TITLE: Unlawful use of amendments to the Unlawful Activities (Prevention) Act, 1967

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ABSTRACT: The 2019 amendment to the Unlawful Activities Prevention Act, 1967 (UAPA for short) was a culmination of the 4385th meeting of the Security Council of the United Nations on 28th September 2001 which emphasized that all its member states should enact domestic legislation to combat terrorism. *Ipso facto*, the ratiocination for the latest amendment to combat terrorism whether within the geographical confines of India or outside India, needs to be dissected as it is possibly being misused against the state's own citizens to jail dissenters instead of terrorists. [1]

Hence, the amendments in the year 2008 and 2019 to the UAPA did not precisely define an unlawful activity. There is no doubt that the Security Council of the United Nations specifically had in mind terrorism. Activities such as advocating secession of a part of India or using terrorism to advocate freedom from the Indian union for any group which professes a religion or language or culture or ethnic identity different from the majority. [2]

Most minorities occupy geographical units which would signify these geographical units should separate from the rest of India. It is inconceivable that any nation-state will tolerate dismemberment of its contiguous parts. The People's Republic of China is a case in point where Tibet has been forcibly incorporated into the nation and its distinct ethnicity, religion, language and culture eradicated forever.

Hence, directly or indirectly advocating the secession of any part of India or that a certain community which professes a particular religion, speaks a particular language or professes a certain religion does not belong within India and so should leave India will fall within

[1] The 4385th meeting of the Security Council of the United Nations adopted Resolution 1373 (2001) on 28th September, 2001, under Chapter VII of the Charter of the United Nations requiring all the States to take measures to combat terrorism.

[2] Unlawful Activities Prevetion (Amendment) Act, 2008, (Act 35 of 2008)

the gamut of an unlawful activity. It is respectfully submitted that any activity which contradicts the Constitution of India, more specifically its preamble or its Part III which embodies all the fundamental rights, may safely be described as "unlawful." However, not all activities are heinous enough to be brought under the purview of the UAPA.

Terrorism is a dastardly crime involving the use of high technology and funds garnered from all over the world to dismember India. It must also be borne in mind that one man's terrorist is another man's freedom-fighter and so activities aimed at carving out a so-called "Khalistan" homeland or an independent state of Kashmir should be brutally exterminated. The *raison d'etre* for this is that the state comprises citizens residing within defined geographical boundaries. When citizens of India or aliens advocate independence from the Indian union, it follows they are enemies of this country which justifies the use of state force to exterminate them. [3]

However, the UAPA should not become a tool for those in power to intimidate dissenters or journalists and activists and jail them to silence discordant voices which are a hallmark of democracy. Dissenting against government lethargy, corruption or indolence is by no stretch of imagination an unlawful activity. Unfortunately, the UAPA has been misused to jail dissenters and iconoclasts without justifiable cause by clubbing them with terrorists and terror organizations.

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This research endeavor is an attempt to define what constitutes an unlawful activity and ensure that basic human rights are embodied in the jurisprudence developing under this draconian law for although the aim and object of this law may be laudable, the drafting of this law has been imperfect.

INTRODUCTION: The UAPA is a culmination of the earlier anti-terror laws which were the Terrorist and Disruptive Activities Act, 1987 (TADA for short) and the Prevention of Terrorism Act, 2002 (POTA for short). The Unlawful Activities (Amendment) Bill, 2008

[3] Swamy Subramaniam :Terrorism in India –A Strategy of Deterrence for India's National Security (2008, Kindle Edition) –Pgs 100-140

was rushed through Parliament without sufficient debate because the demand of several Members of Parliament to refer this Bill to a standing committee was ignored.

A large number of provisions incorporated in TADA which was allowed to lapse in 1995 and the POTA which lapsed in 2004 were incorporated in the UAPA. Rather than draft new sections in the UAPA to ensure this law could not be misused by any political party in power against specific minority groups, the 2008 amendment to the UAPA merely copied the earlier provisions from TADA and POTA making the very preamble of the UAPA a farce. The 2019 amendments revamped sections 35 and 36 of the UAPA to allow incarceration of suspects for 180 days without a charge-sheet being filed.

Any law which makes drastic inroads into the fundamental rights of Part III embodied within the Constitution of India must be deliberated and dissected through the medium of Parliamentary debates. Another method of ensuring these anti-terror laws are not misused against minorities is to invite representative bodies such as the Minorities Commission and other stake holders to suggest meaningful amendments to this law or oppose those amendments which have purposely not been drafted with precision to allow misuse against specific minorities.

