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EVALUATING THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2019

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DISCUSSION PAPER

TABLE OF CONTENTS

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ABSTRACT

This paper attempts to analyse the recently passed amendments to the Unlawful Activities (Prevention) Act (UAPA), under the broader legal discourse relating to counter-terrorism, national security and human rights concerns. It further looks at UAPA in light of domestic jurisprudence on fundamental rights protection as well as various international legal instruments to assess its compatibility with universally accepted human rights norms.

INTRODUCTION

India's security law regime has evolved significantly since the days of its conception during pre-independence years. Given the country's distinct position as a multicultural, multi-religious and multilingual country, the greater part of India's security struggles in the post-independence period have been due to internal conflicts. The most commonly encountered security threats to its territorial integrity have been due to political uprisings in Punjab, militant activities in Jammu and Kashmir (J&K), insurgent groups in the northeastern states and the Naxalite movement in central India (Manoharan 2009: 20).

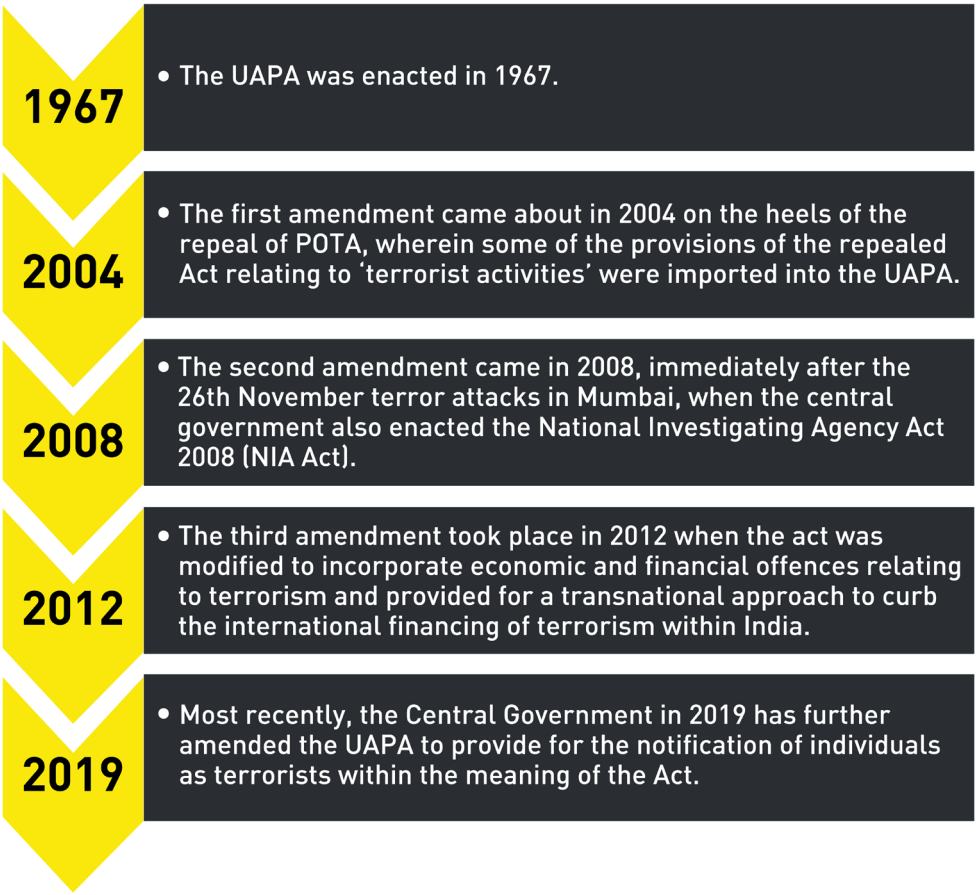
The situation has resulted in various anti-terror laws to be enacted in India over the years. The Unlawful Activities (Prevention) Act of 1967 (UAPA) is one such law, currently the only remaining nation-wide counter-terrorism law in India since the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and the Prevention of Terrorism Act, 2002 (POTA) were repealed.

