

# Anti-terrorism Law Antagonizes the Dissent

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## ABSTRACT

These days, a lot of laws have turned into tools of oppression rather than being signs of liberty and dignity. The Unlawful Activities (Prevention) Act, or UAPA, is one such law. There are several reasons why this act has been in the news lately. Two of those reasons were the passing of Father Stan Swamy, who was repeatedly refused release despite his failing health, and the Delhi High Court's decision to give bail to three college students accused of violating the Unlawful Assembly Provisions in connection with the Delhi riots case in 2020. The authors aim to provide light on the strict terms of this act in this text. Furthermore, the author aims to draw attention to a few recent UAPA instances involving a number of academicians, students, civil rights activists, and journalists etc. It will also be discussed how it has been misused to tramp constitutional validity.

**KEYWORDS:** UAPA, Unlawful activity, Unlawful organization, Terrorist act, 2019 Amendment.

## INTRODUCTION

The Criminal Law Amendment Act of 1908, which was used to suppress the Indian freedom struggle during the colonial era by prosecuting its leaders, is where the history of the UAPA begins. Following independence, the National Integration Council established a committee on national integration and regionalization to make recommendations regarding the limitations that could be implemented to protect India's integrity and sovereignty. The Unlawful Activities (Prevention) Bill was tabled in Parliament and approved during the fifth Lok Sabha in 1967 as a means of putting the recommendations into practice. This was made possible by the introduction of the Sixteenth Amendment to the Constitution. The Criminal Law Amendment Act of 1908 gave the Central Government the authority to outlaw any organization.

In order to stop illegal actions that could endanger India's integrity and sovereignty, the UAPA was passed in 1967. It gave the Central Government the authority to designate as "illegal organization" any organization that engages in "unlawful activities." To become the current version, this statute underwent more than six changes. At first, it was merely intended to make illegal any actions that fell under the purview of Section 2 of the Act's description of "unlawful activities." The Prevention of Terrorist Activities Act (POTA), one of the strictest anti-terror legislation, was repealed in 2004. That same year, the UAPA was revised to incorporate several of POTA's provisions verbatim, making it the main anti-terror law. Before this amendment, the UAPA was not a law against terrorism. This amendment expanded the list of offenses classified as "terrorist acts" to include new ones. This gives the government the authority to outlaw groups that engage in "terrorist acts."

UAPA has been widely criticized for being blatantly abused by the ruling class to target people who disagree with the party's ideology. The recent arrests made in accordance with this legislation amply

illustrate how the distinction between hate speech and political dissent is completely dissolved. In October 2020, Michelle Bachelet, the High Commissioner of the United Nations, released a statement denouncing the appalling state of the right to free speech in India and the widespread application of the UAPA against journalists, civil rights defenders, students, and social activists.

The Act contains a number of contentious provisions that have the potential to undermine individual liberty and create space for the abuse of state power. For instance, it grants police enormous authority over arrests, searches, and investigations; it forbids anticipatory bail for accused parties; it severely restricts bail; it permits intercepted communications to be used against accused parties as evidence; it goes against the established principle of the presumption of innocence until proven guilty; it increases the length of detention up to 180 days; and it makes all offenses listed under it punishable. Additionally, these provisions are incompatible with accepted theories of criminal law administration.

### **REASONS FOR ABOLISHMENT OF TADA AND POTA**

TADA<sup>1</sup> and POTA<sup>2</sup> were controversial anti-terrorism laws in India. TADA was enacted in 1985 while POTA was enacted in 2002. Both laws were later repealed due to human rights violations, abuse of power, and potential for abuse. Here are some reasons for cancellation of TADA and POTA:

**Human rights concerns:** Both TADA and POTA have been criticized for their harsh provisions that allowed people to be detained for long periods of time without formal charges. There were allegations of widespread ill-treatment, torture and violations of the defendant's basic human rights.

**Abuse of Regulations:** Law enforcement agencies have often abused laws against certain communities, especially religious and ethnic minorities. There were cases where innocent people were wrongly accused and harassed and abused.

**Lack of safeguards:** TADA and POTA lacked adequate safeguards to prevent misuse of the provisions. Broad and vague definitions of terrorism and terrorist activity have made it easy for authorities to label terrorists without concrete evidence.

**No time limit for detention:** Both laws allow prolonged detention without formal charges, raising concerns about arbitrary and indefinite detention. Inefficiency in the fight against terrorism: Critics argued that despite the strict provisions, TADA and POTA were not effective in limiting terrorism. Instead, they were seen as tools to suppress dissent and opposition rather than addressing the root causes of terrorism.

**International Criticism:** The international community, including human rights organizations, have raised concerns about abuse of power and human rights violations under TADA and POTA. India faced criticism of the laws and civil liberties and democratic principles.

**Public opposition:** There was growing public outrage against the abuse of these laws and violations of human rights. NGOs and activists played a crucial role in advocating for the repeal of these laws.

