ANALYSIS OF SECTION 35 & 36 OF THE UAPA AFTER THE 2019 AMENDMENT

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ABSTRACT

National integrity and sovereignty is the reputation and dignity of a country on the global scale. The threats to such dignity are dealt with great force and power by the countries. India, from the inception made several statutes in order to deal with any issue that may cause threat to its peace and harmony. The journey started with the Preventive Detention Act in the 1950s, added Acts like UAPA, NSA, NIA, TADA (now repealed), POTA (now repealed), etc. But it is the duty of the state to make sure that while drafting such legislations it is not misusing the public trust by enabling itself to exercise such powers which are against the rights of the individuals. In the paper, the author attempts to analyse the constitutionality of Article 35 of the UAPA as it stands after the amendment of 2019. There have been many questions and allegations regarding its constitutionality and overall working. The author aims to analyse the provision in accordance with the judicial precedents and the internationally accepted principles of the fair trial mechanism.

Keywords*:* Liberty, Individual, Arbitrary.

INTRODUCTION

The Unlawful Activities Prevention Act, 1967[i] was introduced in response to the rising activities in the 1950s and 1960s against the integrity and sovereignty of the country. The original Act of 1967 in its Statement of Objects and Reasons had very clearly mentioned that:

> "*An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for matters connected therewith.*"

But the scope of the Act was altered in 2004[ii] by adding the words "and for dealing with terrorist activities" and thereby extending its scope so as to include the terror related activities under the scope of the Act. The provisions of the Terrorists and Disruptive Activities (Prevention) Act, 1987[iii] and Prevention of Terrorism Act, 2002[iv] were put into the UAPA Act so as to make it an effective legislation which empowers the state authorities for taking action in cases of terrorisms and for the prevention of activities related to terrorism through the amendment of 2004.[v]

Further, the Amendments in the year 2004,[vi] 2008,[vii] 2012[viii] and 2019[ix] made the Act the primary legislation dealing with all such activities which are against the sovereignty and integrity of the nation including the terror related activities. With the amendment of 2019,[x] the Parliament enabled the Central Government's law enforcement agencies power to declare an individual as terrorist through the amendment in the Sections 35[xi] and 36[xii] of the Act alongwith the Schedule IV[xiii] of the Act.

The Amendment of 2019 has been the centre of discussion regarding the constitutionality of the provisions that it has amended and by giving the authorities such powers by which they can unilaterally declare an individual as an terrorist and without providing any such clear cut mechanism for the appeal or any other remedy except for the Review Committee provided under Section 37 of the Act[xiv] again which is constituted by the executive only without any kind of Judicial intervention.

The Criminal Justice Model that India follows is that of Due Process Model, under which the state authorities have an obligation to abide by the rules and to make sure that no innocent is punished in the administration of justice in the criminal cases. But in certain situations it becomes imperative for the state to opt for the Crime Control Model in order to make sure that the societal interests are taken care of, even in the event of some kind of uneasiness to an

individual. Such situations include the situation where it is for national integrity and sovereignty. The legislation like UAPA, 1967 are the prime example of the Crime Control Legislations, but with the Judicial interventions even these are supposed to follow the bare minimum due process standards.[xv]

The Act through the Amendment of 2019 expanded definition and scope of the word "terrorist" under the act by including individuals under sections 35[xvi] and 36.[xvii] Further the Amendment empowered the Director-General of the NIA to seize property of any such individual who is indulging in terrorism act under section 25.[xviii] The notification of the individual as terrorist is provided through the addition of the name in the Schedule IV of the Act, for the denotification of which the mechanism includes the setting up of Review Committee under Section 37,[xix] but this committee is also constituted by the Central Government itself which raises the objections regarding its fairness and transparency.

