An Analysis on the validity of the Unlawful Acts (Prevention) Act

Arkadeep Pal
Alliance School of Law, Alliance University
Karnataka, India

ABSTRACT:

The purpose of this research paper is to analyse and examine the validity of the Unlawful Activities (Prevention) Act of 1967. This paper will describe in detail the background to the legislating of the UAPA 1967, and go on to further discuss the arbitrary provisions of the act. With the help of landmark case-laws, the paper will attempt to determine whether the provisions of the UAPA Act of 1967 are valid, both constitutionally and ethically. A comparison between the various detention and terrorism laws of other sovereign states will be discussed in this paper. The paper will further attempt, through case studies, try and establish how the act suppress free thinking, and criminalises dissent. In conclusion, the researcher will try and answer the two research questions of the paper and give his own suggestions.
Keywords: *UAPA; Dissent; Free Speech; Arbitrary; Constitutional; Ethical*

I. INTRODUCTION

On the 24th of July, 2019, the Bharatiya Janta Party led NDA government passed the Unlawful Acts (Prevention) Amendment. According to government, "the amendment to the UAPA Act will help the government and intelligence agencies to remain four steps ahead of terrorists and non-state actors"

The amendment to the act brings two distinct changes to the original text of the UAPA Bill; the changes are as follows -

Firstly, it gives the National Investigation Agency of India complete autonomy to conduct its operation in any state of the country without informing the State or local authorities. Secondly, it gives the Central Government almost unrestricted power to add or remove names of individuals into the terrorist watchlist without reasonable justification.

Critics of this controversial act contend that the provisions of this statute violate the - integrity of the federal structure of India, and constitutionally guaranteed fundamental principles under Article 14 and Article 22 of the Indian Constitution. Clauses such as Section 35 (2) of the UAPA amendment, give the government a free hand in designating any individual as a terrorist, and it can be argued that this provision of the now amended bill can be used to officially detain political opponents.

Furthermore, it has provisions to detain an individual for 2 years at length without judicial appeal, which violates the principles as laid down in Article 14 of the Indian Constitution and contravenes the landmark judicial precedent as laid down in – DK Basu, Ashok K. Johari v/ State of West Bengal, State of Uttar Pradesh

which set forward the guidelines the police and the state ought to follow while arresting and detaining an individual.

This paper will attempt to analyse the "arbitrary" powers of the government to make laws, while examining the judicial interpretation of the term as discussed in cases such as - M/S SHARMA TRANSPORT REP Vs. GOVERNMENT OF A.P. & ORS[1]; Som Raj vs State of Haryana[2]; Budhan v State of Bihar.[3]

In relation to the above context, this research paper will attempt to analyse the background to the UAPA act of 1967, along with the reasons why such an act was constituted. Furthermore, the researcher will attempt to analyse the arbitrary nature of this act, and find out if it is violative of the basic principles related to laws of arrest and detention. Finally, the paper will cite case studies of how basic fundamental rights of citizens have been violated through the UAPA act.

II. RESEARCH QUESTIONS

1. Whether the provisions of the UAPA are violative of the fundamental rights guaranteed to citizens of India?
2. Whether the provisions of the UAPA Act violate the judicial precedents set forth in – DK Basu, Ashok K Johari vs State of West Bengal, State of Uttar Pradesh?

III. HYPOTHESIS

1. The provisions of the UAPA are violative of the fundamental rights guaranteed to the citizens of India.
2. The provisions of the UAPA are violative of the judicial precedent set forth by DK Basu v/ State of West Bengal.

IV. LITERATURE REVIEW

- **177th Law Commission Report on the Law of Arrest.**

The 177th Law commission report on the laws of Arrest elucidates the requirement of an arrest and detention procedure that is not arbitrary and opaque in nature. The commission, headed by eminent jurists of India rely on the DK Basu Judgement and suggests method by which the government, at both the state and central level, can make the process fairer, reasonable, and justifiable.

