., 2020). It empowered the Central Government to declare any organisation which indulges in 'unlawful activities' as 'unlawful organisation'. This act has undergone over half-a-dozen amendments to make it what it stands today. Initially, it was only meant to criminalize those acts which were within the ambit of definition of 'unlawful activities' in Section 2 of the Act. After the repeal of one of the most draconian anti-terror laws, Prevention of Terrorist activities Act (POTA) in 2004, the UAPA was amended in the same year to include many of the provisions of POTA verbatim to make it the principal terror law in India. Prior to this amendment, UAPA was not a terror law. This amendment added new crime in the list of criminalized acts called 'terrorist acts'. With this, the Government can also ban organisations for indulging in 'terrorist acts'.

The most recent and the most controversial amendment was introduced in 2019 by which the Government can now designate any individual as terrorist, which will be discussed later in the article.

There has been a widespread criticism of UAPA for its rampant abuse by the ruling dispensation to target those who go against the ideology of the ruling party (Alam, 2020). The recent arrests under this piece of legislation clearly demonstrate the complete negation of the difference between political dissent and hate speech. The United Nations High Commissioner, Michelle Bachelet, issued a statement in October 2020 regarding abysmal condition of the right to free speech in India by rampant use of UAPA against social activists, civil rights defenders, students and journalists (Bachelet, 2020).

There are various controversial provisions in the Act which has potential to violate individual autonomy and give room for abuse of power by the State, for example, it gives humongous powers to police regarding arrest, search and investigation; it has no provisions to provide anticipatory bail to the accused; it places stringent restrictions on bail; it allows intercepted communications to be used as evidence against the accused; it violates the established rule of presumption of innocence until proven guilty; it increases the period of detention upto 180 days as well as makes all offences listed under it cognizable. These provisions are also repugnant to established principles of criminal law administration. Some of these controversial provisions will be discussed in detail in the latter.

2. Recent examples of cases under UAPA

The UAPA was amended to tackle the threat of terrorism but in recent times there have been numerous cases initiated against those who raise their voices against the injustice in the society. The records of National Crime Records Bureau (NCRB) show that no cases were filed under the UAPA before 2014. In 2014, 976 cases were filed; 897 in 2015; 922 in 2017 and 1182 in the year 2018 (Dadu, 2020). The 2018 report of NCRB shows that more than 5000 cases are still pending wanting investigation and trial. In 2019 only, around 1,948 cases have been registered under the Act. Moreover, as per the report of Union

Home Ministry, only 2.2 per cent of total cases registered under the act between 2016 and 2019 led to conviction.

In January 2018, several social activists who took part in Bhima Koregaon event were arrested under UAPA over their alleged links to maoists. Some of the eminent human rights activists are Varavara Rao, Sudha Bharadwaj, Arun Ferreira, Gautam Navalakha, Vernon Gonsalves and Anand Teltumde. Despite deteriorating condition of health of some of them in jail, they were denied bail as well as proper medical treatment (Bhaduri, 2020). As a result, one person among the people arrested in the same case, Father StanSwamy, eventually lost his life at the age of 84 waiting for bail for nine months. This case from the outset showed us the dearth of humanity when the tribal rights activist who was also suffering from Parkinson's disease was denied access to sipper and straw in jail by the authorities (Samervel, 2020). He contracted Covid 19 in jail but again denied bail and eventually succumbed to death. Another human right activist, Akhil Gogoi, who is associated with a peasant's organisation was arrested under UAPA for protesting against the Citizenship Amendment Act. He was arrested as a preventive measure on suspicion of him being a member of CPI (maoist) group (Bharadwaj, 2019). After spending 19 months in jail, he finally acquitted of all charges by Special NIA court on July 2021. The judge observed that there was nothing to show that Mr. Gogoi had indulged into any terrorist act.