PURPOSE OF BRINGING THE AMENDMENT TO SECTIONS 35 & 36

The amendment was brought in order to make sure that the terror-related activities can be checked by the authorities. The problem with the earlier provision was that, though it empowered the Central Government to notify certain organisations as "terrorist" but it lacked the complete shut down of the said terrorist acts by that organisation. The said organisations used to suffer by notifications as their names were notified and so the funds and assets of the organisations were seized by the authorities and the members of the organisation were usually not admitted in the foreign countries. But the problem with that was the position that the members used to distance itself from the name of organisation and make a new organisation and so by which they used to get proper working accounts and assets once again by dedicating part of their own personal wealth.

In order to check this menace, the amendment in the year 2019 in UAPA was to hit at the root of the problem. By notifying the individuals as terrorists it became possible for the government to notify the individuals as terrorists, the government will be able to seize the accounts and assets of such individual and in addition to that the foreign countries will also be able to deny entry to such individuals into their land without going into the question of whether or not such individual still belongs to particular organisation or not. Further, in the recent times it has been

noticed that there have been growing concerns regarding the lone-wolf attacks on the Indian land, for which the Union Home Minister in 2018 had shown concerns at the National Security Guards' 34th Rising Day.[xx] In the recent decade the lone-wolf attacks have been rising all over the globe whether it is US, UK, New Zealand, France or any other nation,[xxi] for which it was imperative to bring such legislation which could cater such concerns completely.

Basically, under Section 35 the Central Government has the power to notify any individual or organisation as a "terrorist." The requirement under the Section 35(2) given is just that the Central Government is required to believe so. So, there is no clear cut criteria for declaring any person or organisation as terrorist. The only restriction is in the form of Section 35(3) which gives three categories under which the person or organisation must fall. Further, in case of any kind of objection to such notification, the person or the organisation can make an application for denotification of its name under Section 36. Finally, the Review Committee will decide on the fate of the application.

ISSUES WITH RESPECT TO AMENDMENT TO SECTION 35 & 36

The first primary objection is simply the empowerment of the Central Government for extension of its power to include the categorization of individuals as "terrorists." Further, the amendment is alleged to be in contravention of International Covenant on Civil and Political Rights, 1967[xxii] as it recognises the principle of 'innocent until proven guilty' as a universal human right,[xxiii] which is also a basic principle of any criminal justice system in modern states.

The problem with the new amendment is that it makes it possible for the Central Government to notify any individual as terrorist but it does not lead to any kind of punishment to the individual and neither the conviction. Further, for such categorization of the individual as terrorist, no objective criteria has been laid down by the legislation, which makes it possible for the person in authority to misuse it, as the famous saying goes, "Power corrupts and absolute power corrupts absolutely."

The Constitution of India guarantees certain fundamental rights to individuals upon being arrested:

1. Article 22 of the Constitution and Section 50 of the Criminal Procedure Code, 1973: accord the protection that the person should be conveyed the grounds of arrest.
2. Within 24 hours of the arrest, the person should be brought before a magistrate.[xxiv]
3. Right to be released on bail.[xxv]
4. The right to a fair, just, and speedy trial is provided under Article 14 and 21 of the Constitution as laid down in the case of *Huissainara Khatoon v. Home Secretary.*[xxvi]
5. Right to consult a lawyer as enshrined in Article 22 (1) of Constitution[xxvii] and Section 41D and Section 303 of Cr. PC, 1973.[xxviii]
6. Right to free legal aid is accorded under Article 39A of the Constitution.[xxix]

An arrest under UAPA is different since it is a preventive detention law and a person is arrested majorly on the grounds of abetting or advocating an unlawful activity, terrorist act, raising funds for or conspiring for a terrorist act, being associated with a terrorist organisation, etc. The vagueness of grounds for preventive detention such as security of the state, maintenance of public order, etc. However, given the vagueness of these terms, the State has misused this law. Therefore, the Constitution provides certain safeguards to restrain the misuse of preventive detention laws, which are as follows:

I. If someone is taken in custody in light of any of the preventive detention laws, a person can be kept in custody for 90 days, i.e., 3 months at the first instance. If the detention needs to be extended, the case should be sent to an advisory board, consisting of a person qualified for appointment as a High Courtjudge. On board approval, the detention can be extended.[xxx]
II. Grounds of detention have to be informed.
III. The earliest opportunity of representation has to be given against the detention.

