



THE INCESSANT INFILTRATION UNDER UAPA: A DOOM UPON FUNDAMENTAL RIGHTS

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ABSTRACT

The 'draconian' UAPA having being recently amended has managed to extend the harsh provisions to an individual as compared to a terror organisation. This paper analyses the repercussions of the amendment upon the rights of the individual-accused. Having evaluated the extant literature on Article 14, 19, and 21 of the Indian Constitution and the principle of 'presumption of innocence' of the criminal jurisprudence with respect to UAPA, the paper concludes that the amendment effectively violates the aforementioned. The paper sifts through the vast diapason of legislative and judicial data as well as the current and the controversial instances of powers exercised under the Act to conclude that the Act promotes grave injustice and is redundant for a democratic country such as ours.

INTRODUCTION

In the 2019 amendment to the Unlawful Activities Prevention Act, 1967 ('UAPA') ('the Act') the state has been granted the power to name individuals as "terrorists". In the erstwhile provision, the state was empowered to name only a group or an organization as a terror organization.

More than 75% of cases filed under the UAPA, in the period of 2014-2016, have been concluded as acquitted or discharged. According to National Crime Records Bureau data,² of the 1,226 cases under UAPA filed in 2019, a jump of 33% from 2016, charge-sheets were

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² Crime In India' (National Crime Record Bureau, India 2019).

filed only in 9% of the cases and the conviction rate in 2019 was a mere 29.2 whereas in 2020, out of the 796 cases filed, chargesheets were filed in 126 cases alone. About 50% of cases were sent for trial and a record '0' convictions were recorded. Through this data, evidently the individual accused under the Act faces copious harassment.

The fact that charge-sheets are filed in only 9% of the cases (in 2019) is evidence of the fact that in 91% of the cases, persons are arrested and denied bail for a maximum of six months,³ within which the charge-sheet is to be filed. Even if the charges are dropped, in the public eye, the individuals concerned will have lost their reputation and their options to seek and avail opportunities in life for a dignified existence. The opportunities for gainful employment would also be limited. This violates their right to life and personal liberty. Their prosecution itself jeopardises the prospects of their livelihoods even in the absence of a charge-sheet or their conviction.⁴

A study of the National Crime Records Bureau (NCRB) reports from the year 2010⁵ to 2018⁶ reveals interestingly that there were no crimes registered under the UAPA before 2014. Even the crimes registered under the Terrorist and Disruptive Activities Act, which was repealed, is '0' from 2006 onwards. There could be some UAPA cases included generally under the heading 'other SLL crimes' but it seems unlikely because in subsequent years the UAPA is marked a separate crime head. The NCRB records crimes under the UAPA only from the year 2014 and from 2014 there is a rise in the use of UAPA. The total numbers of cases filed under the UAPA rose from 976 in 2014 to 897 (2015), 922 (2016), 901 (2017), and 1182 (2018).⁷

The definition of "terrorist" has been given an expansion to now include individual under § 35 and § 36 of Chapter VI of the Act vide the latest amendment to the Act i.e. the Unlawful Activities (Prevention) Amendment Act, 2019 ('the Amendment').

This paper evaluates whether the aforementioned latest amendment is constitutionally valid.

³ The Unlawful Activities Prevention Act, 1967, § 43D(2)(b), Acts of Parliament, 1967 (India).

⁴ ²⁵⁴Kapil Sibal, 'Unlawful Activities (Prevention) Amendment' *The Hindu* (2020).

⁵ 'Crime In India' (National Crime Record Bureau, India 2010).

⁶ ²⁵⁶'Crime In India' (National Crime Record Bureau, India 2018).

⁷ ²⁵⁷'Analysis Of Use Of UAPA From NCRB Data'.

