

# INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

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Volume 5 | Issue 3

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2023

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# Unlawful Activities Prevention Act: Democratic or Draconian?

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## ABSTRACT

*The Unlawful Activities Prevention Act, 1967 has often been called 'draconian' and violative of the Indian constitution. From a historical perspective, India has witnessed threats, emanating internally and externally, to its national security. The implementation of preventive detention laws has been governments' response to safeguarding the territorial integrity and sovereignty of the state. However, sometimes, the fundamental rights, especially Articles 14, 19 and 21 of the Constitution are compromised during the implementation of provisions like arrest, bail etc. of the UAPA. Firstly, this paper views the UAPA through a critical lens. Secondly, it looks at the possibility of the alteration of the existing legislation such that the fundamental rights of citizens remain intact. After analysing the same, the paper offers strategies to move forward via an approach that is people centric and democratic, without invalidating the security concerns of the government.*

**Keywords:** Security, Unlawful, Terrorism, Power, Misuse, Arbitrariness, Rights, Judiciary, Democracy.

## I. INTRODUCTION

Preventive detention essentially refers to the detainment of individuals, without trial, national security. Due to this reason, preventive detention laws have the possibility of being misused as the state exercises undeterred powers on the basis of mere suspicion. The acts for countering terrorism in India are essentially the Unlawful Activities Prevention Act, 1967 and the National Investigation Agency Act, 2008. The former was enacted with the objective of safeguarding the sovereignty of India and has been amended in 2004, 2008, 2012 and 2019, respectively, redefining and clarifying its' provisions each time. Members of the civil society have often been of the common opinion that the act should be used in rarest of rare cases, however, on-ground reality shows otherwise. In fact, the Hon'ble Supreme Court has also showed caution in the conviction of individuals charged under UAPA, while granting bail to activists, a bench comprising of Justice Siddharth Mridul and Justice Anup Jairam Bhambhani of the Delhi High

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Court said that the “right to protest is not outlawed and cannot be termed as a ‘terrorist act’ within the meaning of UAPA.”<sup>2</sup> The conflict then takes shape of one between the government and citizens, with judiciary acting as a middleman.

## II. BACKGROUND; TADA AND POTA

The UAPA defines ‘terrorist act’ as “Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security<sup>4</sup>[, economic security,] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or any foreign country”<sup>3</sup>. It also enlists ways through which the same can be done.

UAPA was preceded by two separate laws namely. the ‘Terrorist Activities prevention Act (TADA)’ and the ‘Prevention of Terrorism Act’ (POTA). TADA did not define ‘terrorist’ but only defined ‘terrorist activity and disruptive activity’ which by definition are so vague that they can be widely applied to curb any form of activity or dissent in the name of ‘territorial integrity’. It also made certain confessions made by the accused to police admissible in a court of law. This is a clear violation of the rights of the accused given under Article 20 (3) of the Constitution. TADA gave the government unlimited powers which were known to be misused. POTA was another security law that was enacted post an attack on the parliament in 2001. The legislation carried forward some draconian provisions of the TADA like arresting people on the basis of mere suspicion and presumption with or without them showing any criminal intent. Furthermore, there were safeguards put on the offense of being a part of a terrorist organisation (Section 21) etc. The popular public opinion was against POTA due to its apparent misuse to detain members of minority communities etc and was finally repealed in 2004. Later, the 26/11 attack on Mumbai gave the green flag to the ‘need and enforcement’ for a strong security law like the UAPA.

## III. STAND OF JUDICIARY ON UAPA AND RELEVANT STATISTICAL DATA

The first most significant judicial pronouncement in regard of TADA was *Kartar Singh v. State of Punjab*<sup>4</sup> because it upheld the constitutional validity of TADA with a few changes however it was not accepted by both the civil society and the international community before it was finally repealed in 1995. “Section 3(5)”<sup>5</sup> of the TADA penalised membership of a

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<sup>2</sup> Apoorva Mathur, Countering Terrorism or Suppressing Dissent: A Critical Analysis of the UAPA, 4 INT’L J.L. MGMT. & HUMAN. 5431 (2021).

<sup>3</sup> Unlawful Activities Prevention Act, 1967. No. 37 Acts of Parliament 1967 (India).

<sup>4</sup> *Kartar Singh v. State of Punjab 1994 SCC (3) 569.*

<sup>5</sup> Terrorist And Disruptive Activities (Prevention) Act, 1987, no. 38 Act of Parliament 1987. Repealed 1995.

terrorist organisation and similarly, ‘Section 10(a)(i)’<sup>6</sup>, UAPA penalises membership of an association which is declared unlawful. After referring to *Subramanian Swamy v. Raju*<sup>7</sup>, the court held that a provision, cannot be read down when there its constitutional validity has not been challenged. Recently, the Hon’ble Supreme court while overturning its 2011 judgement confirmed that when a person joins an organisation knowing that has been declared unlawful the mens rea is attached to these actions.

