

SPECIAL ACT OF UAPA: ITS CONSTITUTIONAL VALIDITY

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ABSTRACT

A nation's existence revolves around maintaining its national security. In India, one of the many legislations that has been enacted is the Unlawful Activities (Prevention) Act, of 1967, which is an anti-terror act passed after the repealing of POTA. However, the draconian provisions of it have been reinforced in UAPA thus also giving powers to the government to misuse the legislation and designate any individual as a terrorist, at their discretion. The Act has gone through various amendments. The provisions of UAPA are seen to be violating several fundamental rights which makes us question the constitutional validity of the legislation. The legislation is can be easily misused by the government for draconian measures in the name of national security and preventive detention. In this paper, we analyse the constitutional validity of the act and the provisions that violate the fundamental rights of the citizens through the Draconian nature of the law.

Keywords: UAPA, Anti-terrorism law, Constitutional validity, Violation of fundamental rights

INTRODUCTION

For a strong democracy to function, maintaining the accountability, integrity and transparency of the government and its functioning is the cornerstone of a strong democracy. These are the key features on which the fate of the government depends. It is seen that there have been instances in which the government succeeded in silencing the critics of its policies. Although the constitution of India is a democratic one where citizens have fundamental rights and freedoms, there have been multiple instances of the government repressing dissents and other fundamental rights by unjustifiably imposing strict special laws like that of the Preventive laws of UAPA and NIA.

These special laws are those enacted by the Indian government for exceptional and extraordinary cases and cover situations not falling under the general laws. In India, these laws are enforced to deal with an emergency when there is a threat to countries national security and society. One such law is the Unlawful Activities Prevention Act (UAPA), which is intended to protect the country and its citizens from terrorism and other threats. However, over time it has been criticised for being too stringent and used to suppress dissent and to violate the fundamental rights and the basic human rights of the citizens in the name of national security. Thus the constitutional validity of UAPA is questioned and analysed through the evolution of its amendments and judicial pronouncements.

BACKGROUND OF THE UAPA ACT

The UAPA is a preventive detention law. The first of these laws was the Preventive Detention Act, of 1950 which was temporarily followed by the Armed Forces Special Powers Act, of 1958, which is imposed in the North East and Kashmir till today. Then came the UAPA in 1967ⁱ, which was passed by the parliament with the aim of ‘preventing unlawful activities against the backdrop of the Naga rebellion. Since then the statute has undergone various amendments to keep up with terrorism, it made it more rigorous and stringent. The definition of the Act recognises two types of unlawful acts which are “terrorist acts” under section 15 and “unlawful activities” under section 3. Looking into the evolution of amendments, the first amendment was in 2004ⁱⁱ, during which POTAⁱⁱⁱ was repealed however certain provisions

relating to ‘terrorist activities’ was reinforced in the UAPA. The next amendment was in 2008 right after the Mumbai terror attack, due to which it felt the need to incorporate the definition of ‘Terrorist Act’ falling under section 15 while also mentioning offences which would be held liable under this section. This amendment gave powers to the government to call any act a terrorist act without much justification given to the court. It included not just the acts that would ‘threaten the unity, integrity, security and sovereignty of the people’ but also the acts that are “likely” to threaten this and would be considered terrorist acts. This provision was seen to be giving excessive and unconditional power to the government to declare any act as a terrorist act which would eventually lead to the misuse of powers and violation of people's rights.

Furthermore, in 2013, another amendment incorporated ‘economic and financial offences’ relating to terrorism^{iv}. The most recent amendment took place in 2019, which made the act even more controversial and Draconian in nature as now the state can declare an organization as well as any individual a terrorist leading to excessive exercise of power in the name of security, thus violating the fundamental rights of the individual. This amendment was called “India’s McCarthy moment”^v by many.

A FEW PROVISIONS OF THE ACT AND AN ANALYSIS OF ITS CONSTITUTIONAL VALIDITY

- ***Section 35 and 36 of Act^{vi}: Power to declare individuals as terrorist***

The modification to section 35 of UAPA is arguably the most divisive adjustment made. Among other things, this amendment widened the use of the term “terrorist” by now incorporating ‘individuals’ in sections 35 and 36 of Chapter VI of the act, previously only organizations could fall under terrorism. The Centre felt that to combat the threat of terrorism it was important to add individuals who do not operate under any specific organization to fall under these sanctions.