UAPA however, has escaped these constitutional mandates for the reason that its necessary for the maintenance of national security. It is essential to mention here that India is among the few countries where preventive detention is allowed during peacetime and not restricted to when the country has declared war, even while stipulating bare minimum standards to prevent infringement of fundamental and human rights compared to standards followed internationally. However, Indian governments have tried to surpass even these bare minimum standards**.** It is the basic duty of the state before giving such unchecked powers to itself to make grounds for the need of making such provisions. The Government in any democracy is for the people, of

the people and by the people. In such a scenario it becomes the duty of the government to explain and make people understand the reasons before bringing any such legislation which may cause violation to the Fundamental Rights of an individual. Although in the Parliament one of the reasons presented by the Government was that it was brought in for the purpose of punishing such individuals who carries out such activities solely dependent on himself in certain cases, but the situation before the coming up of this amendment was that the Act had the provisions from sections 16 to 24A[xxxi] for punishing individuals for being "lone terrorists" or punishing the individuals who are members of terrorist organisations.

Article 4 of the ICCPR[xxxii] clearly mentions that only in cases of acute emergency the state has the option to derogate from their duty to protect civil-political rights of its citizens. In the current scenario, the state has failed to prove the test of necessity for digressing from its duty of protecting the civil-political rights of its citizens. The similar provisions for designation of an individual as terrorist also exists under the USA Patriot Act of 2001,[xxxiii] but the most important point to be seen here is that under the said Act the starting Section 1 itself makes it very clear that any executive or government cannot designate a person as terrorist unless they have proper basis for having such suspicion. Here, the Act itself defines the basis for designating an individual and so in a way it justifies its purpose. So, here it is very much clear that on one side the Section 35 of the UAPA, 1967, simply requires the Government to believe a person to be a terrorist whereas the USA Patriot Act requires proper scrutinising and basis for designating an individual so.

The Question of Constitutionality

In the case of Maneka Gandhi v. Union of India,[xxxiv] the apex court established the Golden Triangle of the Constitutional Safeguards and categorically held that in case a law is depriving an individual his "personal liberty" has to stand the test of Article 21 and also that of Articles 14 and 19. The court was further of the opinion that for mere reasons that there is an enabling law, does not make it right for the government to restrain personal liberty of an individual. The law needs to be "just, fair and reasonable."[xxxv]

The new Section 35(2)[xxxvi] empowers the government that in case that if it only believes an individual is related to terrorism then it can declare such an individual as terrorist. The said provision is questionable because of the fact that the provisions does not lay down a just and

fair procedure for naming an individual as terrorist. The word "believes" in the provision points that there will be no FIR, no filing of charge-sheet, no trial under the eyes of a court and neither there will be any conviction, the person is being named as a terrorist only because of the fact that the state believes him so.

Presumption of innocence or the innocent until proven guilty, are the basic principles on which the Indian Justice System works, as is enshrined under the Article 20 of the Constitution.[xxxvii] The principle has been upheld by the apex court in various cases including *Babu* v. *State of Kerala.*[xxxviii] The new amendment makes the person guilty even before any kind of trial or is found guilty. The Supreme Court in the case of *S. Nambi Narayanan* v. *Siby Mathews,*[xxxix] uphold the Right to reputation as an intrinsic part of the Right to life under Article 21 of the Constitution. The government in the current scenario is naming an individual as terrorist before conducting any trial through judiciary, in such a scenario naming him to be terrorist through a notification in the official gazette is a direct attack on the right to reputation of that person. Although it may be understood that a convicted terrorist has no right to reputation for the acts that he has done and it has been proved that he has done them. But even without giving a fair trial to a person, tagging the person as terrorist is completely against the basic constitutional safeguards.