Article 21 duly violated

Right to reputation

The words “life” and “personal liberty” in Article 21 have been interpreted by the Courts to encompass all varieties of life which accumulate to form the personal liberties of a man. Further adding that these words don’t entail “the right to the continuance of a person’s animal existence”. All these aspects of life, which make a person live with human dignity are included within the meaning of the word “life”. The State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence which may include its own officers. Article 21, in its broad application, not only takes within its fold enforcement of the rights of an accused, but also rights of the victim. In certain situations, even a witness to the crime may seek for and shall be granted protection by the State. The right to life and personal liberty is paramount. Likewise, if Articles 14 and 19 are put out of operation, Article 32 will be drained of its blood.⁸

The right to reputation has been held to be a fundamental right guaranteed under Article 21.⁹ The right to protect the reputation from being harmed unfairly inheres in an individual. Such right exists not merely against falsehood but also against certain truths.¹⁰

Right to enjoyment of a good reputation and the right to enjoyment of life, personal liberty and property enjoy equal protection. The term “person” includes not only the physical body and members, but also every bodily sense and personal attribute among which is the reputation a man has acquired. Reputation can also be defined to be good name, the credit, honour or character which is derived from a favourable public opinion or esteem and character by report. The right to enjoyment of a good reputation is a valuable privilege of ancient origin and necessary to human society. Reputation inheres in personal security and enjoys the protection by the Constitution at par with the right to enjoyment of life, liberty and property.¹¹ Reputation has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution.¹² In the International Covenant on Civil and Political Rights 1966, the right to have opinion and the right of freedom of expression under Article 19 of the Constitution is

⁸ State of WB v Committee for Protection of Democratic Rights, AIR 2010 SC 1476.

⁹ State of Maharashtra v. Public Concern for Governance Trust, (2007) 3 SCC 587.

¹⁰ K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

¹¹ Kishore Samriti v. State of UP, AIR 2012 SC (Supp) 699.

¹² Vishwanath Agrawal v. Sarla Vishwanath Agrawal, (2012) 7 SCC 288.

subject to the right of reputation of others. Reputation has been stated to be not merely the salt of life, but also the purest treasure, the most precious perfume of life.¹³ Right to reputation is a facet of right to life and is inseparable.¹⁴

In Om Prakash Chautala's case,¹⁵ the court relied on an earlier decision in Kiran Bedi v Committee of Inquiry¹⁶ wherein the court reproduced the following observation from the decision in D.F. Marison v Davis¹⁷ which said:

*"The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin".*¹⁸

In another case, the court said that the reverence of life can't be isolated from the dignity of human being, who is divine. Dignity endows a human personality with potential eternity. Such dignity should be sustained and this must be the imperative concern of each individual. Further, it can't be treated momentarily. "When a dent is created in the reputation, humanism is paralysed".¹⁹

No judicial order can ever be passed by any court without providing a reasonable opportunity of being heard to the person likely to be affected by such order and particularly when such order results in drastic consequences of affecting one's own reputation, since it violates the guarantee under Article 21.²⁰ Reputation of an individual is an important part of one's life. One has the right to have and preserve his reputation and also to protect it. An individual is entitled to be heard before any order is passed affecting its reputation.²¹

Right to reputation is an element of the right to life of a citizen guaranteed under Article 21 of the Constitution.²² Any treatment meted to an accused while he is in custody which causes humiliation and mental trauma corrodes the concept of human dignity. The majesty of law lies in protecting the dignity of citizens in a society governed by law. An investigator of a crime is required to possess the qualities of patience and perseverance. A citizen in custody is

¹³ Kumar v. State of AP, (2013) 10 SCC 591.

¹⁴ Om Prakash Chautala v. Kanwar Bhan, AIR 2014 SC 1220

¹⁵ *Id.*

¹⁶ Kiran Bedi v Committee of Inquiry, AIR 1988 SC 2252.

¹⁷ D.F. Marison v Davis, 55 ALR 11 (1927).

¹⁸ Viswanath Agarwal v. Sarla Viswanath Agarwal, AIR 2012 SC 2586.

¹⁹ Mehmood Nayyar Azam v. State of Chandigarh, AIR 2012 SC 2573.

²⁰ Divine Retreat Centre v. State of Kerala, (2008) 3 SCC 542.

²¹ *Supra* note 14 at 2.

²² State of Maharashtra v. Public Concern for Governance Trust, (2007) 3 SCC 587.

not denuded of his fundamental right under Article 21. The restrictions imposed have the sanction of law by which his enjoyment of fundamental right is curtailed, but his basic human rights are not crippled so that police officers can treat him in an inhuman manner. On the contrary, they are under an obligation to protect his human rights and prevent all forms of atrocities. A balance has to be struck. Under the impugned s. 35 of the UAPA, the arrest of a person on a mere apprehension of him being a terrorist would tantamount to infringement of his right to reputation and thus his dignity and would have dire consequences of losing right to livelihood as well.

