

CRUSHING DISSENT UNDER THE VEIL OF NATIONAL SECURITY: A CRITICAL ANALYSIS OF THE PROVISIONS OF THE UAPA AND THE NSA

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ABSTRACT

The Government of India and various State Governments have enacted several security laws in India and in the respective States, respectively, since independence. The main purpose of these laws has always been intended to maintain peace and harmony within the society and to prevent terrorism. However, these laws are least used to serve their intended purpose and have mostly been abused by the governments to silence the dissenters. These laws in independent India are nothing more than a colonial legacy that our legislators should have chosen to avoid adopting after independence. Although it is important to have stricter security laws in a country because the security of people is a task vested in the hands of the State, but the State cannot act arbitrarily and suppress the dissent behind the veil of national security. It is important that the provisions of a security law are reasonable and within the constitutional limits. This research article critically analyses the provisions of two security laws, viz. the Unlawful Activities (Prevention) Act, 1967 and the National Security Act, 1980 that are currently in force in India and are widely used against people by the union and the state governments on various occasions. This article also criticises the approach of the Supreme Court of India in dealing with cases under these and other security laws. The article concludes with suggestions to the executive as well as the judiciary to act according to the constitutional principles in dealing with the cases relating to these laws in order to uphold the constitutional spirit which is the essence of the Indian democracy.

Keywords: Citizens, Constitution, Democracy, Dissent, Government, India, National Security, State, Terrorism, Terrorist, Unlawful Activities.

INTRODUCTION

On December 11, 2019, the Council of States passed the controversial 'Citizenship Amendment Bill, 2019'. The Bill received the assent of the President of India on December 12, 2019 and became an Act of Parliament (hereinafter referred to as the CAA). This Act, which provides for the conferment of citizenship of India upon the religious minorities living in the neighbouring countries of Pakistan, Bangladesh and Afghanistan, discriminates solely on the basis of religion and leaves Muslim refugees from these countries in India to live a life of refugee only. The discriminatory provisions of the Act were widely criticised by people across the country and widespread protests broke out in various cities against the law. Shaheen Bagh of the National Capital Territory of Delhi became a permanent site for the protestors. In as early as February 2020, the Shaheen Bagh protest site turned out to be a ground for violence and it gave birth to the Delhi Riots. Soon after the Delhi riots, many protestors in Delhi and across the country were arrested and jailed. The Union Government and many other state governments charged the protestors under various security laws, primarily under the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the UAPA) and the National Security Act, 1980 (hereinafter referred to as the NSA). Following these arrests, the debate over the legality of the UAPA and NSA has once again gained momentum. The matter related to Delhi riots is *sub judice* under various courts of the country and is therefore not further touched upon in the article. The subject matter of our study is mainly concerned with the use of various security laws by our governments on different occasions against the citizens. These security laws have, since very long time, been in controversy. It is alleged that these laws are the tools in the hands of the government to curb the dissenting voices. The study tends to discuss the truth of such allegations against the use of these laws. It analyses the controversial provisions of these laws in depth, followed by the in-depth study of the approach of the Supreme Court of India and of the various High Courts in the matters relating thereto. But before we dive into the provisions of these laws, it is important to understand what these security laws are, what are their scope and their objectives and purpose.

Objective and Scope of the UAPA and NSA in India

The Constitution of India guarantees to every citizen the right to freedom, which is one of the aspects of personal liberty and is most important of all the fundamental rights. The freedom of speech and expression is one of them and includes the right to dissent and to oppose. However,

no right is absolute and is liable to be restricted on reasonable grounds. Causing threat to sovereignty and integrity of nation is one such ground mentioned under Article 19(2) of the Constitution. The Parliament of India as well as various state legislatures enacted various security laws in order to provide for the prevention of unlawful and terrorist activities which pose threat to the integrity and sovereignty of India and includes organised crime, separatism and public disorder by individuals and associations. These laws are special laws and operate alongside and in preference to the general criminal laws of the country, like the Indian Penal Code, the Code of Criminal Procedure, etc. The objective, therefore, of these laws is to ensure the security of India, both internally and externally.