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This research endeavor does not claim to be exhaustive or complete but only to set up a process of meaningful dialogue and scholarly debate to improve and curtail the sweeping provisions of the UAPA which result in innocent activists being detained in jail without charges being pressed.

Conversely, those innocent activists who may have been charged with heinous crimes at the instance of an investigative agency acting at the behest of a government which has a pronounced anti-minority bias. As reported widely in the media, several activists have been languishing in jails for suspected unlawful associations for which there is no credible primary evidence acceptable by the courts.

JUSTIFICATION FOR A DRACONIAN LAW SUCH AS THE UNLAWFUL ACTIVITIES PREVENTION ACT, 1967 AS AMENDED BY THE AMENDMENT ACT OF 2008:

The UAPA undoubtedly has the preservation of peace and order within Indian society as its ultimate aim which is laudable. A nation and its citizens cannot progress without peace and harmony. On the other hand, dissent is also vital for a democracy to flourish but it has to thrive within defined boundaries.

The identity of a state depends on how effectively it maintains law and order through strict enforcement of its legislation. This is why the stricter the penal law, the more need for unassailable primary evidence to convict suspected terrorists. Also, such draconian penal laws ensure peace and harmony culminating in economic progress of the nation.

This is why although the complexities of constitutional law or property law may be proscribed, penal law must be strict enough to deter potential offenders such as terrorists from perpetrating dastardly deeds on our nation.

It follows as a corollary that the nation has to accept such draconian laws like the UAPA to ensure specialized crimes like terrorism are eradicated without the basic human rights of presumption of innocence until proved guilty being overturned. This research paper attempts to further this objective.

DISCUSSION: The rushed amendments in 2008 and 2019 to the UAPA led to the inescapable inference that the lapsed TADA and POTA were resuscitated in a new form without giving adequate thought about how to prevent abuse of such a draconian law by the state. The primary task of a draftsman is to clearly define what is an unlawful activity.

If this definition clause is not clear and specific, the ambiguities only lead to any government in power misusing the law against their opponents resulting in waste of valuable judicial time because writ petitions filed by such detenues clog the dockets of the 25 high courts and the supreme court, seeking the charges against them be quashed.

Only those cognizable crimes which try to overawe the state by advocating violence to dismember the nation should come within the gamut of UAPA, thereby leaving out other cognizable offences which can be tried under the Indian Penal Code, 1860 as amended from

time-to-time. It is worth mentioning that the law of sedition incorporated under Section 124-A of the Indian Penal Code, 1860 has been misused by the state against activists and dissenters.

This has prompted a magistrate in Delhi to observe in his judgment that the law of sedition cannot be used to suppress dissent. Hence, the state can try to intimidate and suppress all dissonant voices by charging them under the UAPA if they do not directly come under Section 124-A.

K. M. Munshi's amendment had removed "sedition" from the Constitution,[4] arguing that its scope was too broad to be compatible with free speech in a democracy, but the Supreme Court's judgment in the Kedar Nath Singh case in 1962 reintroduced it within the Indian Penal Code, 1860 through the back door, to make it clear that inciting violence against a government established by law in India was sedition within the meaning of Section 124-A of the Indian Penal Code, 1860.[5]

Indeed, sedition has survived numerous attempts to get rid of it. Interestingly, in the original Indian Penal Code, drafted in 1860, it didn't even exist (hence, the 'A' after Section 124, signifying a later amendment). It was introduced into the code in the 1870s, as a response to the rising Wahhabi movement. The words "disaffection" and "hatred" were introduced much later into Section 124-A by the colonial British government to silence freedom fighters who cleverly delivered fiery speeches while carefully avoiding incitements to violence.

According to the data compiled by the National Crime Records Bureau (NCRB), the number of sedition cases registered across the country doubled from 35 in 2016 to 75 in 2018. Although official data of 2019, has not been released, activists fear the number could

[4] Constitution Assembly (Proceedings) Debates Volume VII Part II on 1st December 1948

[5] Kedarnath versus State of Bihar AIR 1962 SC 955

be in thousands.[6] They point out that in the eastern province of Jharkhand alone, police had booked 10,000 tribal under the sedition law last year.

Enacted in 1837, the law of sedition was originally meant to prevent any incitement against the British monarch. Legal experts say it has off late emerged a lethal tool in the hands of police to book dissenters. This is why the observation of the Delhi magistrate that the law of sedition cannot be used as a tool by the government to "quieten the disquiet" needs to be lauded. These words are nothing but a rewording of the Supreme Court judgement which laid down that unless there is an attempt to overawe the government by directly inciting violence against a government established by law in India, it is not a case of sedition.