UAPA permits searches, seizures, arrests to be made premised on the 'personal knowledge' of the police officers who don't require a written validation from a superior judicial authority.²³

Proportionality:

The test of proportionality entails:

- a. A rational connection between the means adopted and the objective to be achieved;
- b. Such means must be least intrusive to the rights or freedoms affected, and
- c. The outcomes of the means must be proportionate to the objective.²⁴

The amendment is grossly disproportionate as there is no rational connection between the means adopted and the objects sought to be achieved therefrom. The statement of the object and reasons of the bill indicates that the amendment has been brought in to give effect to various Security Council resolutions. It is unclear as to what legitimate aim does the State seek to achieve by declaring a person as a terrorist without even providing an efficacious remedy to challenge his notification. Moreover, the UAPA already had provisions which are effective in arresting the persons involved in terrorism like under § 35 the Central Government was empowered to declare by notification an organization which it believes is involved in terrorism. Membership of such terrorist organization is an offence under § 38. Giving support to such terrorist organization is an offence under § 39. § 40 makes raising funds for a terrorist organization an offence. So this entails that the least restrictive measure has not been resorted to.

Due process

Nikesh Tarachand Shah v. Union of India,²⁵ while holding that § 45 of the The Prevention of

²³ 273 The Unlawful Activities Prevention Act, 1967, § 43A, Acts of Parliament, 1967 (India).

²⁴ 274 Modern Dental College and Research Centre & others v. State of Madhya Pradesh & others, (2016) 7 SCC 353

²⁵ Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1.

Money-Laundering Act, 2002 violated Article 21 of the Constitution, this Hon'ble Court held that after *Maneka Gandhi v. Union of India*²⁶ and *RC Cooper v. Union of India*,²⁷ law under Article 21 implies due process, procedurally and substantively.

The procedure or the redressal mechanism followed under the Act is irrational as only government's opinion is considered for banning any organization and now any individual. There is no hearing or procedure followed before designating any organization as terrorist organization, only post-decisional hearing is done by a review committee which is headed by sitting or retired high court judge to determine the continuation of designation as such.²⁸

The banned organization can make an appeal to government and if it is rejected then an appeal can be made to a review committee, an extended body of government. So same authority is categorizing the organization and same is imposing ban, then hearing appeal and also the second appeal. This safeguard does not have any separation of power. The individual accused under the Act is not informed of the grounds of the inclusion of his name as terrorist, so the remedy under § 36, provided for in the Act, is rendered practically otiose.

Instead, POTA authorizes the central and state governments to establish administrative "review committees," which consist of three members appointed by the central or state governments themselves and whose chair must be a current or former High Court judge. These review committees trace their origin to the directions of the Supreme Court of India when adjudicating the constitutionality of TADA. Without specifying in particular detail the precise form that these entities should take, the court directed both the central and state governments to establish review committees to oversee, evaluate, and make recommendations concerning the implementation and application of TADA, in order to ensure that its provisions were not being misused.²⁹

The 2019 amendment designating individuals as terrorist does not provide for any change in the procedure for such designation. So same procedure is to be followed. Individuals being classified as terrorist should have different mechanism and faster mechanism of redressal for the reason that an individual has fundamental rights protected under constitution, unlike an

²⁶ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

²⁷ *RC Cooper v. Union of India*, (1970) 1 SCC 248.

²⁸ ²⁷⁸The Unlawful Activities Prevention Act, 1967, § 43, , Acts of Parliament, 1967 (India)..

²⁹ *Kartar Singh v. State of Punjab*, (1994) 2 S.C.R. 375

organization. They may be arrested, detained and their movement may be restricted which leads to their violation of fundamental rights guaranteed under constitution. But there is no change in the process of removing an entity listed as terrorist.

Another reason cited by the government for the amendment is that the United Nations Security Council (UNSC) designates individual as terrorists and India being a signatory to the United Nations Charter is obligated to treat the individual as terrorists.³⁰ However, the standards as prescribed by the same are not followed.

THE PERSISTING THREAT TO FREE SPEECH

Since the notification of the Amendment, people are being prosecuted without evidence of any alleged "deadly means used", or attempted to be used, or, for that matter, in preparation thereof. Even taking the broad definition of a terrorist act into account, most prosecutions are based on inferences drawn from speeches made, or alleged conspiracies based on alleged statements recorded, or alleged documents recovered by the investigation authorities.