Enacted as a temporary measure in 1985 to meet the challenges posed by violent extremism in Punjab, TADA was allowed to lapse in 1995 following criticism regarding its provisions on bail and detention, as well its arbitrary implementation and poor conviction rate (Noorani 2012: 81-88). POTA was introduced in 2001 and passed a year later, fuelled by growing international concern for counter-terrorism laws in the wake of the 9/11 attacks in the US, and India's brush with terrorism with the attack on the Indian Parliament on 13th December 2001. It retained several provisions from TADA but in a more comprehensive manner. It was repealed in 2004 after it faced similar criticism regarding its misuse and overall effectiveness as its predecessor (Noorani 2012: 89-97).

The UAPA was enacted in 1967, and has been amended several times since, the most recent amendment taking place in 2019, to provide for the notification of individuals as terrorists within the meaning of the Act[1]. However, the amendment has seen widespread criticism. For instance, Sections 35 and 36 of the 2019 Act have been criticised explicitly for infringing on the individual's fundamental rights under Articles 14, 19 and 21, relating to the right to equality, freedom of speech and expression, and right to life respectively.

[1] The Unlawful Activities (Prevention) Amendment Act of 2019, No. 28 of 2019 (8 August 2019). http://egazette.nic.in/WriteReadData/2019/210355.pdf

FIGURE 1: TIMELINE OF THE UNLAWFUL ACTIVITIES (PREVENTION) ACT AND ITS AMENDMENTS



In this respect, two petitions were filed in 2019 in the Supreme Court of India: the first one instituted by Sajal Awasthi, an individual, and the second by an NGO called the Association for Protection of Civil Rights (APCR), challenging the constitutional validity of the amendments. Other petitions have been filed since, all of which are still pending before the Court as of May 2020 (ANI 2019, Rahman 2020).

TERRORISM - GLOBAL DEFINITION AND SCOPE

Although there have been continued efforts at various levels of global policymaking to combat the menace of terrorism, there is no universally accepted definition of terrorism in the international context. Even within the United Nations, the UN Security Council Resolution 1373 (2001) only provides for an anti-terrorism agenda without defining what exactly constitutes terrorism (Roach et al. 2012: 3). Consequentially, Resolution 1373 imposes an obligation on states to implement counter-terrorism measures within their territories, and as such, diverse approaches have been adopted by different countries. In his special report, the former UN Special Rapporteur Martin Scheinin stated that leaving it at the discretion of individual nations to define terrorism can lead to severe consequences, including the possibility of human rights abuses by the State, sometimes even through "deliberate misuse" of the term (UN Commission on Human Rights 2006).

For instance, the first comprehensive counter-terrorism law enacted by China in 2015 was condemned for being too 'sweeping' since it required technology companies to provide the Chinese government with backdoor access to encrypted data for the prevention and investigation of terrorist activities (Zhou 2016). Within the broad definition of terrorism under that law, the spreading of terrorist propaganda through speech and thought is also deemed as terrorist activity. Therefore, this allows for intrusive requests by the Chinese government for accessing data for counter-terrorism purposes, which could result in State-imposed censorship and mass secret surveillance and threaten the fundamental human rights of citizens (ibid.).

Human rights concerns have also been raised regarding the application of Chile's anti-terrorism laws against the Mapuche indigenous peoples. In the absence of precise definitions of terrorism under the Anti-Terrorism Law, the irregular detention and prosecution of Mapuche persons has been called out as discriminatory as well as being violative of the right to a fair trial (Amnesty International 2018).

The denial of the right to a fair trial is also evident in the Russian authorities' abuse of counter-terrorism and counter-extremism laws to designate organisations as terrorist, and prosecute persons on terrorism charges without proper investigation. The accused persons, usually political opponents or dissenters, are routinely ill-treated, detained for indefinite periods of time and handed out lengthy sentences without recourse to fair trial standards (Human Rights Watch 2020a).

In the Indian context, while there has been potent political consensus on the need to have strict anti-terror laws since the 2008 Mumbai terror attacks, the laws enacted to control extremist violence are more commonly used to limit popular movements and curb dissenting voices (Singh 2012: 445). Moreover, continued amendments to the UAPA to include previously criticised provisions from older anti-terror legislation, as well as the inclusion of provisions intended to broaden its scope, have invited not just domestic criticism but also international disapproval (Human Rights Watch 2020b).