Specifically, the UAPA was enacted upon the recommendation of the Committee on National Integration and Regionalisation appointed by the National Integration Council to look into the matter of putting reasonable restrictions upon the fundamental right to freedom of speech and expression, right to assemble peaceably without arms, and the right to form associations or unions, guaranteed under Article 19(1) of the Constitution of India, in order to safeguard the sovereignty and integrity of India.ⁱ The Preamble to this Act declares that these restrictions are necessary in order to combat international terrorism in accordance with the Resolution 1373 (2001) of the United Nations Security Council, and other related resolutions which requires the States to act against certain terrorists and terrorists organisations, to freeze their assets and economic resources, to prevent them from entering into their territories or to transit through it and to prevent the direct or indirect supply, sale or transfer of arms and ammunitions to the enlisted entities. The Act, therefore, seeks to prevent and cope up with the terrorist activities and the matters connected therewith or incidental thereto.ⁱⁱ On the other hand, the NSA provides for preventive detention of people in specified cases and the matters connected therewith. This Act seeks to detain any person in order to prevent him from acting prejudicially to the defence of India, foreign relations, national security, as well as against the public order or the maintenance of supplies and services essential to the community.ⁱⁱⁱ

Both the UAPA and NSA are applicable to the whole of India. Prior to the passing of Jammu and Kashmir Reorganisation Act, 2019, the NSA was not extended to the united Jammu and Kashmir. However, this Act operates along with pre-existing Jammu and Kashmir Public Safety Act in the newly formed two Union Territories, making the preventive detention laws stricter in the two Union Territories than before. Under the provisions of these laws, every

person, and not the citizens alone, shall be liable to punishment for every act or omission committed in derogation of the laws so provided within the territories of India. The UAPA extends the application of its provisions upon those persons, who commit any offence under this Act outside the territories of India, as well as to the citizens residing outside India, the persons in government service, and the persons on any ship or aircraft registered in India.^{iv}

CONTROVERSIAL PROVISIONS OF THE UAPA AND THE NSA

The objective and purpose of the two security laws, viz. the UAPA and the NSA may seem to impose reasonable restrictions upon the individual liberties of the citizens. It is understandable that certain restrictions may be imposed upon the liberty of the individuals in order to maintain the security and integrity of a nation. However, it is also important to understand whether the restrictions so imposed are actually reasonable or not; whether these laws actually serve the purpose of their enactment or they have become an instrument of oppression by the governments to curb the dissenting voices.

Under the UAPA, the Central Government is empowered to identify and determine an organisation or an individual as unlawful and terrorist in nature. Section 2(1)(o) of the Act defines an ‘unlawful act’ as inclusive of any action which disclaims, questions, disrupts, or intends to disrupt the sovereignty or territorial integrity of India or causes or intends to cause disaffection against India. Section 35 of the Act empowers the Central Government to add any organisation or an individual name to the first schedule or to the fourth schedule, respectively, if in its opinion such an organisation or individual is involved in terrorism. The term ‘Terror Activities’ is defined under section 15 of the Act as any act done with the intention to threatening or likely to threaten the unity, integrity, security or sovereignty of India or with striking terror in public by using any violent means or by doing any other act in order to compel the government or any organisation or any person to do or to abstain from doing something. Under the provisions of this Act, the accused may be kept in custody for a maximum period of six months for the purpose of investigation. The accused may be kept in police custody too, if it is so requested by the police officer making the investigations. The provision of this Act makes the bail an exception, which generally operates as a rule in criminal cases. Moreover,

the Act bars the protection of anticipatory bail to the accused in offences committed under this Act.

Similarly, under the provisions of the NSA, a person can be detained if the government is satisfied that the person might commit an act which would be prejudicial to the defence, foreign relations or security of India or maintenance of public order or the maintenance of supplies or services essential to the community.^v Under this Act, it is not mandatory for the authority making the detention order to disclose the grounds of detention to the person being detained if it considers the disclosure of such facts to be against the public interest.^{vi} Moreover, the maximum period for which a person can be detained is twelve months.