- **Unlawful Activities (Prevention) Act; Article by Asish Gupta and Kranti Chaitanya – Economic and Political Weekly.**

[1] AIR 2002 SC 322
[2] AIR 1990 SC 1176
[3] AIR 1995 SC 191

This article published in the Economic and Political Weekly opines relating to the arbitrary nature of the act, and provides recommendations to make the act less arbitrary.

- **Indian Penal Code – K.D Gaur**

KD Gaur serves as an authoritative text in the subject of Indian criminal law, and the book is divided as per the various sections of the Indian Penal Code, with relevant case-laws.

- **The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes – Article by South Asia Human Rights Documentation and Ravi Nair – Economic and Political Weekly.**

This research journal elucidates the varying arbitrary measures the UAPA employs in terms of supressing political dissidents; furthermore, it gives us a comparison of terrorism laws in other sovereign states when compared to India.

- **Criminalising Dissent: Consequences of UAPA – Anushka Singh – Economic and Political Weekly.**

This research journal gives us various case studies relating to how the UAPA is implemented in India. It further calls for significant reform in the police and judicial system in terms of arrest and detention.

V. Research Objectives

1. To analyse the constitutional validity of the UAPA amendment in light of the DK Basu judgement.
2. To examine the extent of the arbitrary powers of the executive in relation to laws of arrest and detention.

VI. Scope

The scope of this paper will limit itself to the analysis of the UAPA through judicial rulings, and through peer reviewed articles.

VII. Methodology

The researcher in the present research has adopted doctrinal or nonempirical method for collecting required data. This research will base its findings, inter alia, on analytical and critical studies.

VIII. Background to the Unlawful Acts (Prevention) Amendment

The roots of the Unlawful Acts (Prevention) Amendment can be traced back to colonial times; in 1908 the British Raj implemented the Criminal Law Amendment Act. This act, for the first time, brought into the purview of the concept of "unlawful association." At the time, the act was used to criminalise the leaders of the Indian Freedom Struggle.

Once the Indian government attained freedom in 1947, the administration decided to keep the provisions of the Criminal Law Amendment. However, on the flipside, the Nehru government began to use the provision against their own citizens; i.e. against dissidents who spoke out against the policies of the Indian National Congress.

In the subsequent years, the Indian Judiciary however held in cases such as – VG Row v/ State of Madras; AK Gopalan v/ State of Maharashtra; and the Romesh Thapar v/ State of Madras, in essence, collectively held that fundamental rights of the citizens can be curtailed only in the most extreme and in the rarest of the rarest circumstances; and that any statute, legislation, or executive decision that aim towards curtailing said rights, will be held unconstitutional. On the basis of these judgements, the judiciary held that Section 124A of the Criminal Law (Amendment) Act was unconstitutional as they put arbitrary, and unreasonable restriction on the ability of the citizens to enjoy their fundamental rights.[4]

To overcome such restrictions put by the Indian judiciary, the 1st amendment to the constitution was introduced, wherein there was significant tweaking done to the language of Article 19 of the Indian constitution; the phrases "public order" and "friendly relations with states" were added under the purview of "reasonable restrictions". The consequence of such an amendment was that the phrase "public order" was used arbitrarily by the government in place of the now repealed 124A section of the Criminal Law (Amendment), and dissidents of the government were being rounded under the justification of them violating "reasonable restrictions."