Having disaffection towards any government whether established by law or not is not an offence unless the person who harbours such disaffection takes voluntary steps to incite violence against the government by use of force such as exploding bombs or other acts of violence, This is why the United Kingdom has already repealed this obsolete law which is seen as being anti-democratic.

The UAPA has had several amendments made with the most recent amendment carried out in 2019, amending section 35. This amendment expanded the definition of "terrorist" to include individuals under section 35 and 36 of Chapter VI of the Act. It allows the DG of the National Investigative Agency (NIA in short) to seize property used from proceeds of terrorism under section 25 and the powers of officers with the rank of inspectors and above to investigate cases under the UAPA section 43. A review committee to "de notify" the individual notified as a terrorist is also constituted by the Central government thus removing all the chances of any institutional mechanism for judicial review.

The primary objections to the amendment are under section 35, in addition to the categorization of organizations as terrorist organizations. The 2019 amendment extended the power to include

[6] Records of the National Crime Records Bureau available online.

within the scope of the UAPA the categorization of individuals as terrorists as well, negating the aim and object of the 1967 legislation which was primarily to declare associations as unlawful because they advocated dismemberment of India.

Secondly, the new 2019 Amendment is contrary to the principle of "innocent until proven guilty" and also violates the International Covenant on Civil and Political Rights, 1967 which recognizes the principle of innocent until proven guilty as a universal human right throughout the civilized world.

Thirdly, it can be argued that the law is used to repress terrorism rather than combat it because the amendment provides hat designation of an individual as a terrorist would not lead to any conviction or penalties.

Fourthly, no objective criteria has been laid for categorization and the government has been provided with "unfettered powers" to declare an individual as a terrorist without primary evidence admissible by the courts . Hence, the mere association of an individual with other groups or individuals can lead to him or her being designated as a terrorist although the individual may be a pacifist working for the uplift of tribal as seen in the case of Fr Stan Swamy, a Jesuit priest who has been incarcerated without cogent evidence of being a terrorist.

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DATA TABLE OF OFFENCES REGISTERED UNDER THE UAPA FROM 2015 TO 2018:

Interestingly, records of the National Crimes Records Bureau reveals there were no crimes registered under the UAPA before 2014. Under the repealed Terrorist and Disruptive Activities Act (TADA for short) the crimes registered were zero from 2006 onwards. It is possible some cases under the UAPA may have been included under the heading of "other SLL crimes" but in later years offences under the UAPA were categorized as separate crimes by themselves. The NCRB records offences or crimes under the category of UAPA only from the year 2014 onwards which registered a marked increase in the use of the UAPA.

OFFENCES REGISTERED THROUGHOUT INDIA UNDER THE UAPA [7]

[7] Records of the National Crime Records Bureau available online.

YEAR	TOTAL OFFENCES REGISTERED
2014	976
2015	897
2016	922
2017	901
2018	1182

From the perspective of the states, the maximum number of cases of the UAPA have been in the states of Manipur, Jammu and Kashmir and Assam and these are mostly where there has been insurgency, Naxalite and Maoist activity which is the reason why there has been an increase in the number of crimes registered under the UAPA. There were 630 cases registered in Manipur in 2014 and 544 cases registered in the same state in 2015, while 382 cases were registered in 2017 and 289 cases in 2018.

If you compare Manipur with Jammu and Kashmir before it was bifurcated by the Central government, the crimes rose from just 45 in 2014 to 59 in 2015, 161 arrests were made in 2016 and 156 arrests in 2017 and 245 cases were made in 2018.

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Independent research has shown the use of the UAPA has risen in the states where the BJP has been in power. While Jharkhand had 44 cases under the UAPA in 2014, it rose to 137 cases in 2018. In Uttar Pradesh, there were 30 cases in 2014 which rose to 107 in 2018. In Assam, there were 148 arrests in 2014 which rose to 308 arrests in 2018.

However, although the BJP has never come to power in Kerala, this southern state saw a steady rise in cases registered under the UAPA with only 30 cases registered in 2014 which rose to 185 arrests in 2018. It is significant that the Left Front was in power in Kerala during the above period when this data was obtained from the NCRB.

The 2018 NCRB report also mentions that 3920 UAPA cases were pending investigation from previous years with the added reportage of 1182 fresh cases, totally making it 5107 cases under

the UAPA pending until 2018. This leads to the inference that after the suspects are charged under the UAPA while bail is rarely granted, trials take years to complete with a majority of the cases even from 2014 not having completed trial.