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<sup>1</sup> Terrorist and Disruptive Activities Prevention Act, 1985

<sup>2</sup> Prevention of Terrorism Act, 2002

**Legal Challenges:** Many legal challenges have been filed against TADA and POTA in various courts questioning the constitutional validity of these provisions. In several cases, the judiciary has expressed concern about the abuse of these laws.

In response to these questions and criticisms, TADA was allowed to expire in 1995 and POTA was repealed in 2004. The decision to repeal these laws reflected a commitment to respect human rights, ensure the rule of law and address the concerns of various stakeholders.

## CONSTITUTIONALITY OF UAPA

### 1. ARREST UNDER UAPA:

Arrest and detention guaranteed by Article 22<sup>3</sup> of the Constitution is a constitutional protection. It states that anyone arrested or detained has the right to know the reason for the arrest and detention as soon as possible. The police are obliged to deliver such an arrested or imprisoned person to the judge within 24 hours. In addition, section 50 of the Criminal Code forces the police who make an arrest without a warrant to immediately inform the arrested of the charge and the crime for which they were arrested. Under the UAPA, an arrest can be made without giving a person reasonable cause. In the important case of *DK Basu Vs. State of West Bengal*<sup>4</sup>, It is a requirement that the family of the arrested person must be informed after the arrest, if the arrest is under the UAPA and the arresting officer is only required to inform suspects of the charges for which he was arrested "as soon as possible." There is no fixed term in law.

### 2. PRESUMPTION OF INNOCENCE:

"One of the fundamental guarantees of human rights and the rule of law is the right to a fair trial<sup>5</sup>". One of the elements of the right to a fair trial that is never acceptable is the presumption of innocence. By assuming the accused is guilty unless the accused proves his innocence, THE UAPA violates this part of the right to a fair trial. According to Section 43A of the Act, the court "shall presume, unless the contrary is shown, that the accused has committed such an offense" if "definitive evidence" is found against the person who has been arrested. This also signals the reversal of another universal rule of criminal law, which states that the prosecution has the burden of proving guilt. Furthermore, at this point, it is very challenging for an accused person to gather evidence to support his innocence.

### 3. PERIOD OF DETENTION:

The Act was amended in 2008, extending the detention period from its previous fixed 90 days to 180 days. A public prosecutor only needs to demonstrate to a court that the investigation is ongoing after the initial 90 days have passed; this is sufficient justification to hold the accused for an additional 90 days. On the other hand, a person accused of a crime punishable by death, life in prison, or a minimum of ten years in prison, or by 60 days in jail if charged with any other crime, cannot be detained for longer than 90 days under Section 167 of the CrPC. This length of incarceration is not as great in other democracies as it is in

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<sup>3</sup> Article 22

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate

<sup>4</sup> *D.K. Basu Vs. State of West Bengal* (1997 (1) SCC 416)

<sup>5</sup> *Zahira Habibullah Sheikh and ors. Vs. The state of Gujarat*

India. For instance, the maximum length of incarceration in Canada is one day; in France, it is only five days; and in the UK, it is 26 days . In India, it might be the highest.

#### 4. STRINGENT PROVISIONS FOR BAIL:

The terms of bail and the protocols for investigations and arrests in UAPA cases differ from those for IPC offenses . According to Section 43D of the UAPA, a judge may only refuse to grant bail to an accused person if he is convinced that there are "reasons to believe that the charges against the accused are prima facie true" in response to the public prosecutor's objections. The court looked at what "prima facie true" meant in the *Jayanta Kumar Ghosh v. State of Assam*<sup>6</sup> case. According to the ruling, the objective is to ascertain whether the charges are "inherently improbable or wholly unbelievable," a determination that can be made by looking through the information gathered throughout the course of the investigation.

It is more difficult to obtain bail under UAPA since this test is less stringent than the one used to deny bail under Section 437 of the Code of Criminal Procedure. In actuality, the Court is ignoring considerations under the CRPC in cases under UAPA, such as the potential for absconding, tampering with evidence, and intimidating witnesses by the accused. It only considers whether there is proof of guilt. In order to establish the charges' prima facie validity early in the proceedings, it is extremely unlikely that the prosecution will have any evidence against the accused. The Kerala High Court noted in *Abdul Sathar v. Superintendent of Police*<sup>7</sup> that the seriousness of the offense and the impact of granting bail on the public are the more important factors to take into account when determining whether to grant bail rather than the length of time the accused has been detained. Nonetheless, judges will typically reject bail requests in order to avoid being accused of being forgiving of those who engage in terrorist activity. These requirements are stricter in the case of UAPA, which is why the government is choosing to charge an individual or group under it in an effort to silence dissenting views.

#### 5. MEANING OF UNLAWFUL ACTIVITY:

This term is defined under Section 2 (o) of the UAPA as “any action taken by an individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),

1. 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
2. which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or
3. which causes or is intended to cause disaffection against India”.