The arbitrariness of the government further increased in the subsequent years; perhaps the most prominent example of this was seen in 1963, when India was engaged in a war with China, and to supress the regional dissidents of the government's policies and critics of the war against China, the 16th Amendment to the constitution was passed by the Parliament. The 16th amendment further tweaked Article 19 to add that the government can put "reasonable" restrictions on the interest of "sovereignty and integrity" of the state. This clause was essentially added to give the government a free hand to detain any individual or groups that demanded autonomy or demanded to secede from the Union.[5]

It was on the backdrop of the 16th amendment to the Constitution that the government introduced the first draft of the Unlawful Acts (Prevention) Act on the floor of the Parliament. Due to wide-spread protests, the first draft of the UAPA bill was withdrawn from the floor of the house, and so was the second draft. In 1967, the UAPA bill was finally enacted into law. The act in its initial stages gave the Central Government arbitrary powers to ban organisations, without almost any due process involved. This was done through Section 5 of bill which

[4] Adve, Nagraj, and Harish Dhawan. "Suppression of Dissent." *Economic and Political Weekly*, vol. 43, no. 2, 2008, pp. 4–4. *JSTOR*, www.jstor.org/stable/40276886.
[5] SINGH, ANUSHKA. "Criminalising Dissent: Consequences of UAPA." *Economic and Political Weekly*, vol. 47, no. 38, 2012, pp. 14–18. *JSTOR*, www.jstor.org/stable/41720156.

constituted a non-transparent "Unlawful Activities Prevention Tribunal" which almost gave the central government a free hand in designating anyone they wanted as a terrorist or a terrorist organisation.

This provision, along with the power of Preventive Detention was used during the Indira Gandhi regime in order to curb dissidents and opposers of the state of Emergency which was declared, citing it was reasonable to detain them as they were considered to be - "internal disturbances". In essence, the government, through the UAPA act could ban any association on the basis that it was "unlawful" and had to give no justifications relating to the same.[6]

UAPA, in the 21st century, was used to pave the way for even more draconian laws. The Terrorist and Disruptive Activities (Prevention) Act (TADA) and the Prevention of Terrorism Act (POTA) of 2002 were introduced by the government on the rationale that the acts will help to root out anti-state activities within various states in India. However, these statues were used to round up and detain, without just cause, several hundred citizens the government deemed to be conducting "unlawful" activities. It is often contended that, like the Criminal Law Amendment of 1908, TADA and POTA were used to supress the most vocal and active dissidents of the central government, and of the state as a whole. Due to major media, and judicial pushback these two highly controversial statutes were repealed. The government, however, to go around such scrutiny, amended the 1967 UAPA bill; in 2004 and 2008 there were amendments made to the 1967 bill to incorporate the most controversial aspects of TADA and POTA. The most baffling example of this is seen when the term "unlawful activity" of the UAPA 1967 was changed to include the definition of a "terrorist activity" as was provided in the Prevention of Terrorism Act of 2002. The 2008 Amendment to UAPA introduced the term "terrorist gang" and gave the central government further substantial arbitrary powers in terms of banning, arresting, and detaining individuals or organisations they deemed as "unlawful". Now under the UAPA the government could ban organisations on two specific grounds – for being "unlawful" and for being a "terrorist organisation."

To further increase the arbitrary powers of the government, on February 2012 set up a specialised body named the – "National Counter Terrorism Centre" or the NCTC. The NCTC derives it powers from the provisions of the UAPA, and to an extent functions in the same manner as the Office of the National Counterintelligence Executive (NCIX) which operates in the United States of America.

The NCTC will be able to arrest, search, and detain any individual or organisation without consulting or even informing the State Governments.

[6] South Asia Human RIghts Documentation Centre, and Ravi Nair. "The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes." *Economic and Political Weekly*, vol. 44, no. 4, 2009, pp. 10–14. *JSTOR*, www.jstor.org/stable/40278825.

The latest amendment to the UAPA bill was passed in 2019, on the backdrop of a landslide electoral victory of the Bhartiya Janta Party. The added features of the amendment were discussed in the introductory part of the research paper.

IX. AN ANALYSIS ON THE ARBITRARY POWERS OF ARREST AND DETENTION, WITH REFERENCE TO THE UAPA.

The Unlawful Activities (Prevention) Act, while takes into its purview plethora of arbitrary actions, perhaps the most arbitrary aspect of the act is its powers related to arrests and detention of individuals.