The 2019 amendments to the UAPA have been challenged in *Sajal Awasthi v Union of India*<sup>8</sup> and even by *Protection of Civil Rights v. Union of India*<sup>9</sup> they call the amendment as being manifestly arbitrary and UAPA unconstitutional. The former case is in the nature of PIL and still pending under the Hon’ble Supreme Court.

#### IV. COMPARISON OF UAPA WITH IPC AND CRPC

While IPC states offences of regular criminal nature, the UAPA charges exceptional offences and prescribes exceptional provisions for the same. The intention behind creating the divide has essentially been the transnational impact of offences under the UAPA. Apart from the types of offences, the punishment sees a slight variation as offences like ‘terrorism’, the given punishment includes death under ‘Section 16’<sup>10</sup>. However, the main difference is in the process of trial and bail.

Under regular procedure, an accused is required to be presented before a magistrate within 24 hours and according to ‘Section 167’, CrPC, “The Magistrate to whom an accused person is forwarded under this section may, from time to time, authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole”. This is in contrast to ‘Section 43 D (2) (a)’<sup>11</sup> which extends detention up to 180 days starting from thirty instead of fifteen days.

UAPA may seem lenient in front of the ‘USA Patriot Act’ or it may be compared with procedures followed by countries like Germany that do not have a separate statute for terrorism for example, in any case, the problem with security laws especially that deal with terrorism is that they tend to overturn the biggest of democracies into authoritarian regimes.

##### (A) Key observations

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<sup>6</sup> Unlawful Activities Prevention Act, 1967. No. 37 Acts of Parliament 1967 (India).

<sup>7</sup> *Subramanian Swamy v. Raju*<sup>7</sup> (2014) 8 SCC 390.

<sup>8</sup> *Sajal Awasthi v. Union of India.*, WP (C) 1076/2019.

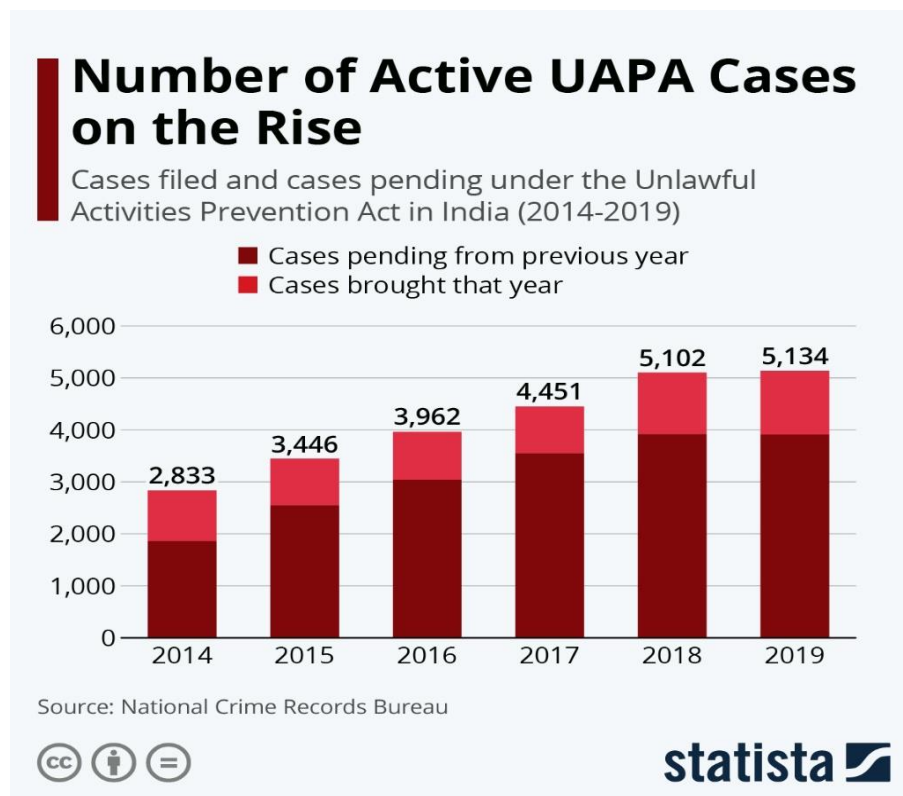
<sup>9</sup> *Association for Protection of Civil Rights v. Union of India*, WP (C) No. of 2019.