METHODOLOGY: This research endeavour is a combination of doctrinal and non-doctrinal research with a predominance of doctrinal concepts. This has been done to ensure the conclusion is compatible with contemporary thinking about terrorist activities which are a gross violation of human rights. The veracity of the axiom that terrorists deny others their human rights while unabashedly claiming their own human rights have been violated. A balance has to be struck between the human rights of the Indian populace which has witnessed bomb blasts and terrorist violence versus the rights [i]of disgruntled groups who use religion as a tool to foment discord in society.

PETITIONS CHALLENGING THE UAPA's CONSTITUTIONALITY: Strangely, just two petitioners challenged the constitutionality of the 2019 amendment in the Supreme Court, according to available data as gleaned from the internet. A Public Interest Litigation (PIL) was filed by Sajal Awasthi against UAPA in 2019 in the Supreme Court to declare it unconstitutional as it violates basic fundamental rights. He said this law indirectly curtailed the right to dissent and infarcted Articles 14 (right to equality), 19 (right to freedom of speech and expression) and 21 (right to life) of the Constitution. Furthermore, it does not provide any opportunity to he individual who is termed as terrorist to justify his case before his arrest. The petitioner also said :

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"The right to reputation is an intrinsic part of a fundamental right to life with dignity under Article 21 of the Constitution of India and tagging an individual as terrorist even before the commencement of trial or any application of judicial mind over it, does not adhere to procedure established by law."

Another petition field by the Association for Protection of Civil Rights (APCR) contended that the new Section 35 allowed the Central government to designate an individual as a terrorist and add his identity to Schedule 4 of the Act while earlier only organizations could be notified as terrorist organizations.

The 2019 amendment does not specify the grounds for naming an individual as a terrorist and that "conferring of such a discretionary, unfettered and unbound powers upon the Central government is an anti-thesis to Article 14." There was no doubt that these were cogent and weighty arguments against the vires of sections 35 and 36 as amended by the 2019 amendment act.

VIOLATION OF ARTICLE 19 (1) (a) OR THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION: The Amnesty International executive director criticized the action of the Jammu and Kashmir (J & K for short) police for invoking the UAPA against journalist Masrat Zahra under section 13 of the amended law. The J& K police alleged he had uploaded anti-national posts on Facebook with criminal intention to induce the Kashmiri youth to join terrorism by glorifying anti-national activities. Similar was the fate of Peerzada Ashiq for stories on diversion of Covid-19 testing kits said ti signals the authorities attempt to curb the right to freedom of expression. This intimidation of journalists endangers the attempt to address the Covid-19 pandemic. The police justified the cases brought against the journalists saying that Masrat Zahra's post could provoke the public to disturb law and order and Peerzada Ashiq's story about diversion of Covid-19 testing kits could cause fear or alarm in the minds of the public. There is no doubt that the two journalists belong to a certain minority community which is treated with suspicion.

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This can lead us to logically deduce there was justification for the Amnesty International director to allege the UAPA was used to "target journalists and human rights defenders who criticize government policies." It is correct to assert that the judiciary does not interfere in government policies and legislation is nothing but an outcome of these policies. Hence, unless there is a clear and blatantly discriminatory violation of the fundamental rights in Part III of the Constitution, the high courts and the Supreme Court will uphold the validity of the UAPA which is the reason why it is being misused by several agencies against certain minority groups.

VIOLATION OF FUNDAMENTAL RIGHTS: The UAPA allows the government at the Centre and the states to detain a person without an arrest warrant issued by a competent magistrate's court or detain him in prison for up to 180 days without a charge-sheet being filed. The

government can set up special courts with the powers to use secret witnesses and to hold secret hearings behind closed doors to which journalists and activists are not allowed access.

Needless to say, these secret witnesses produced by the special police are often bogus witnesses who have been pressurized to depose against activists and others to ensure they are convicted. This violates the basic right to an open trial where journalists and activists are allowed free access and the right of the accused to know who are the witnesses who will depose against him.

The threat of being thrown into jail supresses the right to freedom of speech and freedom of the press because journalists are prevented from reporting cases being tried under the UAPA in these special courts. Both civil liberties and the basic constitutional guarantees and freedoms in Part III of the Constitution are bypassed.

The government has sought to justify the designation of individuals as terrorists on the ground that it is these individuals who comprise unlawful terrorist organizations so that any law to be used against the latter organizations would be thwarted by allowing such individuals to carry on their nefarious activities.

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But the question remains whether Parliament can confer powers on specialized police agencies to prosecute individuals in secret proceedings without confronting the suspect with specific charges under the UAPA or holding a trial after charge-sheeting him. Detaining any individual for 180 days in the most horrendous conditions without a charge-sheet being field or without allowing him or her to know what are the specific charges against him or her is a gross violation of human rights.