This act not only used as a weapon to target human rights activists but also students who gather courage to speak on the discriminatory policies of the Government. In recent times, some students who participated in the protest against the Citizenship Amendment Act were arrested despite the police not having adequate evidence. Safoora Zargar from Jamia Milia Islamia University, who was arrested for hatching conspiracy for riots in north east Delhi in January 2020. She was pregnant when she was arrested but had been denied bail on several occasion and languished in jail before she finally granted bail (Pasha, 2020). Another student activists who were arrested are Natasha Narwal, Meera Haider and Umar Khalid for riots in north east Delhi. In a recent order of Delhi High Court while granting bail

to three students in connection with Delhi riot observed that no prima facie case has made out against them under UAPA apart from the fact that they all engaged themselves in anti- CAA protest. The Court also expressed concern stating that “it appears that in its anxiety to suppress dissent, State has blurred the line between the constitutionally guaranteed right to protest and terrorist activity. If Such blurring gains traction, democracy would be in peril”.

The UAPA has also been invoked against journalists on large scale who dare to do justice with their profession and raise their voices against the violations of human rights by the ruling elite. The UAPA is slapped on their faces to silence them , perhaps, one of the reasons behind India’s such low rank (142 out of 180 countries) in World Press Freedom Index 2020. The most recent and glaring example is a case of journalist from Kerela, Siddique Kappan, who was arrested by the UP Police when he was heading to Hathras to cover the rape and murder case of a Dalit woman. He has not even given permission to visit his ailing mother on her deathbed yet. Another journalist from Kashmir, Gowhar Gilani, was booked under the Act for his social media posts (Ganai, 2020). These are just few examples to demonstrate the weaponisation of UAPA to dismantle the freedom of speech and expression guaranteed by the Indian Constitution.

3. Overview of the Arbitrary Provisions of UAPA

Meaning of Unlawful Activity

This term is defined under Section 2 (o) of the UAPA as “any action taken by an 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 cause or is intended to cause disaffection against India”.

This definition aims to criminalize not just the act of cessation or secession of the Indian territory but also seems to criminalize any discussion or debate on such issue. The definition became further problematic when Section 2(o)(iii) was added through amendment in 2004. This amendment added that unlawful activity covers any act which causes ‘disaffection against India’ . The meaning of the word ‘disaffection’ is highly vague and can be broadly interpreted to include situations of criticism of government policies and failures, political dissent, criticism of social inequalities etc. (Chauhan et al., 2012). It seems to criminalise even unintentional disaffection.

Meaning of Terrorist Act

This term was included as a separate crime in the UAPA with 2004 amendment after the repeal of POTA. Section 15 was inserted which defines ‘terrorist act’. If an individual or organisation is involve “in making or using bombs, dynamite, or other explosives substances, or by any other means of whatever nature, which is likely to cause harm to the population, then that individual or organisation will be said to be engaged in terrorist activities”. The phrase ‘*any other means of whatsoever nature*’ gives unfettered powers to those in power to exploit and harass innocent people (Pal, 2019). Again, the word ‘likely’ empowers the Government to detain any person before a person actually does something. It is a subjective criterion depends on the whims and fancies of the Government (Singh, 2012). Similar definition was also present in the TADA which led to its subsequent dissolution in 1995 because of its rampant abuse by the Government.

In a recent case of *Asif Iqbal Tanha vs.State of NCT of Delhi*, the Delhi Court observed that the more stringent the penal law, the more strictly it must be construed and held that ‘terrorist activity’ cannot be interpreted broadly to include ordinary penal laws within its ambit. The court endeavoured to defined

this term stating that “The extent and reach of terrorist activity must travel beyond the effect of an ordinary crime and must not arise merely by causing disturbance of law and order or even public order; and must be such that it travels beyond the capacity of the ordinary law enforcement agencies to deal with it under the ordinary penal law,”.

4. Banning Organisations

The Central Government is empowered to ban any organisation under Section 3 and Section 35 of the UAPA. Section 3(1) states that the Government can declare any organisation as unlawful if “it is of the opinion that such organisation has become an unlawful association”. The Government needs to specify reasons for doing so in a notification but it can opt to withhold the reasons if it thinks that such disclosure would not be in ‘public interest’. Further, Section 35 of the Act empowers the Government to declare any organisation as terrorist outfit if it ‘believes’ it to one. There is no obligation on the Government to specify any reasons under this section.