<sup>10</sup> Unlawful Activities Prevention Act, 1967. No. 37 Acts of Parliament 1967 (India).

<sup>11</sup> *Ibid.*

The main issue with security laws is that they can easily violate human rights of individuals when executed in an arbitrary manner. Even though the court has held that “Exceptionally stringent provisions of the UAPA are meant to apply only to exceptional cases, and not as substitutes for ordinary penal law.”<sup>12</sup>

The data given below reveals the real picture, though absolute credibility of any piece of news can also not be ascertained.



**Description:** The number of cases being registered under the UAPA are on the rise however, the pendency of the cases is also increasing as the accused await trial. According to the NCRB data and reports, since 2014, the number of cases which are pending has been on the rise with new cases being added each year. As per records, in 2019, 34 persons were convicted against 1,948 making the conviction rate only 1.7 percent.

<sup>12</sup> *Asif Iqbal Tanha v State of NCT of Delhi* (2021) SCC OnLine Del 3253.

<b>Table 5: Conviction Rate (Calculated Based on the Persons Arrested)</b>						
Year	UAPA			IPC (Cognizable Crimes)		
	Persons Convicted	Persons Arrested	Conviction Rate	Persons Convicted	Persons Arrested	Conviction Rate
	(A)	(B)	$[(A/B)*100]$	(C)	(D)	$[(C/D)*100]$
2015	23	1128	2.03	869013	3636596	23.89
2016	24	999	2.40	794616	3737870	21.25
2017	39	1554	2.50	873983	3727909	23.44
2018	35	1421	2.46	864686	3315033	26.08
2019	34	1948	1.74	837075	3112639	26.89
2020	80	1321	6.05	634229	4424852	14.33
<b>Total</b>	<b>235</b>	<b>8371</b>	<b>2.80</b>	<b>4873602</b>	<b>21954899</b>	<b>22.19</b>
<b>Conviction Rate from 2015-2020</b>	<b>2.80</b>			<b>22.19</b>		

Source: NCRB - Crime in India: 2015 to 2020, Chapter 19A, Tables 19A.7, 19A.5

**Description:** According to the data collected by People’s Union for Civil Liberties, less than 3% of the arrests made under the UAPA between 2015 and 2020 have resulted in convictions. There is a wide gap in the number of people arrested and number of people convicted, however this does not indicate the time period of detention of the individuals who are eventually acquitted.

## V. CRITICAL ANALYSIS

The critical analysis will be divided into sections, one that highlights the arbitrariness of the legislation and the other that explains the intention behind the legislation. This is an attempt to bring to light the draconian provisions of the act but also offer an explanation for the continued existence of UAPA despite appeals that time and again challenge its constitutionality.

### 1. The UAPA violates articles 14, 19 and 21 of the Constitution

**Section 15:** This section of UAPA fundamentally posits that there must be a “perceived or probable threat to the unity, integrity, security, and sovereignty of India.”<sup>13</sup> and uses the word ‘likely’ which signifies that an individual or an organisation can be booked for an act on an apprehension that it may be an act that can classify as a terrorist act. In *Siddhique Kappan v. State of U.P*<sup>14</sup>, A journalist was arrested on the apprehension that he may threaten the peace and sovereignty of the nation as a result of his reporting. The rule of “intelligible differentia”<sup>15</sup> cannot apply as it can never be ascertained whether individuals arrested under the UAPA are

<sup>13</sup> Unlawful Activities Prevention Act, 1967. No. 37 Acts of Parliament 1967 (India).

<sup>14</sup> Siddhique Kappan v. State of UP (2023) SCC OnLine All 21.

<sup>15</sup> *Jagannath Prasad v. State of Uttar Pradesh AIR 1961 SC 1245.*

actually guilty or not, though they are usually presumed guilty until innocence is proven which is a reversal of an important principle of natural justice.

**Section 35:** According to the 2019 amendment, any individual can be declared as terrorist under Section 35 of the UAPA calling for an unequal treatment of these individuals by specifying their names under the first schedule of UAPA. This amendment had made the targeting of individuals easier for the government which includes holding their activities accountable for terrorism. This gives a lot of discretionary power to the executive authorities and officers who carry out arrests as there is a risk of arbitrariness which may lead to unjust arrests in the name of national security. Furthermore, the right of ‘audi alteram’, a part of the rule of natural justice<sup>16</sup>, which is a facet of Art. 14, is being violated as the accused is not presented before a magistrate within 24 hours, and the opportunity to be heard is deprived.