THE SECURITY APPROACH

Despite the lack in consensus on a universally accepted definition of terrorism, it cannot be denied that terrorism is a grave danger to the national security of a State. At the same time, state policies must protect and advance human rights even while promoting security and combating the threat of terrorism.

Scholars have often suggested two contrasting approaches in responding to terrorism and in the maintenance of internal security: the utilitarian approach, and the justice approach (Monshipouri 2012: 22). According to the utilitarian approach, the protection of innocent citizens requires a restriction to be imposed on certain rights and freedoms, which will ultimately benefit all citizens in the long run. The justice approach, on the other hand, emphasises the rule of law, social justice and the importance of human dignity. This approach centralises democratic ideals and the core values of human rights. Since the utilitarian approach tends to legitimise specific state actions in the name of protecting overall interests, there is a looming fear of suppression of civil liberties and fundamental freedoms becoming common state practices (Ibid.: 23).

In India, national security laws have been enacted from time to time due to violent political conflicts from as early as the British colonial period. Although criminal laws in India, including counter-terrorism laws, guarantee the protection of fundamental rights, coercive colonial-era provisions used to establish British control are still a part of the present-day national security framework. As a result, legal institutions in India are still grappling to reconcile its colonial past with its obligations towards upholding the rule of law, human rights, and democratic values (Kalhan et al. 2006: 110).

The UAPA was initially enacted against the backdrop of the Naga rebellion to deal with unlawful associations which were prejudicial to the sovereignty and integrity of India. It was applicable in the entire territory of India, including the state of Jammu and Kashmir, where it was applied by the central government through the Constitution (Application to Jammu and Kashmir) Amendment Order 1969 (Singh 2012: 438-439). The scope of the UAPA was widened after the 2004 amendment to include "terrorist activities" in addition to the provisions regarding "unlawful activities" which already existed under the original Act. Thus, the UAPA was slowly modified to deal with two types of activities that were deemed criminal under the Act - 'unlawful activities' in Section 3 and 'terrorist acts' in Section 15.

The 2004 and 2008 amendments to the UAPA expanded the definition of a "terrorist act" to include acts that intend to threaten or strike terror in India or outside. This has led to a growing level of obscurity and ambiguity to what must constitute the likelihood of an intention to threaten or to strike terror (Garge 2019: 88). Secondly, a terrorist act is not only one which is carried out through bombs and other devices, but it was expanded to include the broad classification of acts "by any other means of whatever nature", which is devoid of any relation to the aim of the Act perpetrated or intended (Noorani 2012: 101).

HUMAN RIGHTS CONCERNS AROUND UAPA

Prior to the 2019 amendment, the UAPA provided for the notification of organisations as terrorist organisations and listed membership in a terrorist organisation, as well as financing of such organisations as punishable offences. Considering the broad contours of the definition of a terrorist act and the absence of sufficient legal safeguards within the Act itself, the exercise of executive power in notifying an individual as a terrorist runs the risk of being used arbitrarily.

The report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism also provides three cumulative characteristics which can assist states in defining 'terrorism'. These include acts which are intended to cause death or serious bodily injury, which are motivated by political, philosophical, ideological, racial, ethnic, religious or other considerations of a similar nature, and which are acts within the scope of international instruments relating to terrorism (UN Commission on Human Rights 2006). The definition under UAPA lacks the second element concerning the ideological motivation or purpose behind the actual or intended terrorist act (Noorani 2012: 101).

The amended provision implies that any individual associated with a terrorist act or a terrorist organisation can now also be named as a terrorist him/herself and be listed publicly as such. In such a situation, the arguments could be made regarding the flaws in designating individuals as terrorists. Existing criticism for

laws against terrorism includes the idea of 'guilt by association' where the concept of membership is considered to be a vague one and criminalises the right to the association itself (Bhatia 2018: 21). In 2011, the Supreme Court of India rejected the notion of guilt by association and found that the punishment for membership of a terrorist organisation under the UAPA is inconsistent with fundamental rights (Garge 2019: 91).