Another striking feature is that the organisations which have been banned under Section 3 can remain in the list of banned organisation for two years but there is no fixed time limit for those which are in the list by virtue of Section 35 of the Act. Though, the terrorist organisation can apply to the Central Government to remove its name from the list under Section 36 and 37 of the Act. But these sections make no clarity on the procedure to be followed by the Government for disposing of the application for removal of name. The Constitution guarantees a fundamental right to association and banning any organisation for life time even when it is no more indulges in any sort of unlawful or criminal activities would defeat the very purpose of the Constitutional principle.

The Act makes room for appeal to a Review Committee in case of rejection of the application to remove name from the list. The members of this Committee will be appointed by the Central Government. This raises concerns regarding fair and impartial hearing as those who are behind rejecting the application at the first place will be deciding the fate of an organisation in the Review

Committee. Moreover, the Committee has no obligation to give any reasons if it decides to refuse the appeal making the process highly opaque and unfair.

Arrest under UAPA

There is a constitutional safeguard against arrest and detention which are guaranteed under Article 22 of the Constitution. It states that every person, arrested or detained, has a right to know the grounds of such arrest and detention as soon as possible. The Police is required to produce such arrested or detained person, as the case may be, to the Magistrate within a period of twenty four hours. Moreover, Section 50 of the CrPC places an obligation on the Police who is making an arrest without warrant to immediately communicate the arrested person about the charges and offence for which he is arrested. Under UAPA, an arrest can be made without giving reasonable justification to the individual. The guideline provided in the landmark case of *DK Basu vs. State of West Bengal* that the family of an arrested person must be informed after the arrest is flouted in the case of arrest under UAPA an Officer who is making an arrest is only obligated to inform the suspect of the charges for which he/she is arrested “as soon as maybe”. There is no prescribed or fixed time limit mentioned under the Act.

Presumption of Innocence

“The right to fair trial is one of the fundamental guarantees of human rights and the rule of law”. Presumption of innocence is one of the facets of right to fair trial derogation of which is not permissible in any circumstances. THE UAPA violates this aspect of the right to fair trial by presuming the accused guilty unless his innocence is proved by the accused himself. Section 43A of the Act says that if “definitive evidence” is found against the arrested individual, then the “court shall presume, unless the contrary is shown, that the accused has committed such an offence”. This also marks the reversal of another universal criminal law principle that the burden of proof of guilt lies on the prosecution. Moreover, it is highly difficult for an accused to collect evidence to prove his innocence at this stage.

Period of Detention

The amendment to the Act in 2008 increased the detention period from earlier fixed 90 days to 180 days. After the completion of 90 days period, a public prosecutor is only required to prove before a judicial authority that the investigation is still going on, this is sufficient fact to detain the accused for further period of 90 days. In the contrary, under Section 167 of CrPC, “a person cannot be detained for more than 90 days he is accused of offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years and for 60 days if accused for any other offence”. In other democracies of the world, this period of detention is not as high as it is in India. For example, In Canada, the maximum period of detention is one day, it is only five days in France, in UK it is 26 days (Nair, 2009). It is perhaps the highest in India.

5. Stringent Provisions for Bail

Bail provisions and procedures related to investigation and arrests are different in cases of UAPA from those followed in offences under the IPC (Saxena, 2020). Section 43D of the UAPA states that if the public prosecutor raises opposition for granting bail to the accused, then the judge can only deny bail if he is satisfied that there are “reasons to believe that the charges against the accused are prima facie true”. In the case of *Jayanta Kumar Ghosh v. State of Assam*, the court examined the meaning of “prima facie true”. It held that the test is to determine whether the accusations are “inherently improbable or wholly unbelievable” which can be determined by examining the evidence collected during investigation. This test is lower than the test followed while rejecting bail under Section 437 of the Code of Criminal Procedure, thus making it more difficult to get bail under UAPA. In fact, the factors such as possibility of absconding, tampering of evidences and intimidating witness by the accused which are given consideration under the CrPC are being overlooked by the Court in cases under UAPA. It only focuses on whether there are evidences to show guilt. It is highly unlikely that prosecution has any evidence against the accused at the early stage of the proceeding to prove that the charges are prima facie true. In *Abdul Sathar v. Superintendent of Police*, the

Kerala High Court observed that the considering factor for granting bail is not the number of days that the accused has spent in jail but the magnitude of offence and effect of awarding bail on the public. However, in most cases, judges are likely to decline bail application in order to not get accused of being lenient with people who are indulged in terrorist activities.