**Section 2 (1) (o):** The definition of ‘unlawful activity’ has been worded in an extremely generic and vague manner, as a result of which, the government can exercise unrestricted powers to classify any activity as unlawful as it seems fit. The right most susceptible to getting violated is “the right to” Freedom of Speech and Expression.”<sup>17</sup> The government may use the provision to prevent any criticism or action that questions the status quo as it may be seen as a threat to the sovereignty of the state. It is commonly observed that student activists are usually at the mercy of the government when they dare to dissent and exercise their ‘right to protest.’<sup>18</sup> Sometimes, an individual who may be charged for sedition under “Section 124A”<sup>19</sup> of the IPC is charged for terrorism under UAPA. While the judiciary stayed the operation of Sedition for the time being as a result of *S.G Vombatkere v. Union of India*<sup>20</sup>, there is no such restriction on the application of the UAPA.

**Section 43:** ‘Section 43 A’ of the UAPA gives power to arrest on the ground of personal belief and information handed by ‘any’ person, the grounds for testing the credibility of the source has not been given under the act nor is there any review of the decision of the individual who is doing such an arrests on account of personal belief. ‘Section 43 D’ specifies that the period of detainment under UAPA may be extended until 180 days if the investigation hasn’t resulted in enough evidence and even the slightest shred of evidence is enough to further extend that period of detainment without bail. The same was justified in the case of *NIA v Zahoor Ahmed*

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<sup>16</sup> Ganesan v. State (2020) 10 SCC 573.

<sup>17</sup> INDIA CONST. art. 19, cl. 1 (a).

<sup>18</sup> State of NCT Delhi v. Devangana Kalita (2021) SCC OnLine Del 3255.

<sup>19</sup> Indian Penal Code, 1860. No. 45 Acts of Parliament 1860 (India).

<sup>20</sup> S.G Vombatkere v. Union of India (2022) 7 SCC 433.

*Shah Watali.*<sup>21</sup>

## 2. The objective behind the UAPA as a security provision

**Reasonable restrictions for national security:** It is true that Part 3 of the Indian Constitution is included in the basic structure of the constitution and the rights granted under it are fundamental and inalienable. However, these “fundamental rights enshrined in the Indian Constitution are not absolute”<sup>22</sup> and are subject to reasonable restrictions. These restrictions primarily include sovereignty and integrity of the state, public order among other areas of national interest. For the government, protecting the territorial sovereignty and integrity of India has been a priority. Hence, this has been the biggest argument for defending security laws like the UAPA. It has also been held by the courts that national security assumes prime importance and fundamental rights can be restricted if some act affects “national security”<sup>23</sup> in “interest of the general public”.<sup>24</sup>

**Presumption of constitutionality:** In any democratic country, it is presumed that any law that is brought into existence is intended to be beneficial for the people and national interest at large. As already specified in the previous issue. This is called the presumption of constitutionality principle. “The Legislature is presumed to know and understand the needs of its own people.”<sup>25</sup> The primary goal behind a stringent security law is to protect the territory, government and its people from any kind of threat and terrorist activity. To give effect to this intention, nation-states are obligated to enact security laws which depart from regular criminal codes.

**Offences with transnational impact:** Unlike other offences, the impact of terrorism is not limited to the people within a particular state but may extend beyond that. For example, the 9/11 attack on the twin towers in the USA shook the entire world and brought into light the concept of suicide bombings as a type of terrorist activity. The definition of ‘unlawful activity’ is vague perhaps because the method through which such an activity keeps on changing as per the evolution of the society. What is unlawful today may not be unlawful some years down the line and vice versa. For instance, cyber terrorism has started to increase in the 21<sup>st</sup> century with advancements in technology and digital media. Hence, under grave offenses like terrorism, the probability and extent of harm is greater so the prosecution requires an extended period of time for investigation to be certain before allowing the accused to walk free. This is the justification used in order to back provisions which allow detention of accused for over 30 days and deny

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<sup>21</sup> NIA v Zahoor Ahmed Shah Watali\_Criminal Appeal No 578 of 2019.

<sup>22</sup> Jayendra Vishnu Thakur v. State of Maharashtra (2009) 7 SCC 104.

<sup>23</sup> L.K. Koolwal v. State of Rajasthan and Ors. AIR 1988 Raj 2.

<sup>24</sup> Narendra Kumar v. The Union of India AIR 1960 SC 430.

<sup>25</sup> State of Andhra Pradesh v. McDowell & Co. (1996) SCC (3) 709.



bail on grounds of reasonable apprehension etc.