This definition appears to criminalize any discussion or debate on the subject, in addition to the act of ceasing or secession of the Indian territory. In 2004, an amendment was made to add Section 2(o)(iii), which further complicated the definition. This amendment expanded the definition of unlawful activity to include any actions that result in "disaffection against India." The term "disaffection" has a very ambiguous definition that can be widely used to describe a variety of contexts, such as protesting political

<sup>6</sup> *Jayanta Kumar Ghosh Vs. State of Assam* 2010 (4) GLT 1

<sup>7</sup> *Abdul Sathar v. Superintendent of Police* [1981] 3 SCC 317

actions, social injustices, and government policies and missteps . It appears to make even inadvertent disaffection illegal.

## 6. MEANING OF TERRORIST ACT:

Following the repeal of POTA, this term was added to the UAPA as a distinct crime in the 2004 amendment. A new section called "Terrorist Act Definition" was added. An individual or organization will be considered to be involved in terrorist activities if they are "involved in making or using bombs, dynamite, or other explosives substances, or by any other means of whatever nature, which is likely to cause harm to the population." The phrase "any other means of whatsoever nature" grants individuals in positions of authority unrestricted authority to take advantage of and harass innocent people. Once more, the word "likely" gives the government the authority to hold anyone without cause or trial. It is a subjective standard that is dependent on the government's whims and fancies. Similar provisions were also included in the TADA, which was eventually dissolved in 1995 as a result of widespread abuse by the government.

In the recent case of *Asif Iqbal Tanha v. State of the NCT of Delhi* <sup>8</sup>, the Delhi Court held that "terrorist activity" cannot be interpreted broadly to include ordinary penal laws within its ambit and noted that the stricter the penal law, the more strictly it must be construed. In attempting to define this term, the court stated that "terrorist activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to deal with it under the ordinary penal law, and it must be such that it travels beyond the effect of an ordinary crime and must not arise merely by causing disturbance of law and order or even public order."

## 7. 2019 AMENDMENT IN UAPA:

In 2019, an amendment was proposed to the UAPA, resulting in two modifications. Firstly, it gave the National Investigation Agency total authority to conduct investigations and operations anywhere in the nation without first obtaining consent from state and local governments. One could view this modification as a setback to federalism. Secondly, it granted the Central Government unrestricted authority to append any "individual" to the terrorist list without providing any justification or explanation. An executive's designation of someone as a terrorist even though they have no affiliation with any terrorist organizations can have a significant negative impact on that person's life.

The case of *Sajal Awasthi v. Union of India* <sup>9</sup> contested the constitutional validity of this amendment. The petitioner contested the constitutionality of the 2019 amendment to the UAPA that allows the Central Government to designate anyone as a terrorist without providing any objective standards to be met beforehand. According to him, this clause directly violates Articles 14, 19, and 21 of the Indian Constitution. Additionally, he said, "Tagging someone as a terrorist even before a trial or any application of judicial mind over it, does not absolve them of their right to life with dignity<sup>10</sup>, as guaranteed by Article 21 of the Indian Constitution.

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<sup>8</sup> *Asif Iqbal Tanha v. State of the NCT of Delhi*

<sup>9</sup> *Sajal Awasthi v. Union of India*

<sup>10</sup> *Maneka Gandhi Vs Union of India AIR 1978 SC 597*

The Association for Protection of Civil Rights presented an additional challenge, stating in its petition that "it is antithesis to Article 14 to confer upon the Central government such discretionary, unrestricted, and unbound powers."

## CONCLUSION

Anti-terrorism laws are being used more and more frequently in recent years. The use of the UAPA against academics, journalists, social activists, human rights advocates, and students who speak out against the government's policies presents a very negative image of the largest democracy in the world. These individuals continue to be detained in jail despite the lack of sufficient evidence to establish their guilt. A regular person finds it extremely difficult to defend themselves against the strict provisions of this act; in fact, obtaining bail is a very difficult task under this legislation. Laws by themselves cannot prevent terrorism, but if they are not applied strictly, as in the case of the UAPA, those in positions of authority may misuse them against the weak. It is equally crucial to pass laws that promote social and economic development, address the issue of uneven development, allow for political dissent and discussion, and include minorities in order to curb the threat of terrorism. "Discrimination on the basis of ethnic origin or religious belief creates grievances that can be conducive to the recruitment of terrorists, including feelings of alienation and marginalization and an increased propensity to seek socialization in extremist groups," stated the former Secretary General of the United Nations once.

Furthermore, we currently lack a legal review mechanism to combat terrorism. It's crucial to periodically review laws to make sure that no human rights are being violated. The United Kingdom, where terrorist acts are reviewed once every twelve months, serves as an inspiration for this. A review committee must be established in order to oversee investigations fairly and to examine the process of classifying people as terrorists in an unbiased and logical manner. One of the four pillars of democracy, the judiciary, should actively defend the government's violations of human rights by the authorities while disguising their actions under UAPA because justice must not only be served, but also seen to be served.

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