The absolute power conferred upon the Central Government under the UAPA can be easily misused to secure the political or ideological needs of the government in power. The ambit of the term 'unlawful activities', is wide enough to include any act committed by a person who disagrees with the government or criticises it using non-violent means. It is thus easy to bring an action against the person who does such act. When the power lies with the government to act upon its 'belief', the construction of the words 'integrity of India' and 'disaffection against India' becomes a tool to silence the dissenting voices. Moreover, any act which has the effect of compelling the government to abstain from doing anything or to do something, wherein there exists no construction *noscitur a sociis* of the words 'any other act', it is most likely that the government can term a non-violent protest as prohibited under this Act. The gross violation of fundamental rights of the citizens by the arbitrary use of this Act is evident from the data published by the National Crime Records Bureau in the Year 2019. The total number of persons arrested under the UAPA in the year 2018 was 1421, but only 853 persons were charge sheeted. The number of persons discharged was 23 and 117 acquitted, but the number of convicts goes down to 35.^{vii}

Similarly, the NSA, which empowers the central as well as the state governments to detain an individual for acting against the security of state or disrupting the public order, neither defines the term 'security of state' nor the 'public order' nor the actions which may be prejudicial to either of them. It therefore lies upon the sole discretion of the government to decide which acts are threats to public order or security of state. It is most appropriate to say that it is the subjective satisfaction of the state which forms the basis of action against any person under NSA. Subjective satisfaction is wide enough and involves arbitrariness without a doubt.

Moreover, the arbitrariness is fed by one of the provisions of the Act itself which says that where a person has been detained following a detention order made on two or more grounds, such detention order shall be deemed to have been made separately for each of those grounds and the order shall not be invalid only because any one or more of the grounds mentioned therein were vague, non-existent, not relevant, not connected or not proximately connected with the person or for any other reason whatsoever.^{viii} The data for Preventive Detentions in the year 2018 shows the misuse of the NSA as well. While 697 persons were detained, only 129 persons actually remained in detention at the end of the year and 334 persons were released within first month to sixth month of their detention.^{ix} As per the provisions of this law, no person can be detained for more than three months except a longer detention term is authorised by the advisory board constituted under the Act. Also as stated earlier, the detaining authority need not compulsorily tell all the grounds of one's detention to him if such information is against the public interest. What constitutes public interest is itself undefined in the Act and is therefore left to be determined by the detaining authority itself on a case-to-case basis. The Act although provides a deadline of five days within which the grounds of detention have to be told to the detainee under ordinary circumstances, and within fifteen days in exceptional circumstances^x, however this position differs from the position created by the ordinary law which requires the authority to tell the grounds of arrest immediately before making the arrest of the person.

The problem with the two Acts does not end here. India is a country governed by the rule of law. It is a prerequisite of the rule of law that the judiciary should be separate and independent from other branches of the government. Appointment of a judicial officer therefore plays a major role in discharging his functions independently and impartially. In case of the UAPA and NSA, the case is however different. The parliament of India enacted a new law called the National Investigation Agency Act, 2008 in order to establish a national level agency to investigate and prosecute the offences that affect the sovereignty, security and integrity of India, the security of state, friendly relations with foreign states and the offences under the Acts enacted to implement international obligations and the related matters.^{xi} The tribunal constituted under this Act is authorised to investigate and prosecute the offences committed under the UAPA. The power of establishing the tribunal and defining its jurisdiction is vested with the central government. Apart from this Act, the UAPA also provides for the constitution of an Unlawful Activities (Prevention) Tribunal under section 5. It further provides for the

constitution of a Review Committee under section 37. However, in both these adjudicatory bodies, the appointment of the Presiding Officer of the Tribunal and that of the Chairperson of the Review Committee is vested in the hands of the Central Government.^{xii} The NSA too has a similar provision in terms of appointment of members including the Chairman of the Advisory Board constituted under its section 9 for the purpose of looking into the validity of the detention orders made by the detaining authority against any person. These provisions affect the 'judicial system' constituted under the Act and makes it similar to the 'telephone justice' that was once prevalent in the former Soviet Union and the East European Communist States. Telephone Justice is incompatible with the Rule of Law because there the government is able to influence the judges, effectively placing themselves above the law. This gives more air for arbitrariness to breathe. It is needless to say that these special courts follow a modified procedure which dilutes the rights of the accused available generally in a criminal trial.