To understand what empowers the UAPA to make arrests, one has to understand what kinds of acts does the UAPA criminalises.

The under chapter IV of this act, the physical element required to establish that an individual or organisation is engaging in "terrorist" activities, if it involves making or use of bombs, dynamite, other explosives or inflammable substances, or by *any other means of whatever nature*, which is likely to cause harm to the population.[7]

The reason the phrase – "*any other means of whatever nature"* is highlighted is that any physical act can be deemed as a terrorist act by the government. Establishing such a low bar to designate an act as terrorist activity is an arbitrary method use by the government to supress dissidents. Under this act, if a foreign individual is making a speech against the government in India, the government could detain him under the provisions of this act as they could contend that his speech could terrorise the people of the country.[8]

Furthermore, the act has constituted a significantly lower requirement to establish mens rea or a guilty mind in relation to a terrorist activity as is defined under the act. To establish mens rea under this act, the government only has to establish that the individual or organisation is *"likely"* to strike terror in the people. Taking the example of the foreign individual making a speech against the government, under this act the government could detain him even before he makes the speech under the presumption that his speech is *likely* to cause terror among the people.[9]

In relation to a question of the laws of arrest and the powers of the executive to implement the same, the Supreme court in the landmark judgement of Joginder Kumar v/ State of UP held that –

[7] South Asia Human RIghts Documentation Centre, and Ravi Nair. "The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes." *Economic and Political Weekly*, vol. 44, no. 4, 2009, pp. 10–14. *JSTOR*, www.jstor.org/stable/40278825.
[8] B D, 'Judicial Analysis Of The Constitutional And Procedural Safeguards Against Arbitrary Arrest And Detention' (2013) 2 Christ University Law Journal
[9] SINGH, ANUSHKA. "Criminalising Dissent: Consequences of UAPA." *Economic and Political Weekly*, vol. 47, no. 38, 2012, pp. 14–18. *JSTOR*, www.jstor.org/stable/41720156.

"No arrest can be made because it is lawful for the police officer or the government to do so. The existence of the power of arrest is one thing and the justification for the exercise of such power is quite another."[10]

The UAPA act clearly violates the precedent laid down by the Supreme court, as the government does not need to give substantial justification for the arrest of individuals.

Under section 43A of the act, a designated authority on the basis of belief "from personal knowledge", or information furnished by another person, or "from any document, article or any other thing which may furnish evidence of the commission" of an offence under the Act (emphasis added). The arresting officer only needs to inform the suspect of the charge against him/her *"as soon as maybe"*.

The phrase of *"as soon as maybe"* has no defined statutory time-limit; hence the police officer or the so-called designated authority can abuse their power and detain the arrested individual for a time that is not normally followed or is the statutory requirement.

To further add to the arbitrary powers related to arrests and detention, the 2008 amendment extended the pre-charge detention period from 90 days, a standard that was already unusually high according to international standards, to 180 days. However, the way the increase in the period of detention is applied is unusual. After 90 days the prosecutor for the government must only prove that the investigation is proceeding to get a judge to sign off on detaining someone for another 90 days, which is not the standard usually followed. The general rule is that a prosecutor must prove that there is a substantial risk in letting the arrested person out of custody, not only show that the investigation is proceeding.

Furthermore, the 180-day period is exuberantly high when compared to international standards. The UK terrorism act permits a detention of 28 days; the United States law of arrest allows for a detention of 7 days, and in Australia the time one can be held before charging is limited only to 24 hours.

In Maneka Gandhi v/ The Union of India, it was laid that - *any procedural law must be just, fair, and reasonable*; none of these terms are fulfilled in the UAPA act.