In response to the instance of the Jammu and Kashmir police imposed UAPA against a journalist named 'Masrat Zahra' under Section 13, UAPA for 'uploading anti-national posts on Facebook with criminal intentions to induce the youth and glorifying anti-national activities' and another named 'Peerzada Ashiq' for stories on 'diversion of COVID testing kits', the Amnesty International Executive Director said that this points towards the authorities' endeavor to deter the right to freedom of expression. He further added that UAPA has been wrongly used to punish those who criticize government policies such as journalists and human rights defenders.³¹

Right to dissent: Indirect Infringement to Free Speech

Dissent is an integral aspect of the right to free speech under Article 19(1)(a) as interpreted in *Maqbool Fida Hussain v. Rajkumar Pandey*.³² The impugned Sections, under the guise of prohibiting terrorism, are aimed to target critical speech against the government.

³⁰ Designating Individuals as Terrorists, Published by: Economic and Political Weekly, Vol. LIV No. 32, August 10, 2019.

³¹ ²⁸¹India: Government must immediately stop intimidation of journalists in Jammu and Kashmir, available at: <https://www.amnesty.org/en/latest/news/2020/04/journalists-in-jammu-and-kashmir/> (last visited December 1, 2021).

³² *282Maqbool Fida Hussain v. Rajkumar Pandey*, 2008 CrLJ 4107.

“Again, our Constitutional democracy guarantees the right of free speech and that right is not conditional upon the expression of views which may be palatable to mainstream thought.

*Dissent is the quintessence of democracy”.*³³

Public discussion and debate are required and are necessary for smooth functioning of a healthy democracy. In fact, when there is public discussion and there is some dissent on these issues, an informed and better decision could be taken which becomes a positive view and help the society to grow.³⁴

Democracy is based essentially on free debate and open discussion, for that it is the only correction of Government action in a democratic set up. If democracy means Government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making choice, free from general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, the most comprehensive sense, is not possible unless there is a free and independent press.³⁵

Dissent is the quintessence of democracy. Hence, those who express views which are critical of prevailing social reality have a valued position in the constitutional order. History tells us that dissent in all walks of life contributes to the alteration of social reforms. Democracy is founded upon respect for their courage. Any attempt by the State to clamp down on the free express of opinion must hence be frowned upon.³⁶

The Supreme Court held that dissent is part of discussion which in turn is freedom of speech and expression. Public discussion and debates on sensitive social issues like reservation are necessary in a vibrant democracy like India to promote awareness in public, which in turn is necessary for effective working of the democracy. Discussion includes dissent also which in turn helps society to grow.³⁷

³³ F.A. Pictures International v. Central Board of Film Certification, AIR 2005 Bom 145.

³⁴ Prakash Jha Production v. Union Of India, (2011) 8 SCC 372.

³⁵ S. Rangarajan v P. Jagjivan Ram, (1989) 2 SCC 574.

³⁶ *Id.*

³⁷ 287State v. Kunji, AIR 1970 All 614.

THE ACT PROMISES ARBITRARINESS

The Hon'ble Supreme Court has held that laws are “manifestly arbitrary” in violation of Article 14 of the Constitution when they are “obviously unreasonable”, capricious, irrational, without adequate determining principle, or excessive and disproportionate or ultra vires the act.³⁸

Section 35 does not provide the detailed grounds and reasons on the basis of which an individual can be notified as terrorist rendering an arbitrary discretion with the government. The amendment fails to specify the grounds on which an individual may be termed as a ‘terrorist’ and such an anomaly is clearly violative of Article 14 as it confers excessive, unbound, discretionary, and unfettered powers upon the Central government. Take an example, the period of incarceration upon arrest under UAPA is 180 days without the requirement of filing a chargesheet which clearly impinges upon their right under Article 21 of the constitution. Thirdly, it confers upon the government broad discretionary powers and also authorizes the creation of “*special courts with the ability to use secret witnesses and to hold closed-door hearings.*”

Moreover, the lack of fair hearing violated natural justice principle of audi alteram partem or the rule of fair hearing. Invoking *Union of India v Tulsiram Patel*,³⁹ that violation of natural justice results in arbitrariness and violates Article 14.