APPROACH OF THE CONSTITUTIONAL COURTS IN MATTERS RELATING TO UAPA AND NSA

In India, the third arm of the state, that is, the judiciary is vested with the function of interpretation of the laws and the constitutional courts have been made the guardian of the fundamental rights of the citizens in each and every case of violation. Time and again, the Indian judiciary has stepped forward in strengthening and widening the ambit of rights of the citizens so that there is more space for them to enjoy the same. In the conflict between citizens' rights and states' action violating the particular right, the judiciary has always upheld in favour of the citizens' rights. However, this is the case when the dispute is related to general or other special laws. The judicial approach in the matters relating to national security or the abuse of security laws is just opposite. Where in other cases, the court came forward as guardian of citizens guaranteed rights, in cases relating to violation of rights by abuse of security laws the supreme court took an opposite approach than the normal. In the year 1982, in the case of *A.K. Roy v. Union of India*^{xiii} the Supreme Court of India had to deal with the constitutionality of the NSA. Upon the question of authority of the Parliament to legislate upon the matter of 'public order', which is a state subject, with respect to this Act, the Supreme Court made it clear that the national legislature has the authority to legislate upon the matters relating to national security and therefore, the Parliament's authority in this case is undisputed. This ruling

of the court in favour of parliament is not of a concern because any otherwise observation with respect to parliament's authority would have made the national security a weaker subject in the hands of Union Government, who in fact has been vested with the ultimate power of securing the Union of India as whole. When the court was faced with the question of legality of provisions of the NSA, specifically with the contention of the petitioners that the provisions are not in line with the general rules of criminal law and thus violates a range of constitutional rights guaranteed to an accused, the supreme court rejected most of them. For example, the court observed that certain amount of 'minimal latitude' in the definition of preventive detention was necessary in the NSA so that it could work effectively. It further observed that the procedure followed under the NSA, which is not in line with the general criminal law of the land, is in line with the constitution. Although the Act bars the legal representation and cross examination of the persons detained by the authorities, yet it is not *ultra vires* the principles established under the Indian Constitution, because the constitution does not provide expressly for the representation of individuals who have been in preventive detention. This approach of the supreme court cannot be appreciated because it failed to observe that the constitution does not even bar from providing rights to persons in preventive detention if it does not expressly recognise the same in any of its provisions.

In *Maneka Gandhi*^{xiv}, the Supreme Court had rightly observed that "liberty can be curtailed only if the grounds listed in the saving sub-articles are directly, specifically, substantially and imminently attracted so that the basic right may not be stultified. National Security, sovereignty, public order and public interest must be of such a high degree as to offer a great threat. These concepts should not be devalued to suit the hyper-sensitivity of the executive or the minimal threats to the State." The Supreme Court has time and again reiterated that an order passed by an authority based on subjective satisfaction is not totally immune and is liable to judicial scrutiny to a limited extent. This creates an impression that the apex court has always advocated for the guard of individual rights even in the sensitive matters involving security of state that are generally left as the subject matter of the executive. However, in *A.K. Roy*^{xv} the supreme court turned a blind eye towards its own precedents upholding citizens' rights.