The Act has been criticised for being passed without proper discussion in both the houses of the Parliament. During the Parliamentary debates regarding the provisions to be amended under the bill, it was alleged by the Member of Parliament Mr. Kapil Sibal that, *"You are using your brute majority in the Lok Sabha and manufactured majority in the Rajya Sabha to push these patently unfair amendments."*

Further, Mr. Chidambaram during the Parliamentary debate while highlighting the faults in the bill said that,[xl]

> *"If you look at the statement of objects and reasons, the real mischief Paragraph 3, Sub Paragraph 2, where it is mentioned in passing that it is to empower the Central Government to add and remove the name of an individual. This is mischief and this is why we oppose the act. We are opposing the mischievous amendments which have empowered the Centre to name an individual. You are effectively amending Sections 35 Sub Sections 1, 2 and 3*

> *and Section 36 Sub Sections 1, 5 and 6. The real mischief in Section 35 Sub Section 2."*

Similar concerns were raised by the other members of the house highlighting the problems with the bill, the thing that needs to be focussed here is that the ruling party did not take into consideration the concerns raised by the members of the house in the opposition. It is the duty of the ruling party to take into account the voices of all the members whether they are of the same party or are in opposition, because regardless of the power, they are also the representatives of the people of the country.

Pending Litigations

The case of *Sajal Awasthi* v. *Union of India*[xli] is still pending in the apex court to decide upon the constitutionality of the Act. When the action of the state is such that it violates the rights of the individual which are guaranteed by the Constitution, it becomes the duty of the judiciary to protect these constitutional safeguards. The petitioner has filed the PIL stating that the amended UAPA infringes the Article 14, 19 and 21 and so it is Unconstitutional. Further, the Act does not provide any kind of framework for the individual to justify himself before the arrest. The petitioner categorically stated that:

> "*Right to Reputation is an intrinsic part of the fundamental right to life with dignity guaranteed by Article 21 of the Constitution of India. Therefore, tagging any individual as 'terrorist' even before the commencement of fair trial or any application of judicial mind over it, does not adhere to procedure established by law."*

The problem with the tagging of the individual as terrorist lies with the fact that an individual even if denotified from the list of terrorists in the future will still be such a mark on his reputation which will not be removed.[xlii]

The Act in its present form can be used by the state to suppress dissent, opinion and opposing political voices, which will be in direct violation of Article 19(1)(a) of the Constitution.[xliii] With such unfettered powers it will become a tool for the political party in the power to use against its opponent which cannot be allowed to happen. In *Anuradha Bhasin* v. *Union of India*,[xliv] while stating the importance of free speech and expression including that of press, the court held that:

> *"Responsible Governments are required to respect the freedom of the press at all times. Journalists are to be accommodated in reporting and there is no justification for allowing a sword of Damocles to hang over the press indefinitely. The freedom of speech and expression and the freedom to practise any profession or carry on any trade, business or occupation through the medium of internet enjoys constitutional protection under Article 19(1)(a) and Article 19(1)(g). Thus, the restriction upon these fundamental rights must agree with the mandate under Article 19(2) and (6) of the Constitution, inclusive of the test of proportionality and any order suspending internet services indefinitely is impermissible under the Temporary Suspension of Telecom Services (Public Emergency or Public Service Rules) Rules, 2017. Any orders which suspend the internet facility issued under the suspension rules, must adhere to the principle of proportionality and must not extend beyond the necessary period."*

Though the Act has been amended in order to make sure that sufficient provisions are there in order to combat modern day terrorism including cross-border, cyber-terrorism and intra-country. But there are anticipations regarding the misuse of these provisions due to the prior experience of the state using the sedition laws and other anti-terror legislations to suppress dissent. Generally these laws are vaguely worded and leave wide scope for misuse, the same is the situation in the Section 35 and 36 of the Act.

CONCLUSION

The Amendment of 2019 to Section 35 and 36 was done in order to make sure that any such individual who is acting or may act against the interest of the country can be punished with strictest provisions. The national integrity and sovereignty of the country is of paramount importance, and in order to be sure that the state sometimes needs to opt for crime control model legislations, due to which there may be some inconveniences to the individuals. In the present Act also, there are few provisions which are said to be in violation of certain constitutional safeguards and for which the petitions are pending in the Supreme Court.