These aspects are more stringent in the case of UAPA and this is the reason why the authorities are opting to charge a person or organisations under it in order to suppress dissenting opinions.

No Compensation for Malicious Prosecution

It is interesting that after the dismantling of POTA in 2004, many of its provisions were included in the UAPA verbatim but one of the sections of POTA, Section 58 was kept out of its ambit. Section 58 of POTA provided for the punishment and compensation for malicious actions exercised by the Police authority. This states that if any police officer exercises powers maliciously or corruptly then he must be punished with imprisonment or with fine. The exclusion of this section from the UAPA demonstrates the clear intention of the Government to provide blanket protection to those who indulge in the abuse of power.

6. 2019 Amendment in UAPA

An amendment was introduced in the UAPA in 2019 which brought about two changes. First, it empowered the National Investigation Agency by giving it a complete freedom to investigate and operate in any part of the Country without prior permission of the State Governments and local authorities. This change can be perceived as a blow on federalism. Second, it gave the Central Government an unbridled power to include the name of any ‘individual’ into the list of terrorist without giving any explanations or reasons. Designation of an individual as a terrorist even when they have no connection with any terrorist organisations by an executive can have huge repercussions on the life of the individual.

The constitutional validity of this amendment was challenged in the case of *Sajal Awasthi v. Union of India*. The petitioner challenged the

constitutionality of the amendment introduced in the UAPA in 2019 by which the Central Government can tag any individual as terrorist without mentioning any objective guidelines to be followed before conferring such designation. He said that this provision is a direct assault on Article 14, Article 19 and Article 21 of the Indian Constitution. He also stated that “Right to Reputation is an intrinsic part of a fundamental right to life with dignity under Article 21 of the Constitution of India and 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”.

One more challenge was brought forward by the Association for protection of Civil rights which stated in its petition that “conferring of such a discretionary, unfettered and unbound powers upon the Central government is antithesis to Article 14”.

7. Conclusion

There has been growing widespread use of anti-terrorism laws in the recent times. The use of UAPA against social activists, human rights defenders, academicians, journalists and students for raising their voices and opinions in the public against the policies of the Government portrays the world's largest democracy in extremely bad light. These people remain languished in jail even when there is absence of adequate evidence to prove them guilty. It is very difficult for a common person to defend himself against the stringent provisions of this act, even getting bail is the matter of great hardship under this act.

Law alone cannot stop terrorism but if the law is not used in letter and spirit then it can be abused by those in powers against the weak as evident in the case of UAPA. In order to nip the threat of terrorism in the bud, it is equally important to make law which results in inclusion of minorities, lead to social and economic development, tackle the problem of uneven development, give room for political dissent and debate etc. The former United Nation's Secretary General had once opined that, “discrimination on the basis of ethnic origin or religious belief create grievances that can be conducive to the recruitment of terrorists, including feelings of alienation and

marginalisation and an increased propensity to seek socialisation in extremist groups”.¹

Moreover, presently, we do not have review mechanism of laws for tackle terrorism. Periodic review of legislations is important to check violations of human rights. For this inspiration can be drawn from United Kingdom where terrorism acts are reviews once in every twelve months.² There is a need to set up a review committee to look objectively and rationally into the process of designating individuals as terrorist and also to supervise investigation with fairness. Judiciary, one of the four pillars of democracy, should also play an active role in defending the human rights violations by the authorities under the garb of UAPA as justice should not only be done but also seen to be done.

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¹ *Supra* note 21.

² UK terrorism Act 2000.

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