In DK Basu v/ State of West Bengal, the court laid down guidelines relating to the laws of arrest the police and the executive must follow. Among the guidelines, there are clauses relating to the notification of close friends and family of the arrested individual; however, under the UAPA the police or the so-called designated authority is not required to make any such notification. Furthermore, the arrested individual can ask for an advocate to be present during a part of his interrogation, another right that the government ignores in relation to arrests made under the UAPA act.[11]

[10] B D, 'Judicial Analysis Of The Constitutional And Procedural Safeguards Against Arbitrary Arrest And Detention' (2013) 2 Christ University Law Journal

Under 51A of the Act, inserted through the 2008 amendment, the central government can *"seize, freeze and prohibit the use of funds, financials, assists, or economic resources of the individuals suspected to carry out terrorist activities under the definition of this act."* As critics of this amendment pointed out, the scope of such a provision is extremely broad, and that the government can literally destroy livelihoods through controlling the finances of an individual on mere suspicion.

One of the most controversial sections of this act is the reversal of the concept of presumption of innocence. Under the principle of rule of law, and natural justice the burden of proof is on the prosecution, and that for someone to be tried for a criminal act, such an acquisition must be proved beyond reasonable doubt. However, under section 43A of the act, 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."*

It is vital to understand that the "definite evidence" the clause speaks about is subject to scrutiny or checks before the case commences before a judicial court. Hence, there is a significant chance of manipulation of evidence.

Furthermore, the concept of presumption of innocence is enshrined under Article 20 of the Indian Constitution. The concept of innocent until proven guilty is an internationally recognised concept, and is even covered under Article 14 of the International Covenant on Civil and Political Rights or the ICCPR, which India is a signatory to. The National Human Right's commission, while speaking on the concept of presumption of innocence, opined that – *"Breaching fundamental principles of fair trial, including the presumption of innocence, is prohibited at all times."*

The principle of presumption of innocence has also been upheld several times by the Indian judiciary, specially seen in the landmark judgement of – Babu v/ State of Kerala and the others.

The last arbitrary power this paper will discuss is in relation to the immunity the central government claims from prosecution in relation to this bill. Section 49 of the bill reads –

"Protection of action taken in good faith. —No suit, prosecution or other legal proceeding shall lie against—

(a) the Central Government or a State Government or any officer or authority of the Central Government or State Government or District Magistrate or any officer authorised in this behalf by the Government or the District Magistrate or any other authority on whom powers have been conferred under this Act, for anything which is in good faith done or purported to be done in pursuance of this Act or any rule or order made thereunder; and

[11] B D, 'Judicial Analysis Of The Constitutional And Procedural Safeguards Against Arbitrary Arrest And Detention' (2013) 2 Christ University Law Journal

(b) any serving or retired member of the armed forces or para-military forces in respect of any action taken or purported to be taken by him in good faith, in the course of any operation directed towards combating terrorism.

Thus essentially, any individual who would have been illegally detained or wrongly arrested, has no legal recourse to seek compensation or combat impunity.

X. CASE STUDIES

- **SIMI**

The UAPA charges against Students Islamic Movement of India (SIMI) are reflective of the fact that "national security" and its threats are constructed myths that the government conceives to suppress any potential challenge to its hegemonic position. Following the 11 September 2001 attack on the United States, the Bhartiya Janata Party (BJP)-led regime in India banned the SIMI under the UAPA, 1967 in 2001. SIMI, which came into existence in 1977, had no record of being implicated in any act of "striking terror" or promoting enmity between groups. It was the government's perception of SIMI as a possible political challenge to the right-wing dominated government that led to the ban on SIMI. The ban blatantly exemplifies the farce that Acts such as the UAPA make out of the judicial system. In case of the charges against SIMI, it became evident that the Tribunals function as per the will of the government, SIMI was banned in 2001, 2003 and 2006; each time a new Tribunal was constituted, the ban on SIMI was upheld.

In the process, not only the biases with which the government works get exposed but also a stereotypical image of certain organisations that are banned gets created in in the popular imagination. The tribunal's judgement against SIMI planted a picture of the organisation which is meant to excite suspicion about Islamic beliefs and practises as though the practises themselves constitute the "unlawful."