**The purpose of UAPA has not exhausted:** As observed in *Arup Bhuyan vs The State Of Assam Home Department*<sup>26</sup>, “The main objective of the UAPA is to make powers available for dealing with activities directed against the integrity and sovereignty of India.”<sup>27</sup> Due to the presence of an unequal power dynamic in the society, there will always be threats to people, governments and the overarching national security of a country. So, applying the literal rule of construction, the objective behind the enactment of the UAPA has not exhausted as the country still faces security threats.

## VI. WAY FORWARD

- 1. Checking arbitrariness:** The intent of the legislature behind the enactment of a statute is comprehended by its implementation, for ordinary citizens. When provisions of the UAPA are misused, for example, in cases where bail is repeatedly denied for a long period of time, as seen in *State of NCT Delhi v. Devangana Kalita*<sup>28</sup>, then public distrust increases towards the government. Arbitrariness has no place in a democracy like India that upholds rule of law. The actions of the government should be subject to review and should not be entitled to blanket immunity.
- 2. Fast-track investigation and role of Special Courts:** The NIA must ensure that the investigation of the detainee charged under UAPA is carried out on a fast track basis because the bail and punishment provisions are proportionately more stringent than given under the IPC and the CrpC, and it is the responsibility of the state to ensure that no innocent person is falsely charged or that their fundamental rights are restricted arbitrarily. “A fair investigation is also a part of constitutional right guaranteed under 20 and 21. These special courts should act as safety measures for people accused the UAPA to get speedy trial and timely bail etc. In the recent case of *Manzer Imam v. UOI through Jt. Secretary, Internal Security Division, Ministry of Home Affairs & Ors.*<sup>29</sup>, the Delhi HC has demanded centre’s response on the pendency of cases under NIA.
- 3. Upholding rights of the accused including custodial safety:** Since the number of days the accused can be detained under the UAPA is substantively long, it needs to be

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<sup>26</sup> Arup Bhuyan v. The State of Assam Home Department (2011) 3 SCC 377.

<sup>27</sup> Ibid.

<sup>28</sup> State of NCT Delhi v. Devangana Kalita (2021) SCC OnLine Del 3255.

<sup>29</sup> Manzer Imam v. UOI through Jt. Secretary, Internal Security Division, Ministry of Home Affairs & Ors W.P.(CRL) 1392/2021.

ensured that their right to speedy trial, safety at all times while under custody, right to counsel etc. are upheld. The process of investigation under UAPA should not feel like punishment itself, because the conviction rate under these offences continues to be very low. This means that there are a greater number of people who are detained for months and years on apprehension of guilt than real evidence.

4. **Scope of inclusion of offenses under IPC:** There is lack of clarity as to when an offence becomes grave enough to challenge the security and sovereignty of the nation for it to attract stricter provisions of the UAPA and not the IPC and CrPC. The government has the option of limiting UAPA for solely terrorist activities with a more specific definition of terrorism in terms of extent of violence used, internal and external factors, number of people affected and the probability of damage caused to public and property and most importantly the criminal intent behind the activity.
5. **Intervention of Judiciary:** In the case of *Union of India v. K.A Najeeb*<sup>30</sup>, the petitioner spent five years in jail and appeared for bail on numerous occasions but was denied the same. There are multiple instances wherein the time spent under detention or in the apprehension of bail is longer than the prescribed punishment for the offence committed. The court needs to play an active role in bringing prisoners to speedy trial.

Recently, in *Judgebir Singh v. National Investigation Agency*<sup>31</sup>, the court has held that an opportunity of hearing must be given to the accused before the detention period is extended upto 180 days. Moreover, this judgement is pertinent as it emphasized the right of the accused to be released on bail.

## VII. CONCLUSION

The UAPA clearly departs from the regular criminal procedure and safeguards, and from the rights of the accused granted to people by the constitution of India. The international community must come together to address the essential elements of terrorism in order to avoid any ambiguities in its definition and consequent penalization. However, it must be noted that in order to give effect to preventive detention and security laws, the state cannot unreasonably restrict fundamental rights, and must strike a balance between safeguarding sovereignty and human rights. The state must not forget that India is a democracy and at no cost can it become authoritarian or totalitarian, because that would violate the basic structure and essence of the Constitution of India. The civil society must feel secure and not threatened by a law that is

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<sup>30</sup> Union of India v. K.A Najeeb (2021) 3 SCC 713.

<sup>31</sup> Judgebir Singh v. National Investigation Agency (2023) SCC Online SC 543.

enforced for its own protection. Hence, the judiciary must uphold the interests and concerns of the civil society and set precedents which play an active role in curbing arbitrariness which may arise during the implementation of preventive detention laws.

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