Effects of the Provision: this provision led to giving the government the vast and arbitrary power to label anyone as a terrorist. This can lead to wide misuse of power and violation of the fundamental rights of due process of law of the citizen as well as lead to a way of suppressing dissent as well as the right to reputation seen in the case

of *S.Nambi Narayanan v Siby Mathews & Others Etc.*^{vii} thus one can question whether there was a real need for this since “lone terrorists” was already under section 16 to 24A of the act. Thus the constitutional validity of these amendments was challenged in the case of *Sajal Awasthi v. Union of Indias*^{viii} and *Association for Protection of Civil Rights v. Union of India*^{ix}. The main contention in the cases was that the provisions violate the principle of natural justice and by its arbitrariness and violating Article 14, 19 and 21 of the constitution since it does not mention any specific criteria by which a person may be assumed to be a terrorist even before the trial begins thus subduing the power of the judiciary in adjudicating the presumption and judicial review.

Thus we can see the lacune in this act. It has many controversies over the arrest of dissents like journalists, students etc. an

- ***Section 25 of UAPA: Powers Given to NIA***

The amendment gives the NIA officers of the rank of inspector and higher the power to investigate cases of terrorism. Secondly, it amended section 25 for the ‘seizure of property’ by the NIA officer while doing an investigation. And made the detention period 180 days from 90 days.

Effects of the Provision: However this provision can be seen to be undemocratic since it gives excessive powers to the Police without any checks and balances making it draconian in nature.

- ***Section 43D (5) of UAPA: Refusal of Bail***

Under this section, the act made it virtually impossible to get bail under the act with no exceptions. This was questioned in the Elgar Parishad caste violence case, here Bombay high court called the provision “illusionary” and stated that it made the granting of bale almost impossible.

Effects of the Provision: thus this provision leads to the violation of the right to life and personal liberty under Article 21 of the Constitution. The courts held that the “totality of the case should be taken into account”. However, there were cases like *Union of India v KA Najeeb*^x. where the accused was made to stay in jail for several years even

before his trial began, which violated the fundamental right to speedy trial which cannot be denied and thus led to granting of bail in this case.

- ***The violation of rights of Arrest and Accused in the Indian constitution***

The foundation that one is innocent until proven guilty is believed. However, UAPA revokes this privileged as it can presume a person to be a terrorist even before his trial and without judicial review since it is at the discretion of the government. This thus denies the fundamental rights of Article 22 and also rights under Section 50 of the CrPC which lays the grounds of protection under arrest. UAPA being a preventive detention law takes advantage of its nature and vagueness of terms in misusing its powers, it even escapes the safeguards laid down for Preventive Detention laws for the reason of national security.

ANALYSIS OF JUDICIAL PRONOUNCEMENTS OF THE UAPA ACT

We see that the constitutional validity of the Preventive Detention laws is challenged in various cases. Like in the case of *A.K Gopalan v. The State of Madras*^{xi}, the constitutional validity was challenged, and the court held that section 14 of PDA curtailed the power of judicial review. While in *Maneka Gandhi v. UOI*^{xii}, this previous judgement was overruled, here due process of law along with 'freedom and liberty' was emphasised. It was also said that the A.K Gopalan case lacked vision and held that Justice Fazal Ali made a dissenting judgement.

UAPA was one such law curated for special situations to protect national security however it is being misused due to its stringent provisions and draconian nature. We can discuss the case of *Romila Thapar v UOI*^{xiii} which emphasises how UAPA restricts people's fundamental rights during peacetime when there is low risk to countries' security. In the case of *V.G Row v. State of Madras*^{xiv}, where it was held by the supreme court held that the government has to give the grounds on which it declares an organization unlawful without which it would violate the fundamental right to freedom of association. Furthermore, in the case of *Arupa Bhuyan v State of Assam*^{xv}, it was held that membership in an unlawful organization cannot be punished in every case. Even the issue of granting bail was questioned in the case of *Nikesh Tarachand Shah v Union of India*.

Critical Analysis:

The UAPA is thus a statute which was passed in 1967, which repealed POTA as an anti-terrorist act, however, we see that despite the repealing of POTA due to be deemed as unconstitutional many sections of it were incorporated in the UAPA, which makes it questionable since it was termed draconian in the first place and yet reinstated. The act is also extremely vague and ambiguous in terms of the definition of terrorism, this can lead to excessive use and lucrative interpretation of the term by giving discretion to the investigating agencies. The act also gives wide discretion to the will of the centre which can lead to subjective interpretation and its misuse to shut down dissents and other political agendas.