In the case of *People's Union for Civil Liberties v Union of India*,⁴⁰ it was opined that if while combating terrorism, if human rights are infringed, it will be self-defeating.

Principles of natural justice are naturally flaunted under the Act

Articles 14, 19, and 21 of the Indian Constitution are the substratum of the concept of natural justice. In *E P Royappa v. State of Tamil Nadu*,⁴¹ it was opined that a properly expressed

³⁸ *Shayara Bano v. Union of India*, AIR 2017 SC 4609, at para 101; *K.S. Puttaswamy v. Union of India*, 2019 1 SCC 1, at para 105; *Joseph Shine v. Union of India* (2019 3 SCC 39).

³⁹ *Union of India v Tulsiram Patel*, 1985 AIR 1416.

⁴⁰ *People's Union for Civil Liberties v Union of India*, (2004) 9 SCC 580.

⁴¹ 291 AIR 1974 SC 555.

and authenticated order can be challenged on the ground that the principles of natural justice have not been observed. In another landmark case of *Maneka Gandhi v. Union of India*,⁴² the court opined that the procedure entailed in the impugned legislation empowering the administrative authority to restrict the fundamental rights of the people is unfair and unreasonable and hence, violates Articles 14 and 21.

It was held that duty to give reasonable opportunity to be heard is implied from the nature of functions to be performed by the authority which has the power to take punitive action. The authorities have a duty to proceed in a way which is free from arbitrariness, unreasonableness or unfairness and must meet the requirements of natural justice. The rules of procedure laid down by law come within the purview of Article 14.⁴³ It was held that denial of hearing which is reasonably due to a party cannot be made on the ground of the conduct of the party attributing bias.⁴⁴

In *Maneka Gandhi v UOI*,⁴⁵ the Court held that *“the doctrine of audi alteram partem is intended to inject justice into law and it cannot be applied to defeat the ends of justice or to make law lifeless, absurd, stultifying, self defeating or plainly contrary to commonsense or the situation. The core of it (the audi alteram partem rule) must remain, namely, that the person affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relation exercise”*.

The right to a fair hearing is “a rule of universal application” in the case of administrative acts or decision affecting rights, as “it is a duty lying upon everyone who decides anything”. Natural justice has achieved something like the status of a fundamental right.⁴⁶

Under Article 14, the requirement of natural justice has been regarded as an integral part of the guarantee of equality of Article 14, as the violation of a rule of natural justice leads to arbitrariness and consequently, is discriminatory.⁴⁷ In *A.K. Gopalan v State of Madras*,⁴⁸ minority decision rendered by Justice Fazl Ali opined that the principle of natural justice that

⁴² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴³ *Ministry of Chemicals and Fertilizers Govt. of India v. Cipla Ltd*, AIR 2003 SC 3078.

⁴⁴ *Orissa University of Agriculture & Technology v. Manoj K. Mohanty*, (2003) 5 SCC 188.

⁴⁵ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

⁴⁶ 296H.W.R. WADE & C.F. FORSYTH, *Administrative Law*, 9th Edn, p 36, 496

⁴⁷ *DTC v DTC Mazdoor Congress*, AIR 1991 SC 101

⁴⁸ *A.K. Gopalan v State of Madras*, AIR 1950 SC 27.

“no one shall be condemned unheard” was part of general law of the land and should accordingly be read into Article 21 as “law” and any adverse order passed without giving an opportunity to be heard is unreasonable and hence void.⁴⁹

Violation of principles of natural justice will be violative of Article 14 and would also be destructive of Article 19(1)(g) and negate Article 21 by denying a procedure which is just, fair and reasonable.⁵⁰ If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power and rules of natural justice operates areas not covered by any law validly made.⁵¹ For, it is only our constitutional commitment to principles of fair procedure in the treatment of individuals which makes majority will, a tolerable, let alone attractive basis of governance.⁵² Article 21 has been interpreted to not only protect life and liberty but also follow a fair procedure.⁵³

The principles of natural justice are now considered so “fundamental” as to be “implicit in the concept of liberty” and therefore implicit in every decision-making function, call it judicial, quasi-judicial or administrative.