Such a practise is essentially dangerous to the very fabric of democracy and secularism.

- **Imran Kirmani, Seema Azad, and Angela Sontakke.**

Imran Kirmani, an aeronautical engineer from Kashmir working as a technician in Delhi, was picked up in 2006 by members of the Special Cell of Delhi Police alleging association with Lashkar-e- Taiba, a banned organisation. He along, with Ghulam Rasool, was incarcerated for 5 years only to be acquitted for a crime not committed. Such cases are examples of the grave injustice that the UAPA allows.

Seema Azad, a human rights activist, along with her husband, were picked up on the charges of being a Maoists and for sedition in February 2010. Her crime was that of running a magazine – "Dastak" which was critical of the government and sided with the Kasshmiri people in calling for a referendum in the valley.

Angela Sontakke, a Dalit activist from Maharashtra, was arrested by the Maharashtra Police's Anti-Terrorist Squad (ATS) in April 2011 for alleged links with Maoists. Twenty cases were foisted on her for "crimes" that she allegedly committed in Gadchiroli and Gondia, two places she has never visited.

Custodial Death of Swapan Dasgupta.

Swapan Dasgupta was charged under the UAPA in February 2010, for being the editor of the magazine People's March [allegedly an organ of CPI (Maoist)] died in custody due to ill-treatment and neglect of his deteriorating health. It is a fact to note that the magazine for the publication of which he was charged was registered under the Registration of News- paper Act. This case of custodial death in West Bengal in September 2011 was conveniently passed off as a case of death succumbing to ailment.

It is clear from cases such as these that under the UAPA, there is little to no care taken of those under custody. The detention of innocent seems to be the rule under such an act, rather than the exception.[12]

XI. CONCLUSION AND SUGGESTIONS

This research paper was an attempt to bring to the light how governments across the political spectrum use the repressive and draconian statute that is UAPA to supress political opponents, and dissidents.

One of the arguments used towards the favour of implementing such a statute is that it is in furtherance of the Directive Principles of State Policies, in the name of "national security." However, it is contended by the critics of the statute that any law or legislation or statute must be in adherence with the Fundamental rights of the country.

The UAPA criminalises the fundamental right of association, but also makes little to no distinction between political dissent and criminal sedition. Political dissent is a fundamental right that must be protected by the state, however, this act does anything but.

It is understood that given the complexities relating to terrorism, strict and sometimes even arbitrary actions are needed; however, to have an act that gives any government a free hand in dealing with political dissidents in the way they want does not achieve the goal of protecting national security.

Suggestion of the researcher –

1. An immediate repeal of the Unlawful Activities (Prevention) Bill. Such an act should be replaced by a legislation that allows for a degree of transparency, and judicial scrutiny.
2. As is seen in the above submissions, there must be a massive action taken towards police reform, which should include sensitisation in terms of community, religion, and should work towards decreasing the

[12] SINGH, ANUSHKA. "Criminalising Dissent: Consequences of UAPA." *Economic and Political Weekly*, vol. 47, no. 38, 2012, pp. 14–18. *JSTOR*, www.jstor.org/stable/41720156.

massive arbitrary powers that the police hold.

3. Legislations relating to protection of political dissent should be passed, in order to properly define what does and does not constitute political dissent.
4. Compensation should be provided to those individuals who were detained under the UAPA for a significant amount of time, and proven innocent.

XII. BIBLIOGRAPHY

Research Journals and Articles –

1) Unlawful Activities (Prevention) Act; Article by Asish Gupta and Kranti Chaitanya – Economic and Political Weekly.

2) The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes – Article by South Asia Human Rights Documentation and Ravi Nair – Economic and Political Weekly.

3) Criminalising Dissent: Consequences of UAPA – Anushka Singh – Economic and Political Weekly.

Governmental Reports -

1) 177th Law Commission Report on the Law of Arrest.

Books –

1) Indian Penal Code – K.D Gaur