The issue arises that the centre has excessive powers and also escapes Judicial review, only the centre can suspect someone to be a terrorist and does give the individual the benefit of judicial review and due process of Law. Due to this, there has been a misuse use of power in a draconian manner without any judicial scrutiny and accountability. It is known that the fundamental principle of the criminal justice system is that a victim is innocent until proven guilty however in UAPA it presumed the accused to be guilty even before trial and thus may lead to the violation of the fundamental rights of the accused. This can be seen through the provision of granting bail, under this act which is termed as “illusionary” because it has made it almost impossible to get bail like in the recent cases of students being jailed in the JNU protest. This is seen to violate Article 21 of the Constitution. About, the act also extended the pre-charge detention period from 90 to 180 days which violated the right to liberty and judicial interpretation of the presumption.

It is also noted that there have been no compensations given to those charged wrongfully under the act. For instance the case of Mohammad Ifran Gaus. Also, it is important to note that the data recorded by National Crime Records Bureau (NCRB) 2019 shows that there was a hike of 165% and 33% from 2016 however the conviction rate remains only 29%.^{xvi}

Comparative Analysis:

While comparing to the Anti-terror laws in the United States, which has the USA Patriot Act, 2001. Which also gave powers to the agencies to investigate any crimes or suspects of terrorism. It also included the provision of punishing those who support terrorist crimes and

scrutinising terrorism related to money laundering. The Patriot Act is a combination of efficiency and effectiveness unlike the Indian Act of UAPA which is broad and vague in nature leaving it to the discretion of the government. However, despite it being well drafted and streamlined, it is also said to infringe on the constitution and violate the privacy of its citizens just like the case with the Indian UAPA statute, which leads to the government having arbitrary powers which can blur the line and lead to being draconian. Now looking into the laws in the UK, The Terrorism Act, of 2000, recognises anyone having a terrorist connection or knowing that terrorist activity is taking place and not informing the authorities as liable under the act as well.

CONCLUSION

In conclusion, as seen through the analysis above, we can say that without a doubt, The Unlawful Activities Prevention Act today falls short of solving the issues for which it was created. This is due to the centre being given extreme powers which have resulted in its draconian use, which leads to questioning its constitutional validity as it's violating many fundamental rights. Thus there needs to be a balance between national security and the rights that can be curtailed during such a state during a state of peace. This can be done through having a yearly review of the act and tracing incidents where abuse of power took place, further preventing the abuse of the act provisions an authority to establish authority for police complaints and give importance to evidence for examination.

In addition, judicial review should be ensured in every case to avoid the violation of fundamental rights and to keep a check on the constitutional validity of the provisions. Apart from this those who are detained but eventually not convicted should be given compensation for the detention they faced.

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ENDNOTES

ⁱ Unlawful Activities (Prevention) Act 1967.

ⁱⁱ Unlawful Activities (Prevention) Amendment Act, 2004.

ⁱⁱⁱ Prevention of Terrorism Act 2002.

^v Tanishk Gautam & Josheca Mukerji, Critical Analysis of Unlawful Activities Prevention Act, 1967, 26 Supremo Amicus [524] (2021).

^{vi} Unlawful Activities (Prevention) Act 1967, s 36.

^{vii} S. Nambi Narayanan v Siby Mathews & Others Etc., (2018) 10 SCC 804.

^{viii} Sajal Awasthi v. Union of India., WP (C) 1076/2019.

^{ix} Sajal Awasthi v. Union of India., WP (C) 1076/2019.

^x Union of India v KA Najeeb, (2021) 3 SCC 713.

^{xi} A.K Gopalan v. The State of Madras, AIR 1950 SC 27.

^{xii} Maneka Gandhi v. Union of India, AIR 1978 SC 597.

^{xiii} Romila Thapar v. Union of India, 2018 SCC 2386.

^{xiv} V.G Row v. State of Madras, 1952 AIR 196.

^{xv} Arupa Bhuyan v state of Assam, 6(2011) 3 SCC 377.

^{xvi} 2Dipankar Ghose, NCRB report: Sedition cases up in 2019 but conviction at an all-time low, <https://indianexpress.com/article/india/ncrb-report-sedition-cases-up-in-2019-but-conviction-at-all-time-low6664179/>, (Dec. 2020).