Having analysed the extant literature on the point, it is safe to conclude that the Act, post-amendment, effectively violates the principles of natural justice. Firstly, § 35 empowers the government to declare any individual as a terrorist in the Fourth Schedule of the UAPA. However, no procedure whatsoever has been detailed for the government to exercise such power, a mere belief is enough for the aforementioned declaration by the government. Therefore, consequently as per the Act the government may notify an individual as a terrorist without a reasonable opportunity of hearing. This renders the impugned provision arbitrary, excessive, unfair and disproportionate.

A fortiori, The basis on which a person can be declared a terrorist is vague and unclear. Whilst § 36 allows an individual notified as a terrorist to appeal to the Government, its operability is difficult and there is no provision for oral hearing at the state of appeal. Conclusively, the

⁴⁹ Nawab Khan v State of Gujarat, AIR 1974 SC 1471.

⁵⁰ Charan Lal Sahu v. Union of India, AIR 1990 SC 1480.

⁵¹ Scheduled Caste and Weaker Sections Welfare Association v. State of Karnataka, AIR 1991 SC 1117.

⁵² T.R.S. Allan, “Rule of Law as the Foundation of Judicial Review”, in Christopher Forsyth, Judicial Review and the Constitution, p 413.

⁵³ Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, (2005) 5 SCC 294; Narendra Singh v. State of M.P. (2004) 10 SCC 699.

impugned sections violate the principles of natural justice.

PRESUMPTION OF INNOCENCE REVERSED

*Presumption of innocence has been held to be a Human Right.*⁵⁴ In *Charu Khurana v. Union of India*,⁵⁵ the Court ruled that dignity is the quintessence of human personality as it is a highly cherished value. Therefore, the right to honour, dignity and reputation are basic elements of the right guaranteed Article 21.⁵⁶ The presumption of innocence the fundamental principle of procedural fairness in criminal law⁵⁷ as well as a quintessence of Article 21.⁵⁸ In *Noor Aga v. State of Punjab*,⁵⁹ the Supreme Court ruled reverse burdens as constitutional, further stating that policy as well as social control matters justify this extraordinary measure. Sinha J. Opined that to ensure security of the state, individual liberty must be subject to social interest.

The UAPA amendments retain this burden-shifting aspect of the offense. The UAPA posits reverse onus clause, however, the safeguards lack the standard required for its proper implementation. For example, Jayanth Krishnan posits a scenario whose basic elements are entirely plausible: Imagine, for example, a situation in which a person is suspected of owning a firearm that the government thinks was used in a terrorist crime. Suppose the firearm has traces of blood on it, but that it was planted in the person's home by the real terrorist. Now assume because the accused – like many Indians – believes that the police engage in doctoring evidence, he refuses to give a blood sample. The court will be permitted to look askance at the accused not only for “possessing” the firearm, but also for not submitting to the blood test.⁶⁰

Moreover, A high conviction rate does not necessarily imply a crime-free society. This is all the more pertinent in reverse onus clauses where a conviction is not a necessary indicator of the proof of the guilt of the accused and may just be the unfortunate result of the accused being

⁵⁴ *Rajesh Ranjan Yadav v. CBI*, (2007) 1 SCC 70.

⁵⁵ *Charu Khurana v. Union of India*, (2015) 1 SCC 192.

⁵⁶ Bedi, Shruti, “Presumption of Innocence and Reverse Onus Clauses: The State of Criminal and Constitutional Jurisprudence in India”. https://law.unimelb.edu.au/_data/assets/pdf_file/0010/3436084/Paper_Shruti-Bedi.pdf

⁵⁷ Andrew Ashworth, *Principles of Criminal Law* 72 (2009).

⁵⁸ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

⁵⁹ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

⁶⁰ Jayanth K. Krishnan, *India's Patriot Act: POTA and the Impact on Civil Liberties in the World's Largest Democracy*, 22 *LAW & INEQ.* 265, 269 (2004).

unable to meet the high standard of proof imposed upon him. With the probability of erroneous convictions being significantly higher in reverse burdens, public interest stands defeated.⁶¹

Irit Weiser highlights the important symbolic function of the standard of proof beyond reasonable doubt as being indispensable towards shielding the accused from the social stigma, loss of reputation, and psychological and economic harms of a criminal conviction.⁶² The convictions also entail dire consequences with severe punishments. Subsequent to the Human Rights Act, 1998, the House of Lords has factored offence seriousness in many decisions to invalidate reverse burdens, such as in *R. v. Lambert*.⁶³