The Act in its present form is prone to misuse even in situations which are not of national security. The unfettered enabling power of the state to designate any individual as terrorist without following the basic principles of criminal justice administration and due process of law is completely against the basic principles of a democracy. Social Theory propounded by Hobbes states that an individual in order to become part of a state/society gives up certain rights of his for which in return he gets certain privileges and protection of the state. But here in the present scenario the state which is based on the principles of democracy is taking away the basic rights of that individual which in any scenario cannot be allowed to happen. On the other hand, it has to be kept in mind that till the end of 2022, only 48 individuals have been designated as terrorists which are proved to be involved in such activities which are of anti-national nature.

After analysing the provisions of the Act(as they stand after the amendment), in the opinion of the author there is imminent need of providing for a certain procedure for appealing the matter to a judicial authority, as it is against the natural justice that the review committee is constituted by the executive itself.[xlv] Further there is a requirement of defining the word "belief" in *sensu stricto*, in order to make it possible for the state to have some responsibility and not being able to arbitrarily decide the status of an individual as a terrorist.

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9. Terrorists and Disruptive Activities (Prevention) Act, 1987
10. Prevention of Terrorism Act, 2002 (Act 15 of 2002).

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3. *S. Nambi Narayanan* v. *Siby Mathews*, (2018) 10 SCC 804.
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[i] The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

[ii] The Unlawful Activities (Prevention) Amendment Act, 2004 (Act 29 of 2004).

[iii] Terrorists and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987).

[iv] Prevention of Terrorism Act, 2002 (Act 15 of 2002).

[v] The provisions were added through the amendment of 2004 in the UAPA Act in order to make the government agencies capable of taking action against the terrorism because the earlier Acts dealing with the terrorism related activities were repealed because of the criticism they faced owing to the misuse of the powers and arbitrary nature of the provisions of those acts, namely TADA(1987) and POTA(2002).

[vi] *Ibid.*

[vii] The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008).

[viii] The Unlawful Activities (Prevention) Amendment Act, 2012 (Act 3 of 2013).

[ix] The Unlawful Activities (Prevention) Amendment Act, 2019 (Act 28 of 2019).

[x] *Ibid.*

[xi] 35. Amendment of Schedule, etc.-- (1) The Central Government may, by [notification], in the Official Gazette,--

(a) add an organisation to the [First Schedule] [or the name of an individual in the Fourth Schedule];

(b) add also an organisation to the [First Schedule], which is identified as a terrorist organisation in a resolution adopted by the Security Council under Chapter VII of the Charter of the United Nations, [or the name of an individual in the Fourth Schedule], to combat international terrorism;

(c) remove an organisation from the [First Schedule] [or the name of an individual from the Fourth Schedule];

(d) amend the [First Schedule] [or the Fourth Schedule] in some other way.

(2) The Central Government shall exercise its power under clause (a) of sub-section (1) in respect of [an organisation or an individual only if it believes that such organisation or individual is] involved in terrorism.

(3) For the purposes of sub-section (2), [an organisation or an individual shall be deemed to be involved in terrorism if such organisation or individual]--

(a) commits or participates in acts of terrorism, or

(b) prepares for terrorism, or

(c) promotes or encourages terrorism, or

(d) is otherwise involved in terrorism.

[(4) The Central Government may, by notification in the Official Gazette, add to or remove or amend the Second Schedule or Third Schedule and thereupon the Second Schedule or the Third Schedule, as the case may be, shall be deemed to have been amended accordingly.

(5) Every notification issued under sub-section (1) or sub-section (4) shall, as soon as may be after it is issued, be laid before Parliament.]

[xii] 36. Denotification of 1[terrorist organisation or individual].-- (1) An application may be made to the Central Government for the exercise of its power under clause (c) of sub-section (1) of section 35 to remove [an organisation from the First Schedule, or as the case may be, the name of an individual from the Fourth Schedule].

(2) An application under sub-section *(1)* may be made by--

(a) the organisation, or

(b) any person affected by inclusion of the organisation in the [First Schedule as a terrorist organisation, or].

