ISSN: 0975-833X

Available online at http://www.journalcra.com

INTERNATIONAL JOURNAL OF CURRENT RESEARCH

International Journal of Current Research
Vol. 13, Issue, 05, pp.17595-17599, May, 2021

DOI: https://doi.org/10.24941/ijcr.41526.05.2021

RESEARCH ARTICLE **OPEN ACCESS**

THE CONSTITUTION OF India versus THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

***Priyanka Sinha**

Chanakya National Law University

ARTICLE INFO

Article History:
Received 20th February, 2021
Received in revised form
25th March, 2021
Accepted 18th April, 2021
Published online 30th May, 2021

Key Words:

Fundamental Rights, Anti-Terrorism Act, Preventive Detention, Public Order, Sovereinity, Integrity.

***Corresponding author:**
Priyanka Sinha

ABSTRACT

The roots of the Unlawful Acts (Prevention) Amendment are often 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 accustomed 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 like in – V.G Row v. State of Madras; AK Gopalan v. State of Maharashtra; and also, the Romesh Thapar v. State of Madras, in essence, collectively held that fundamental rights of the citizens are often curtailed only within the foremost extreme and within the rarest of the rarest circumstances; which any statute, legislation, or executive decision that aim towards curtailing said rights, will be held unconstitutional. On the concept 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.The provisions of the UAPA are violative of the fundamental rights guaranteed to the citizens of India. The freedom of speech and expression guaranteed under article 19(1)(a) and Article 20 and 21 is being crushed by over-empowering the government with the assistance of the draconian act of UNLAWFUL ACTIVITIES (PREVENTION) ACT,1967 and the amendment Act of 2019.To overcome such restrictions put by the Indian judiciary, the first 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 situ of the now-repealed 124A section of the criminal law (Amendment), and dissidents of the government was being rounded under the justification of them violating "reasonable restrictions." The arbitrariness of the government further increased within the subsequent years; perhaps the foremost prominent example of this was seen in 1963 when India was engaged during a war with China, and to suppress 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 feature that the government can put "reasonable" restrictions on the interest of "sovereignty and integrity" of the state. This clause was essentially added to allow the government a blank check to detain anyone or groups that demanded autonomy or demanded to secede from the Union.

Citation: Priyanka Sinha. "The constitution of india versus the unlawful activities (prevention) act, 1967*", 2021. International Journal of Current Research, 13, (05), 17595-17599.*

INTRODUCTION

The evolution of anti-terrorism laws in India started from the enactment of Preventive Detention Act (PDA) 1950-1969. This act was passed as a temporary measure to face with the issues posed by violence and displacement during the barbarous Partition of India. This law empowered the government of India to detain any individual without any charge. As this was a temporary law enforced at that time, the act was subject to annual review by the Parliament before finally expiring in 1969. It was viewed that the said Act was in direct conflict with the natural justice principles and due process of law.

For instance, the highly conflicted Act AFSPA gave enormous power in the hands of military to act alongside the police in designated "disturbed areas". It vested the soldiers with greater power to use force against civilians than the police are allowed.

The National Security Act 1980(NSA): Was enacted which empowered Centre as well as State government to detain an individual for a maximus period of 12 months. This Act further provided that a person can be detained for up to 10days without being informed about the grounds of detention. It was also given in the provision to withhold the information supporting the detention in public interest and the detained person cannot have the right to legal aid during such detention period.

Terrorist and Disruptive Activities (Prevention) Act 1985 (TADA): Was another experimental act of legislature to counter the issue of terrorism. It has vague definitions but loose provisions. This law, a special TADA courts were set up for trial of accused of terrorist activities in areas which were marked as "terrorist affected areas" by the government of India. This Act also created new offences which are criminal in nature and other procedural powers for police personnel. One special and extraordinary feature of TADA is that it even makes those confession admissible which is given to a police officer. This feature is exception to Section 25 of Indian Evidence Act. Thus, it resulted in custodial abuse and torture of arrested person under TADA by the police officers. In the guise of fighting terrorism, this law was used to detain marginalised communities as well as against trade unions. About, 76,000 people was arrested when TADA came into during 1985 to 1995 and the conviction rate for these arrests was less than 1%, which meant thousands were wrongfully incarcerated.