It is argued that branding an individual as a terrorist by the Central Government, independent of a rigorous trial before the court of law or any other competent body, is essentially a process of profiling individuals (Poddar 2019). Due to the unique nature of anti-terror laws, certain dispensations take place from procedures followed in other criminal offences about the investigation, power of arrest and detention, the grant of bail, admissibility of evidence and sentencing. The National Investigation Agency Act of 2008 (NIA Act), enacted around the same time as the 2008 UAPA Amendment, provides for the Central Government to authorise the NIA to investigate the offences committed under the UAPA (and various other acts). The NIA conducts terrorism cases through 'in-camera' proceedings in special courts and can even refuse to disclose the identity of key witnesses (Noorani 2012: 103).

Furthermore, the provisions relating to detention under the UAPA allow for pre-trial detention for up to 180 days and are contrary to the statutory right of the accused to be released from custody on the expiry of 90 days if the investigation is not completed. Stemming from the provisions which the UAPA has inherited from POTA, bail can be refused if the case is deemed fit to be cognisable and the accusations appear to be 'prima facie' true (Garge 2019: 124). Under the UAPA, there is a reversal of the common law principle of the presumption of innocence and the burden of proof is on the accused to prove that the allegations against him are false.

Over the years, the State has been critiqued for using the UAPA to squash public dissent against it; for instance, through targeting academics and activists by filing omnibus FIRs[2] in order to arrest persons engaged in grassroots activism and academic or journalistic pursuits (Singh 2012: 440). The harsh provisions under the Act are punishment enough when detention can take place on mere suspicion, like in the case of Kanchan Bala who was arrested under the UAPA on the sole basis of a letter recovered from her which belonged to another person charged under the Act for having membership to a terrorist organisation. The incriminating letter only contained a list of books (Singh 2012).

Most recently, human rights activists Anand Teltumbde and Gautam Navlakha were refused anticipatory bail and subsequently arrested in April 2020, in relation to the Bhima Koregaon incident where violence erupted between Dalits and upper-caste Hindus. They were among nine other activists, who were also arrested in 2018 for their involvement in the same incident and are still in jail without any charges being proven against them by the prosecution (Amnesty International India 2020).

Another recent case pertains to the protests against the Citizenship Amendment Act (CAA) and National Registry of Citizens Act (NRC) that took place in Delhi that turned violent when clashes broke out between people. Two PhD students of Jamia Milia Islamia University were arrested on 2nd April 2020, pending further investigation, on the charges of sedition, murder, attempt to murder and promoting enmity based on ground of religion (Ibid.).

[2] Omnibus FIRs are First Information Reports where unsubstantiated allegations are made against unspecified or unidentified persons with no specific details, for example, where the accused persons may be identified only as an 'unruly mob'.

THE SECURITY LAW FRAMEWORK

Indian courts have recognised the right to privacy as an element of human dignity and its protection being sanctioned under Article 21 of the Indian Constitution. In the case of K.S. Puttaswamy v. Union of India (2018), which was concerned with the use and storage of personal data on the internet, the court held that the right to privacy includes the right to be left alone and in a broader connotation, the right to the protection of one's identity. Any restriction of this right must be open to judicial review under the eight grounds mentioned under Article 19(2) of the Constitution and must meet the standards of reasonableness, proportionality and arbitrariness.

It could be argued that the amended provision is in the interest of the sovereignty and integrity of India and the security of the State, which are the considered reasonable restrictions under Article 19(2). However, it is to be noted that the UAPA only provides for a review procedure (under Section 36) once a person has been listed as a terrorist in the new Fourth Schedule as per Section 35(1)(a) of the amended Act. This means that the individual can either have his name removed from the list in the Schedule after making an application to the Central government under Section 36(2)(a) of the amended Act or wait for the central government to do so on its own, under Section 35(1)(c) of the amended Act. However, there is no prescribed period for the de-notification of persons from the list of terrorists, which means that unless the person or the Central Government take active steps, the individual could remain on the list of terrorists in the Fourth Schedule perpetually.