In *Leary v. United States*,⁶⁴ Harlan, J. Opined that Unless it can be stated that the fact presumed is most likely to be followed by the fact proved on which the former was dependent, a criminal statutory presumption must ordinarily be regarded as “irrational” or “arbitrary”, and hence unconstitutional. In the case of *County Court of Ulster County, New York v.*

Allen,⁶⁵ Stephens J. Opined that in case of a presumption shifting the burden of proof to the accused, the basic fact must be sufficiently established such as the presumed fact is proven beyond reasonable doubt and only such presumption would be considered as valid.

The extant principle has been duly incorporated in various Human Rights conventions like the Universal Declaration of Human Rights, 1948 (‘UDHR’),⁶⁶ and the International Covenant on Civil and Political Rights, 1966 (‘ICCPR’).⁶⁷ Although international conventions are not binding, both the UDHR and the ICCPR hold immense persuasive value as the Supreme Court has held that constitutional principles must be interpreted in the light of international declarations/conventions to which India is a signatory.⁶⁸

⁶¹ Juhi Gupta, “Interpretation of reverse onus clauses”, *NUJS Law Review*, 5 *NUJS L.Rev.* 49 (2012).

⁶² Irit Weiser, “The Presumption of Innocence in Section 11(d) of the Charter and Persuasive and Evidential Burdens”, 31 *Criminal Law Quarterly* 318, 323 (1988-1989).

⁶³ *R. v. Lambert*, [2001] UKHL 37.

⁶⁴ 314 *Leary v. United States*, 395 US 6, 36 (1969).

⁶⁵ *County Court of Ulster County, New York v. Allen*, 442 US 140, 167 (1979).

⁶⁶ The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (December 10, 1948), (‘UDHR’) Art. 11(1).

⁶⁷ International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 19, 1966), (‘ICCPR’) Art. 14(2).

⁶⁸ *Apparel Export Promotion Council v A.K. Chopra*, AIR 1999 SC 625.

In addition to this, the Act confers relentless powers which accentuates the injustice that the Act promises of. These include police power to arrest,⁶⁹ search and seizure,⁷⁰ making all offences cognizable,⁷¹ enhancing the period of detention,⁷² disallows anticipatory bail,⁷³ presumes the guilt of the accused, in-camera trials and withholding the identity of witness⁷⁴ and allowing intercepted communication to be used as evidence,⁷⁵ giving excessive power to executive.

Moreover, as the Kerala High Court decision in *Abdul Sathar @ Manzoor v Superintendent of Police and Ors.*,⁷⁶ opines, in cases of terrorism, courts are reluctant to give preference to individual rights when faced with 'public interest' considerations. Section 43D of the UAPA additionally turns the concept of a bail hearing on its head, because it shifts the focus from the CrPC's considerations of the possibility of the accused absconding or tampering evidence or intimidating witnesses to a consideration of the guilt or innocence of the accused.

INTERNATIONAL OBLIGATIONS: FAILURE TO COMPLY

The UN Security Council resolution 1456 of January 2003⁷⁷ mandates the measures taken by a state to combat terrorism to be in compliance with the norms and obligations under international law. § 35 of the UAPA is apparently in violation of the same international law that it claims to be premised upon. The United Nations Special Rapporteur, in 2006, enumerated the requirements to be fulfilled for an offense to be termed as a 'terrorist act'. These are: firstly, the means used were deadly, secondly, the intent behind the act must be to cause fear among population or to compel a government or international organisation to do or refrain from doing something, and lastly, the aim must be to further an ideological goal.

The UAPA, in stark contrast to the aforementioned requirements, entails an overbroad and ambiguous definition of a 'terrorist act'. This includes the death of, or injuries to any person, damage to any property, an attempt to overawe any public functionary by means of criminal

⁶⁹ The Unlawful Activities Prevention Act, 1967, § 43A, Acts of Parliament, 1967 (India).

⁷⁰ The Unlawful Activities Prevention Act, 1967, § 43B, Acts of Parliament, 1967 (India).

⁷¹ The Unlawful Activities Prevention Act, 1967, § 43D(5), Acts of Parliament, 1967 (India).