Prevention of Terrorism Act, 2001(POTA): Was brought in black and white in the wake of 9/11 in the United States. This act enhanced the power of police, limits on the rights of defence and making police confessions admissible as evidence. National Investigation Agency Act 2008-2019 (Amendment) Act, was introduced within a month of Mumbai terror attack in 2008. It sanctioned the creation of a central agency to curb terror cases. The proceedings of NIA mandated the secrecy of identity of witness, which forecloses cross-examination on the behalf of defendants, making the trial patently unfair.

The Unlawful Acts (Prevention) Amendment, 2019(UAPA, 2019): This Act attempts to define the 'unlawful' activity, which refers to an action that supports or intends to support the secession of any part of India, or any act which "disclaims, questions, disrupts or intends to disrupts" the security, sovereignty and integrity of India. The punishment may extend up to seven years. Section 15 of the Act, defines 'a terrorist act' which refers to an act or intent to threaten or likelihood of threating the unity, integrity, security, economic security or sovereignty of India or to strike terror on the people of India. The punishment may extend to death sentence or life imprisonment if the terrorist act results in human loss. There are three cumulative conditions of terrorist crimes, i.e., means, intention and aim. Without these three elements the said prohibited act could not be considered as a terrorist act as it fails to differentiate itself from an ordinary crime. This Act also gave immense power to the government to declare certain organisations as 'unlawful associations' or 'terrorist organizations.' Any membership of these said organizations, intentionally or unintentionally will amount to criminal offence. However, there is no definition of membership in the UAPA, which allows investigating authorities to use even the flimsiest of excuse to book people as member of these terrorist organisations, according to experts. Provisions of UAPA, 2019 is stricter than the domestic criminal law. The Act allows the police to complete the investigation within the time period of 180 days; the average time period provided under Criminal Procedure Code to complete investigation is 60 to 90 days. It also allows police to detain an individual for 6 months at a stretch without even producing any evidence against the accused. The remand could be given for 30days police custody which is double the amount under criminal law. The striking feature is there is no provision for anticipatory bail in UAPA, 2019. In cases of UAPA, it is difficult to get bail which lead to indefinite imprisonment even without conviction, without any evidence, witness and proof. Ultimately it appreciates the practice of custodial torture and other ill- treatment of person detained under said Act.

Another amendment with regard to investigation that has been brought is allowing searches, seizures and arrests based on "personal knowledge" of the police officers with prior approval of only Director General of Police, which means without a written validation from a superior judicial authority. "This interferes with the privacy and liberty of individuals which is not only by a fundamental right but also contravenes the provisions of the International Convention on Civil and Political Rights (ICCPR)", which protects against arbitrary or unlawful interference with a person's privacy and home. The burden of proof is on accused under UAPA cases. This is not only inconsistent with the fundamental norm but also impels the deliberate planting of evidence. The government can name individuals and label them as terrorist on the basis of suspicion, without following any due process. This new law has empowered low rank police officials of NIA to investigate such cases of UAPA. Thus, it provides a lot of room for discretion for how they want to prosecute, when and for what reasons. Such delegation of power gives unconfined power to the investigating authority.

UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967: AN INFRINGEMENT OF FUNDAMENTAL RIGHTS?

The Unlawful Activities (Prevention) Amendment Act, 2019,[1] expanded the scope and definition of the term "terrorist" which includes individuals under Section 35 &36 of Chapter VI of the Act. It also allows the Director-General of the National Investigating Agency to seize the property from any individual indulging in the act of terrorism under Section 25. The powers of officers within the rank of inspector and above to investigate cases under UAPA Section 43. A Review Committee to 'de-notify the individual notified as a terrorist is also constituted by the Central Government thus it removes all the chances of any institutional mechanism for judicial review. There are objections to the amendment of Section 35. Firstly, that it extended the power to include within its scope the categorization of individuals as "terrorists" as well. Secondly, the new Amendment is contrary to the principle of 'innocent until proven guilty' which may also violate the International Covenant on Civil and Political Rights, 1967; it recognizes the mentioned principle as a universal human right.

[1]https://www.livelaw.in/pdf_upload/pdf_upload-362501.pdf viewed on 09 June 2021.