The United Nations Human Rights Committee (UNHRC) in its General Comment No. 34 on the Freedom of Opinion and Expression (2011), in the context of terrorism and extremism has emphasized that counter-terrorism measures should not cause an "unnecessary or disproportionate" interference with a person's freedom of expression. All measures should be compatible with Article 19, paragraph 3 of the United Nations International Covenant on Civil and Political Rights, 1966 (ICCPR). i.e. they should be provided by law, be necessary to meet the legitimate aim and should respect the rights of others or the protection of national security, public order or public health (Scheinin 2015: 435) This observation of the UNHRC implies that any restriction placed upon the freedom of expression of a person must be absolutely necessary to protect a legitimate aim, which in the case of anti-terrorism measures is the security and protection of the territory from threat and violence.

In Shreya Singhal v. Union of India (2015), a case concerning online free speech and the liability of intermediaries providing online services, the Apex Court struck down Section 66A of the Information Technology Act of 2000 for being vague and overbroad, and therefore unconstitutional under Article 19(1)(a). Consequently, any law which is too broad, overdrawn or vague is not compatible to operate in a democratic society like India and likewise, the broad provisions regarding unlawful activities and terrorism under the UAPA should also fail this test under judicial review.

Furthermore, through its various judgements, the Supreme Court has observed the grave limitations of the state in combating threats to the nation. The Apex Court made a pertinent observation in D.K. Basu v. State of Bengal (1996), a landmark case which dealt with custodial death and laid down the minimum basic requirements for the protection of fundamental rights of the accused in judicial custody. It observed that "state terrorism would only provide legitimacy to terrorism" and that it is bad for the rule of law in a democratic state (14).

The balance between the right to privacy and the state's power to conduct surveillance through telephone tapping were examined in the case of PUCL v. Union of India (1996), where the Apex court noted that "terrorism thrives where human rights are violated" and that terrorism breeds when justice is denied to the people. Therefore, it is important to ensure that executive power does not exceed its limits in an effort to curb threats to security with the intended or unintended effect being the curtailment of fundamental human rights and freedoms and an abuse of the rule of law.

CONCLUDING REMARKS

Anti-terror laws are special laws, but they do not operate in isolation. Their enforcement requires the assistance of the same institutions that are required in regular criminal law procedures - the police, the prosecuting agencies and the judiciary. Current criminal law is often stated to be insufficient in meeting the pressing concerns of national security, as it does not confer enough powers on law enforcement officials to effectively combat the threats of terrorism and other activities which threaten territorial integrity (Kumar 2005: 205).

Furthermore, special laws allow for an effective and time-bound investigation, prosecution and adjudication of terrorism-related offences which sends a powerful political message to the perpetrators of such acts. At the same time, the practice of using special laws may exacerbate human rights concerns which already exist concerning the efficacy and legitimacy of the present criminal justice system (Kalhan et al. 2006: 200).

At present, the UAPA proposes far more drastic measures than are necessary for the interests of justice, by having overly broad and ambiguous definitions of terrorism; by not being able to satisfy the principle of legality; by having bail and detention provisions which violate due process and the right to a fair trial; by lacking oversight by the police and prosecution; by discriminatory and uneven application; and by providing broad immunities to officials for not safeguarding the right to effective remedies to the person targeted under these laws (Manoharan 2009: 22). Moreover, unlike TADA and POTA, both of which provided for either a periodic review or a sunset clause, the UAPA does not envisage any such clauses or review mechanisms to monitor its effective application (Abraham 2017).

The Malimath Committee Report on the Reform of the Criminal Justice System (MHA 2003) suggested that the IPC can accommodate such provisions so that there is not a 'legal vacuum' when it comes to dealing with terrorism and national security (Singh 2012: 444). After all, extraordinary laws cannot be allowed to operate in perpetuity without being subjected to legislative review, and by continually amending the provisions of legislations like UAPA, the legislature cannot make reality out of an exception. When it comes to creating an effective anti-terrorism regime which is not at odds with human rights, the most crucial step is in identifying what does not fall under the purview of terrorism. Terrorism is not the same as ordinary criminal offences, or legitimate state responses i.e. counter-terrorism activities, or even national liberation struggles (Roach et al. 2012: 6).

With respect to the Indian counter-terrorism discourse, it is imperative that rather than continuing to employ extraordinary laws to combat the threats to unity, integrity and security of the country, the ordinary criminal justice system should be reformed and strengthened. Special laws relating to terrorism should be subjected to periodic reviews and should apply temporarily, and more efforts should be made towards achieving a political resolution of conflicts.

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