⁷² The Unlawful Activities Prevention Act, 1967, § 43D(2), Acts of Parliament, 1967 (India).

⁷³ The Unlawful Activities Prevention Act, 1967, § 43D(4), Acts of Parliament, 1967 (India).

⁷⁴ The Unlawful Activities Prevention Act, 1967, § 44, Acts of Parliament, 1967 (India).

⁷⁵ The Unlawful Activities Prevention Act, 1967, § 46, Acts of Parliament, 1967 (India).

⁷⁶ *Abdul Sathar @ Manzoor v Superintendent of Police and Ors*, 2014 (1) KLJ 666.

⁷⁷ United Nations Security Council, 'Resolution 1456 (2003)' (2003) <[https://www.undocs.org/S/RES/1456%20\(2003\)](https://www.undocs.org/S/RES/1456%20(2003))> accessed 6 December 2021.

force and any act to compel the government or any person to do or abstain from doing any act etc., any act that is 'likely to threaten' or 'likely to strike terror in people'. This, in turn, confers unfettered power on the government to name an ordinary citizen as a terrorist despite the brutality of such acts being insufficient.⁷⁸

In *Apparel Export Promotion Council v A.K. Chopra*,⁷⁹ the court further said that in cases involving violation of human rights, the court must forever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field.

Article 51(c)¹ mandates that the state must foster respect for international law and treaty obligations in the dealings of organized peoples with one another. The impugned provision is violative of art. 11 of the Universal Declaration of Human Right (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), particularly Art. 14, which entail the principle of 'innocent until proven guilty' as a human right.

The Protection of Human Rights Act, 1993 which has been enacted by Parliament refers to ICCPR as a human rights instrument. Section 2(1)(d) defines "human rights":

"2. (1)(d) "human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India:"

Section 2(1) defines "international covenants":

"2. (1) (f) "International Covenants" means the International Covenant. on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16-12-1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify;"

Under Section 12 of the Protection of Human Rights Act, 1993, the National Human Rights Commission: "is entrusted with the function of studying treaties and other international instruments on human rights and make recommendations for their effective implementation".

⁷⁸ Kapil Sibal, "UAPA undermines personal liberty", *Hindustan Times*, Jun 21, 2021.

⁷⁹ 329 *Apparel Export Promotion Council v A.K. Chopra*, AIR 1999 SC 625

Therefore, the State is bound to follow international covenants through the force of the above mentioned provisions.

Moreover, in *Bachan Singh v. State of Punjab*,⁸⁰ the Court, while evaluating the law on death penalty, recognized the obligations that India assumes in international law, after it ratified ICCPR. Further, the Court drew comparison of Article 6 of ICCPR and Articles 20 and 21 of the Constitution, and opined the same to be substantially similar. The penal law of India was also observed as being in line with the international commitments. In *Francis Coralie Mullin vs The Administrator, Union*,⁸¹ the Court extensively evaluated the ambit of Article 21 and held that the right under Article 21 includes the right to protection against torture or cruel, inhuman or degrading treatment. This right echoes in Article 5 of the Universal Declaration of Human Rights and Article 7 of the International Covenant on Civil and Political Rights.

CONCLUSION

In light of the aforementioned decisions of the Hon'ble courts of law along with the legislative provisions, it is apparent that the provisions added through the latest amendment to the UAPA are grossly violative of the constitutional safeguards guaranteed to the people as fundamental rights. The implications of extending the impugned § 35 to include individual are grave as now any arbitrary act of the government directly infringes the fundamental rights of the person so accused. This coupled with the excessive remittance of powers to the government and the shifting of burden on the accused leads to the accused being subjected to undue harassment. Post-trial, even if the accused is acquitted, the loss of reputation, dignity, and livelihood would subsist. This adds to the failure of test of proportionality necessitated by Article 21 of the Indian Constitution. In my view, the 'draconian' law must be altogether struck off as no amount of amendments can mitigate the inherent arbitrariness which the Act entails. Moreover, the conviction rate is sparse and the innocent people are being thrashed for rightfully raising a voice against the government.

Ergo, the provisions added through the aforesaid amendment must be struck down as being violative of constitutional provisions of Articles 14, 19 and, 21 of the Indian Constitution.

⁸⁰ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

⁸¹ *Francis Coralie Mullin vs The Administrator, Union*, 1981 AIR 746