Thirdly, it has been used to repress rather than to combat terrorism since the amendment provides that designation of an individual as a "terrorist" and that would not lead to any conviction or penalties. And, Fourthly, no objective criterion has been done for categorization. Thus, the government of India has been provided with "unfettered powers" to declare any individual as a "terrorist". Public Interest Litigation is filed in the Apex court of India against the Unlawful Activities (Prevention) Amendment Act, 2019 (UAPA). The petitioner named Sajal Awasthi,[2] filed the PIL against the present UAPA, 2019 to declare it unconstitutional as it infringes the fundamental rights namely; Articles 14,19, and 21 of the Indian Constitution. It also does not provide for any opportunity for an individual to justify his case before the arrest. The petitioner also said 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 most arbitrary and opposition of fundamental rights is the powers related to arrest and detention of an individual under UAPA cases. Chapter IV of this Act, says, that the physical element required to establish that an individual or organisation is engaged 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.[3] Even if a foreign individual makes a speech against the government of India, that person may also get detained under the provision of this Act as they could contend that his speech could terrorise the people of the country.[4] The UAPA Act, generally give less significance to the establishment of *Mens Rea* in relation to a terrorist activity. Hence, to establish *mens rea*, the government only has to establish a relation between the individual or organization that may 'likely' to cause terror in the mind of people. This act allows to detain the foreign individual who may make speech against the government under mere presumption that his speech may likely to cause terror in the people.[5] In Joginder Kumar v. State of U.P, the supreme court held that in answering the question of law of arrest and the power of executive to implement the UAPA act; held that

"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."[6]

The government sometimes refuse to provide substantial justice which is a clear violation of supreme court's guidelines given in various cases. Under section 43A of the UAPA act which give the *Power to arrest, search etc*… the authority is designated on the mere basis of belief or from 'personal knowledge', or 'from any document, article or any other material to furnish evidence of the commission' of an offence under the UAPA Act. Under this section the officer who is making the arrest only needs to inform the suspect. The information 'maybe' given to suspect or may be made 'as soon as possible'. It is not legally binding as well as no time limit has been set to the arresting officer to make sure that the suspect has been informed about the charges. Thus, there is a large scope of abuse of power and arbitrary action by the police officer. The amendment of 2008 in the UAPA act extended the detention period before framing the charges from 90 days to 180 days which is highly unusual. It is an easy process to extend the detention period for the public prosecutor after the said 90 days period of detention which is again highly unusual for the normal procedure. The general rule is the public prosecutor must prove that there might be a slight chance of substantial risk if the arrested person will get out of custody. But under Sec 43A of UAPA act only a statement of investigation in progress is enough to get the extension period for detention of the person after passing of 90 days in custody.
If we compare on international ground then we will get know that, the UK Terrorism Act only permits a detention of 28 days; the US law allows for a detention for 7days; in Australia the time can held before making the charges is limited only to 24 hours.

In Maneka Gandhi v. Union of India, the supreme court held *"the procedural law must be just and fair and reasonable"* but unfortunately none of these guidelines matches the provisions of UAPA act.

In DK Basu v. State of West Bengal, further the court laid down the guidelines for making arrest by the police and made it mandatory to be followed by the executive. The one of the guidelines is the friends and family of the arrested person must be notified; however, in UAPA act the arresting authority is not required to make any of these notifications. Even the right to consult desired advocate is not provided under this act.[7] Section 51A of UAPA act, an amendment was added in 2008 that, the central government may "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." The critical point of this amendment is the scope is limitless so it could be possible that on a mere suspicion the government may literally destroy the livelihoods through controlling the finances. It is hot discussed section of whole UAPA Act, it took the concept of presumption and innocence to upside down. The section 43A of the UAPA act says that if a "definitive evidence" came up against the accused, then "the court shall presume" that the accused has committed the offence. Now the crucial matter of fact is "what is definitive evidence under this section?"; the answer is that the clause that speaks about is subject to scrutiny or checks before the commencement of judicial trial. Thus, there is a little scope for manipulation of evidence.

[2]https://www.scobserver.in/court-case/association-for-protection-of-civil-rights-v-union-of-india viewed on 09 June 2021.
And See also, WP (C) 1076/2019

[3]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. Accessed 17 May 2021.

[4]http://journals.christuniversity.in/index.php/culj/article/view/378/285 viewed on 09-06-2021 13:22.
Or See,
B D, 'Judicial Analysis of The Constitutional and Procedural Safeguards Against Arbitrary Arrest and Detention' (2013) 2 Christ University Law Journal

[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. Accessed 26 May 2021.