[(c) any person affected by inclusion of his name in the Fourth Schedule as a terrorist.]

(3) The Central Government may prescribe the procedure for admission and disposal of an application made under this section.

(4) Where an application under sub-section *(1)* has been rejected, the applicant may apply for a review to the Review Committee constituted by the Central Government under sub-section *(1)* of section 37 within one month from the date of receipt of the order of such refusal by the applicant.

(5) The Review Committee may allow an application for review against rejection, to remove [an organisation from the First Schedule or the name of an individual from the Fourth Schedule], if it considers that the decision to reject was flawed when considered in the light of the principles applicable on an application for judicial review.

(6) Where the Review Committee allows review under sub-section (5) by or in respect of [or an individual], it may make an order to such effect.

(7) Where an order is made under sub-section (6), the Central Government shall, as soon as the certified copy of the order is received by it, make an order removing the organisation from the [First Schedule or the name of an individual from the Fourth Schedule].

[xiii] Added by The Unlawful Activities (Prevention) Amendment Act, 2019 (Act 28 of 2019).

[xiv] Section 37 of the UAPA, 1967. Review Committees:

(1) The Central Government shall constitute one or more Review Committees for the purposes of section 36.

(2) Every such Committee shall consist of a Chairperson and such other members not exceeding three and possessing such qualifications as may be prescribed.

(3) A Chairperson of the Committee shall be a person who is, or has been, a Judge of a High Court, who shall be appointed by the Central Government and in the case of appointment of a sitting Judge, the concurrence of the Chief Justice of the concerned High Court shall be obtained.

[xv] In Maneka Gandhi v. Union of India, 1978 (1) SCC 278, the Court held *"the procedural law must be just and fair and reasonable."*

[xvi] *Supra* note 11.

[xvii] *Supra* note 12.

[xviii] The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967). s. 25.

[xix] *Supra* note 14.

[xx] EconomicTimes News Report: Statements made by the Union Home Minister(Rajnath Singh) in 2018, available at: https://economictimes.indiatimes.com/news/defence/diy-lone-wolf-terror-attacks-a-major-challenge-for-india-rajnath-singh/articleshow/66235255.cms. Last visited on 1 December, 2022.

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[xxiii] International Covenant on Civil and Political Rights, 1967. Art. 14.

[xxiv] The Code of Criminal Procedure, 1973, S 57.

[xxv] *Ibid* s. 50(2).

[xxvi] 1979 AIR 1369.

[xxvii] Constitution of India, art. 22.

[xxviii] The Code of Criminal Procedure, 1973, ss. 41D and 303.

[xxix] Constitution of India, art. 39A.

[xxx] *Supra* note 27..

[xxxi] The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967). ss. 16 to 24A.

[xxxii] Article 4 of the ICCPR: 1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.

[xxxiii] USA Patriot Act, 2001.

[xxxiv] *Supra* note 15.

[xxxv] *ibid.*

[xxxvi] *Supra* note 11.

[xxxvii] Constitution of India, 1950. art. 20

[xxxviii] *Babu* v. *State of Kerala*, (2010) 9 SCC 189.

[xxxix] *S. Nambi Narayanan* v. *Siby Mathews*, (2018) 10 SCC 804.

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[xli] *Sajal Awasthi v Union of India* and *Association for Protection of Civil Rights v Union of India* – with Sajal Awasthi being the lead petition.

[xlii] Example, i) when a police vehicle visits a home even for passport verification the people around the neighbourhood gossip about how the person must have done something wrong,
ii) When an accused in a criminal case is shown on the television screens, the person is often cited by the news channels and the public at large as being a convict without even knowing the complete facts of the case.
In such a society, if an individual is named as a terrorist once, then it will be impossible for him to live a normal life because his reputation in the society will be shattered.

[xliii] Constitution of India, 1950, Art. 19(1)(a).

[xliv] *Anuradha Bhasin* v. *Union of India*, AIR 2020 SC 1308.

[xlv] *Nemo judex in causa sua, meaning, as no one can be judge of its own case.*