The observations of various High Courts regarding the NSA and UAPA are of great importance at this point. The Allahabad High Court had admonished the Uttar Pradesh government in various cases of abuse of NSA. For example, in the infamous case of *Nuzhat Parween v. State*

of *Uttar Pradesh*^{xvi} also known as *Dr. Kafeel Khan's Habeas Corpus* case, the court observed that the remarks over which Dr. Kafeel Khan had been detained were taken out of context and the detention made under NSA is thus on a whim. In another case of detention of Javed Siddiqui, the Allahabad High Court observed that the state authorities are using the provisions of preventive detention as punitive detention which itself defeats the purpose of this law. It went on to say that the history shows that people did not fight for personal liberty, instead they insisted on observing procedural safeguards to ensure personal liberty. While the state continues to detain its people without following proper procedure, the detentions become nothing more than the arbitrary deprivation of liberty.

Similarly, the Delhi High Court hailed the right to protest while granting bail to three Anti-CAA activists on June 15, 2021. The three activists were arrested in connection with the Delhi riots under the provisions of UAPA in the year 2020 following the violent clashes between two communities in parts of Delhi's North East regions. The two *Pinjra Tod* activists of the three arrested were released on bail in every case against them, but still they were kept in prison on account of FIR 59 under the UAPA. The High Court in its bail order said^{xvii}:

“It appeared that in its anxiety to suppress dissent and in the morbid fear that the matters may get out of hand, the state has blurred the line between constitutionally guaranteed ‘right to protest’ and ‘terrorist activity’. If such blurring gains traction, democracy would be in peril.”

The high court affirmed that the right to protest cannot be called as a terrorist act within the meaning of the UAPA and emphasised that the ingredients of offences under sections 15, 17 and 18 must be seen to be satisfied from the factual allegations under the UAPA. The high court referred to the ruling of the Supreme Court in the case of *Mazdoor Kisan Shakti Sangathan v. Union of India*^{xviii} while explaining the contours of a legitimate protest in which the apex court observed that legitimate dissent is a feature of democracy and the righteousness or justifiability of the issues raised in any protest must not be looked into because everyone has a right to express their views whatever it may be, and anything which might appear to be insignificant or irrelevant in the first instance may gradually gain momentum and acceptability when it is duly voiced and debated.

This bail order was highly welcomed by the legal fraternity across India as it attempted to interpret the provisions of UAPA so as to dilute their nature for future abuse. However, the

Supreme Court, in the appeal filed by the State against the bail order, said that the order of the High Court should not be seen as a precedent for other matters relating to Delhi Riots and observed that the high court has made a very narrow interpretation of the statute. On the other hand, the Supreme Court refused to stay the bail order granted by the high court to the three accused. The observation of the Supreme Court in this matter is awaited and it would be noteworthy that up to what extent the apex court will differ in interpreting the statute from the interpretation done by the high court.

CONCLUSION

As discussed above, the two laws contain certain controversial provisions that are contradictory to the idea of freedom in a democracy. The entire nation is a witness of the misuse of security laws since their inception. Prior to the enactment of the amended UAPA, the Indira Gandhi government in the Union enacted the controversial Maintenance of Internal Security Act (MISA) and used it to silence the dissenting voices of the opposition leaders during the Emergency. The government had put the Communists and the Jan Sangh leaders behind the bars at that time. The Act was repealed after the Janta Party came into power. But in the past four decades, more oppressive security laws have been enacted by various governments in the Union and the States. This in fact is an example of how the entire political system in India is afraid of dissent. This fear of dissent is beyond the Party lines or ideological differences and our legislators obtained this as a colonial legacy.

The timeline of the Indian Security Laws after independence dates back to 1950 when the Preventive Detention Act (PDA) was enacted and remained in force till 1969. The Armed Forces (Special Powers) Act (AFSPA) joined the list in 1958 and is in force till date. Similarly, UAPA and NSA were enacted in the years 1967 and 1980 respectively and operate till date in India. Three more statutes, namely the Maintenance of Internal Security Act, 1971 (MISA), the Terrorists and Disruptive Activities (Prevention) Act, 1985 (TADA), and the Prevention of Terrorism Act, 2001 (POTA) were enacted for shorter period of time by different governments at the Centre but these Acts could not survive for long. However, it is noteworthy that the UAPA has been amended four times since 2004 that is after the repeal of POTA, in the years 2004, 2008, 2012 and 2019 respectively and the amendments made thereto in the Act has kept

alive the spirits of POTA and TADA in itself. This timeline shows that the governments in independent India were so intolerable towards dissenters that none of them could have survived without suppressing their oppositions' strength using the ultimate authority lying in the tools crafted by them.