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

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

The Article 20 gives the concept of presumption of innocence, that a person is innocent until proven guilty. This concept is also a worldwide accepted concept under law and justice and 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 had been upheld repeatedly by the Supreme court of India in the landmark case of Babu v State of Kerala and Ors.,[8]

THE CONTINUING THREAT OF INDIA'S UNLAWFUL ACTIVITIES PREVENTION ACT TO FREE SPEECH: The Unlawful Activities (Prevention) Act 1967 (UAPA), was enacted to combat terrorism and for the prevention of unlawful activities associated with any kind of terrorist organization or group or any individual for the security, sovereignty, and security of India. Throughout the years it has been amended for effective application and to serve the first intent of the act.
The UAPA has been amended on multiple occasions to include the changing techniques of terrorism, from shifting the burden of proof for extra-territorial arrests. the foremost recent amendment that came was the Unlawful Activities (Prevention) Amendment Act, 2019 (UAPA, 2019) which expanded the very definition of "terrorist" to incorporate individuals under Section 35 and 36 of Chapter VI of the Act. It allows the DG of NIA to seize the property from proceeds of terrorism under Section 25 then the powers of officers with the rank of inspectors and above to investigate cases under UAPA Section 43. The review committee is there to "denotify" the person as a terrorist is constituted by the central government. Hence, it scraps the whole concept of judicial review.

The foremost contention to this amendment is under section 35, which categorizes the organization as a terrorist organization. It extends the power to that extent where an individual can also be declared a 'terrorist' under this amendment act of the UAPA Act. Another amendment in violation of the principle of innocence, that implies the principle of 'innocent until proven guilty' and also violates the International Covenant on Civil and Political Rights, 1967which recognizes the mentioned principle as a universal right. Again, it's getting accustomed to repressing instead of combat terrorism since the amendment provides that designation of a private as a terrorist that may not end in any conviction or penalties. Lastly, no objective criterion had been laid down for categorization. Thus, it gives unfettered powers in the hands of the government to declare any individual a terrorist.

PETITIONS CHALLENGING THE UAPA'S CONSTITUTIONALITY: The petition filed by the Association for protection of Civil Rights (APCR) contended that the new Section 35 allows the Centre to designate a person as a terrorist and add his identity in Schedule 4 of the Act while earlier only organizations may be notified as terrorist organizations. The amendment doesn't specify the grounds of terming a person as a terrorist which "conferring of such a discretionary, unfettered and unbound powers upon the Central government is antithesis to Article 14."

Another instance of the usage of the draconian UAPA was witnessed when the Delhi Police booked a student of Jawaharlal Nehru University Umar Khalid and Meeran Haider and SafooraZargar, another two other students of Jamia Millia Islamia (JMI) University under UAPA. The scholars from JMI were arrested for allegedly hatching a conspiracy to incite communal violence over the CAA which the police said was a "premeditated conspiracy."[9] The Amnesty International executive director[10] seasoned the news that the Jammu and Kashmir police invoked UAPA against the journalist Masrat Zahra under Section 13 for "uploading anti-national posts on Facebook with criminal intentions to induce the youth and glorifying anti-national activities" and Peerzada Ashiq for stories on 'diversion of COVID testing kits' said that it "signals the authorities' tried to curb the right to freedom of expression."[11]

This intimidation against journalists endangers the tried to address the COVID-19 pandemic. The police validated the cases that was brought against the journalists saying that Masrat Zahra's post could 'provoke public to disturb law and order'[12] and Peerzada Ashiq's story 'could cause fear or alarm within the minds of public'. He also said that UAPA has been accustomed "target journalists and human rights defenders who criticize government policies." In the case of Anuradha Bhasin v. Union of India,[13] the Jammu and Kashmir police had also invoked Section 13 of UAPA against those who were accessing social media through VPNs to dodge the longest ever internet ban imposed by the government. the government said that it was needed to be done "to curb the misuse of the sites by miscreants for propagating false information/rumours."

The Supreme Court held: *"A 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 practice any profession or carry on any trade, business or occupation through the medium of internet enjoys the 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, 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.*

Thus, it is subject to judicial review if any order suspends the internet under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017.

[8] (2010) 9 SCC 189-B

[9] https://www.huffpost.com/archive/in/entry/delhi-riots-police-books-umar-khalid-meeran-haider-safoora-zargar-under-uapa_in_5e9fb770c5b6a486d0811c0c viewed on 09-06-2021 13:22.