In Sikandhar Ali Khan versus State of Kerala (through the Sub inspecor of police) [8] the Kerala high court pronounced that the expression "terrorist act" was not defined and, on the other hand, the definitions of the term in Section 2 (h) (which contained all the

[8] Sikandar Ali Khan versus State of Kerala (through the sub-inspecor of police) CRL.M.C.No. 3961 & 4285 of 2010.

definitions despite the high court's assertion) stipulated it would have the same meaning as was been assigned to it in sub-section (1) of Section 3. The expression "terrorism" was defined under the Act and was held by this Court, in the case of Hitendra Vishnu Thakur versus State of Maharashtra that it was not possible to give a precise definition of terrorism or to lay down what constituted terrorism.

But the Court stated in the aforesaid decision that it was possible to describe it as use of violence when its most important result was not merely the physical and mental damage of the victim but the prolonged psychological effect it produced or had the potential of producing on the society as a whole. It was also stated in the aforesaid decision that if the object of the activity was to disturb harmony of the society or to terrorise people and the society with a view to disturb even the tempo, tranquillity of the society, and create a sense of fear, paranoia and foreboding, this would come within the gamut of "terrorism."

The two research scholars respectfully disagree with the observations made by the learned judge of the Kerala high court, Justice M. Sasidharan Nambiar by pointing out that if there is no attempt made to define what constitutes "terrorism" which is the core of the UAPA, the entire aim and object of this Act is defeated. An attempt should be made to clearly define the word "terrorism" which constitutes the core of all unlawful activities as other crimes are adequately defined within the comprehensive Indian Penal Code, 1860 and other criminal enactments. It is for this purpose that both the research scholars who have authored this essay have attempted to redefine what has been laid down in the UAPA.

No legislation has been perfectly drafted because draftsmen have limited vocabulary while judges leave the unfinished task of these draftsmen incomplete by not even attempting to define crucial expressions so that the state is left to allegedly terrorize innocent citizens on the ground that they are terrorist sympathizers or have leanings towards such so-called unlawful groups and associations.

Both the researchers have humbly redefined clause (o) of sub-section 1 of Section 2 which alone contains all the definitions within this legislation. Hence, they have endeavoured to venture into territory not ventured into by the learned judge of the Kerala high court.

These redefined definitions will go a long way in curtailing misuse of this draconian law which is a necessary evil in our society. The humble hope of both the researchers is that these redefined clauses given below will be incorporated in the amended UAPA legislation as and when it is deemed necessary.

CONCLUSION: The UAPA has been used as a tool by the government to suppress dissent and stifle the opposition on the specious ground that they are anti-nationals. Criticism of any political party and its policies does not make any individual a terrorist or any organization he has founded a terrorist organization unless there is cogent primary evidence of attempts made to dismember the state or unleash violence within the country.

Hence, the UAPA needs to be amended to allow a system of checks and balances to be incorporated within the mechanism to counter terrorism and terror funding.

The authors of this essay have suggested the following amendments:

(o) "unlawful activity", is any activity clearly defined in any law whether civil or criminal which is in force throughout the territory of India; including disputed territories; and will include any activity hereinafter expressly provided and defined in the Official Gazette of the Government of India or the states. These activities include those defined in the Indian Penal Code, 1860 or other criminal enactments which have been notified in the Official Gazette or any of the states' official gazettes. Mainly, any unlawful activity will mean and include any wilful action by an individual or association of individuals to dismember the Indian union or any of its parts by use of force. This activity may be carried out by signs or symbols or other visible representations or electronic or other means. But the activity is :

— (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or

(iii) which causes or is intended to cause disaffection against India; or

(iv) which causes or tends to cause disaffection between various groups of Indian citizens on the grounds of religion, sect, language, ethnicity, caste, gender, skin colour, tribe, or

(v) which tends to imply whether by signs, symbols, visible or audible methods that any citizen or groups of citizens cannot be loyal citizens of India or owe allegiance to the country or its national flag by virtue of professing any religion, sect, language, ethnicity, caste, gender, skin colour, tribe, or cannot occupy any Constitutional post or public office by virtue of belonging to such religion, sect, language, ethnicity, caste, gender, skin colour, tribe,

(p) "unlawful association" means any association,—

(i) which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(ii) (ii) which has for its object any activity which is punishable under section 153A (45 of 1860) or section 153B of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity:

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(iii) Notwithstanding any of the above, an association will not be deemed to be unlawful solely on the grounds that it has been formed to protest against any law or laws enacted by the Parliament or state legislatures to cause a repeal of such law or laws by peaceful means without the hidden object of dismembering the country or any of its parts by attempting to overthrow the government by unlawful means.

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