Talking specifically about the two Acts, namely the NSA and the UAPA, the nature of the former is not punitive but preventive, but it would be wrong to say that the preventive action taken under the Act is just and reasonable in each and every case and thus such unreasonableness in even a single case violates the fundamental principles enshrined in our Constitution. On the other hand, the provisions of UAPA does not even provide air to the 'rule of law' to breathe. The 'unconstitutionality of provisions' is a feature that is both common and basic in both these laws. It is however unfortunate that the Supreme Court of India has always permitted the commission of this wrong towards the constitution by our legislatures on various occasions and is in no way seems to be interested in turning the tables of its precedents on the matter in near future. The apex court has sabotaged the fabric of constitutionalism by allowing the legislatures to presume unlimited powers in suppressing dissent under the veil of national security.

It is still the courts in which the people of India have immense faith. Therefore, the Supreme Court, before delivering any judgment or order in the matters *sub judice* before it, must recall its observation made in the case of *Charles Sobraj v. Suptd. Central Jail, Tihar, New Delhi*^{xix} wherein it observed that "Fair procedure is the soul of Article 21, reasonableness of restrictions is the essence of restrictions under Article 19 and sweeping discretion degenerating into arbitrary discrimination is the anathema for Article 14." It is the need of the hour that the reasonableness of the restrictions put up by the security laws in India is reviewed and the unreasonableness is removed as soon as possible, not only in order to protect the individual rights from being violated but also to safeguard the constitutional spirit enshrined in the Indian Constitution.

ENDNOTES

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- ⁱ Preamble, The Unlawful Activities (Prevention) Act, 1967, No. 35, Acts of Parliament, 1967 (India).
- ⁱⁱ *Ibid.*
- ⁱⁱⁱ Section 1, The National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India).
- ^{iv} Section 1, The Unlawful Activities (Prevention) Act, 1967, No. 35, Acts of Parliament, 1967 (India).
- ^v Section 3, The National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India).
- ^{vi} Section 8, The National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India).
- ^{vii} National Crime Records Bureau, *Crime in India 2018, Volume 2*, (June 23, 2021, 04:17 PM), https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2010A.7.pdf.
- ^{viii} Section 5A, The National Security Act, 1980, No. 65, Acts of Parliament, 1980 (India).
- ^{ix} National Crime Records Bureau, *Crime in India 2018, Volume 2*, (June 23, 2021, 04:32 PM), https://ncrb.gov.in/sites/default/files/crime_in_india_table_additional_table_chapter_reports/Table%2019A.11.pdf.
- ^x *Supra* note 6.
- ^{xi} Preamble, The National Investigation Agency Act, 2008, No. 34, Acts of Parliament, 2008 (India).
- ^{xii} Sections 5 & 37, The Unlawful Activities (Prevention) Act, 1967, No. 35, Acts of Parliament, 1967 (India).
- ^{xiii} A.K. Roy v. Union of India, (1982) 1 S.C.C. 271 (India).
- ^{xiv} Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597 (India).
- ^{xv} *Supra* note 13.
- ^{xvi} Nuzhat Parveen v. State of Uttar Pradesh, 2020 S.C.C. OnLine S.C. 1033 (India).
- ^{xvii} Devangana Kalita v. State (NCT of Delhi), (2021) S.C.C. OnLine Del. 3255 (India).
- ^{xviii} Mazdoor Kisan Shakti Sangathan v. Union of India, (2018) 17 S.C.C. 324 (India).
- ^{xix} Sobraj v. Superintendent, Tihar, MANU/SC/0070/1978 (India).