[10] https://www.amnesty.org/en/latest/news/2020/04/journalists-in-jammu-and-kashmir/ viewed on 09-06-2021 13:22.

[11] https://www.bbc.com/news/world-asia-india-54655948 viewed on 09-06-2021 13:22.

[12] *"The post in question was an image on Instagram from 2018. It was from a religious procession and showed mourners holding up a poster of Burhan Wani, a militant who had died two years before."*

[13] (2020) 3 SCC 637.

UAPA is a 'security legislation' thus it allows the government to even arrest the citizens that might touches any of the sections of offence. And this makes it a problematic legislation and there are numerous reasons behind it. There is list of things which questions the constitutional validity of UAPA act; firstly, it does not leave any scope of disagreement with the government or actions of government. It confines the liberty to express any political differences with government because it may subject to disaffection with state. The right to speech and expression granted by Article 19(1)(a) is directly violated by the UAPA Act. Article 21 is also violated as those who are being arrested under this Act can be languished in jail up to 180 days even without a charge sheet being filed. It empowers the government with broad discretionary power. Thus, abuse of power is guaranteed when any political revenge buds in the mind of those who are in authority. Not every case can be counted as abuse and arbitrary use of authorial power but it could be possible, as it gives wider scope of abuse of power in the hand of government.

This act may be used to supress the idea of people through intimidating them and harassment. It is a threat to many activities such as debates, any freedom of speech, freedom of press. It criminalises the basic and essential practice of speech in a democracy. The sovereignty and integrity of India is always on priority but it cannot be stand on the corpse of infringed fundamental rights of the people of India. The parliament is although crushing the freedoms of citizens. The RSS itself in 1992 had been declared unlawful under UAPA but individual members were not arrested on solely being a part of the organization. Vajpayee in his speech in 1993 apprehended that "the Government would declare all the opposition as unlawful." The government, however, keeps asserting that they bear no malice and only seek to keep the country united against existential threats. Hence, it is clear that this law can be used as a tool against the opposition and attacks the very importance of speech in a democracy in the name of security.[14]

CONCLUSION

The UAPA amendments brought in 2004, 2008, 2012 and 2019 consistently and increased the authority of the central government despite an allegedly federalist configuration. The Amendment granted officers the prerogative to perform searches or make arrests without a warrant based solely on the private knowledge that they had or the data sourced from a document, article, or the other thing. It becomes clear from the above points that the semantic formulation of those amendments renders the criminalization of practically any act possible if packaged correctly. Nonetheless, the Amendment was not applied retroactively to those individuals whose acts prompted the Amendment and after all, led to democratic practices being arbitrarily labelled as unlawful and to the targeting of journalists and activists under their affiliation to any sort of organization opposing the government's practices.
The enactment of the UAPA Act of 1967 may be a result to forestall unlawful activities and anti-terrorism laws to take care of the sovereignty and integrity of India. The amendments of the UAPA Act are made to combat several modern techniques of terrorism and cross-border unlawful insurgencies. The recently amended provision of the UAPA Act of 1967 is 'The Unlawful Activities (Prevention) Amendment Act, 2019 (UAPA, 2019).' The government has time and again used draconian laws like sedition and criminal defamation laws to silence dissent. These laws are vaguely worded and overly broad and are used as political tools against critics showing a movement towards "thought-crimes." The legislature in realizing the aim of this Act has eroded human rights. The Amendment also violates the mandate of the Universal Declaration of Human Rights and therefore the International Covenant on Civil and Political Rights. The above arguments have acknowledged how the amendment puts the fundamental rights of its citizens in peril and threatens the mere existence of opposition. Under the guise of such laws, the government has booked journalists doing their jobs and citizens fighting for his or her rights and justice. When such horrendous legislation violates and infringes the rights of people, it becomes the duty of the judiciary to step in and restore the faith in democracy. This Amendment reflects the intention with which laws were made under the colonial regime so as to curb several freedom movements under the veil of ensuring public order. The Act mainly criminalizes acts on the idea of 'ideology' and 'association'. Thus, it is often seen that the above are the signs of moving from democracy to autocracy.

[14]https://www.thehindu.com/opinion/op-ed/sacrificing-liberty-for-national-security/article29213720.eceviewd on 09-06-2021 13:22.

****