

JUSTIFICATIONS OF THE UAPA: A NECESSITY OR A SUPERFLUITY?

Abstract

The paper analyses the unique nature of The Unlawful Activities (Prevention) Act and compares it with the general criminal laws and the various previous anti-terror laws to underscore the similarities and distinctions in the various substantive as well as procedural provisions. It thereafter proceeds to question the rationale behind the enactment of the UAPA by delving into the Statement of Objects and Reasons (SOR). Towards the end, it explores the various United Nations Security Council Resolutions mentioned in the SOR as justifications for the enactment of the UAPA weighing on the scales of national security on the one hand and human rights on the other to explore whether the UAPA is a necessary safeguard or a superfluous and oppressive one. It finally lays down certain essential safeguards, the inclusion of which can justify the departure from the general criminal laws.

I Introduction

“We should never forget that everything Adolph Hitler did in Germany was ‘legal’.”

- Martin Luther King Jr.¹

THE ABOVE-MENTIONED words of the prolific statesman Martin Luther King Jr. remind us of the fact that not everything that is done by a State is ‘legal’ even if it is regarded so at the time when it is done. Galileo was sent to house arrest until his death because he denied Copernicus’s theory and believed in the scientific ‘Heliocentrism’ (which was proved to be the correct view later). The World has been a witness to many such Injustices, but atleast in the 21st Century, logic and rationale shall guide us. Justice is the ‘goal’ of punishment, and “injustice anywhere is a threat to justice everywhere”.²

Whenever laws are enacted, various Objects and Reasons are appended to them as justifications for enacting them. Similarly, The Unlawful Activities (Prevention) Act (UAPA), along with each of its Amendments, contains a “Statement of Objects and Reasons” appended to them. It is followed by the scheme of the Act. The Act, during its enactment in 1967, only contained provisions regarding ‘Unlawful Activity’; however, in the year 2004, provisions regarding ‘Terrorist Activities’ were added to the Act *via*

1 Martin Luther King Jr.’s Letter from Birmingham Jail dated April 16, 1963, *available at*: Martin Luther King’s Letter from a Birmingham Jail - Resources - Eternal Perspective Ministries (epm.org) (last visited on May 7, 2023).

2 *Ibid.*

an Amendment. Thereafter, the UAPA endured several amendments, some provisions of which have been repealed subsequently. The UAPA, in its present form, contains seven specific chapters and four schedules. Chapter I is the preliminary chapter which mainly provides the short title and a number of definitions; Chapter II and III contains provisions regarding 'Unlawful Associations' and offences and Penalties for being part of them; Chapter IV³ lays down what constitutes 'Terrorist Acts'⁴, and recommends various punishment for different terrorist acts; Chapter V⁵ provides for Forfeiture of Property intended to be used in terror and proceeds of Terrorism; Chapter VI⁶ contains provisions regarding Terrorist Organizations and Individuals⁷; Chapter VII⁸ provides for the Miscellaneous Provisions. The First Schedule⁹ to the UAPA provides for a list of Terrorist Organizations; the Second Schedule¹⁰ contains a list of Treaties, offences under which shall be construed as 'Terrorist Acts'; the Third Schedule¹¹ contains Security- Features relating to Counterfeit Indian Currency Notes; and the Fourth Schedule¹² provides a list of 'Individual Terrorists'. As per the Ministry of Home Affairs, 88 such individual terrorists have been enlisted in Schedule IV from 2019 to date¹³; and 42 'Terrorist Organizations' have been enlisted under the First Schedule to date.¹⁴

Chapter IV defines the term 'Terrorist Act'¹⁵ in a very wide and ambiguously vague manner.¹⁶ It states that if anyone intends to threaten or is 'likely' to threaten India's unity, integrity, sovereignty, and security, including economic security, or if anyone intends to strike terror or is even likely to do that by various means, it shall be construed to commit terrorist acts. The means include the use of explosives, causing the death of a person or persons, disruption to essential supplies, damage to property, damage to monetary stability, overawing through criminal force, and detaining any person to negotiate claims with the government. In addition, any act in contravention of the treaties mentioned in the Second Schedule shall also be construed as terrorist act. The ambiguity is in the fact that there is no scale to judge the intention or likelihood of

3 Inserted by Unlawful Activities (Prevention) Amendment Act, 2004 (Act 29 of 2004), s. 7.

4 *Id.*, s. 15.

5 *Id.*, s. 7.

6 *Ibid.*

7 The Unlawful Activities (Prevention) Amendment Act, 2019 (Act 28 of 2019), s. 4, 5, 6, 7.

8 *Supra* note 3.

9 *Ibid.*

10 The Unlawful Activities (Prevention) Amendment Act, 2012 (Act 3 of 2013), s. 14.

11 Substituted by G.S.R. 231(E), dated 18.03.2014.

12 *Supra* note 7, s. 12.

13 Ministry of Home Affairs, GoI, Individual Terrorists Under UAPA, *available at*: <https://www.mha.gov.in/individual-terrorists-under-uapa> (last visited on May 7, 2023).

14 Ministry of Home Affairs, GoI, Banned Organizations, *available at*: https://www.mha.gov.in/sites/default/files/BannedOrgOld_16032022.pdf (Last Visited on May 7, 2023).

anyone in committing such acts. Also, some of the means mentioned in threatening or intent to threaten or likely to threaten are not very clear. For instance, if we consider ‘causing death of any person or persons’, how will it be judged whether it is an IPC crime of murder or a UAPA crime of Terrorism? How will we judge the intent or likeliness? It is very evident that the definition is extremely broad and can be well misused. The Legislature might have enacted the UAPA and defined the term ‘terrorist act’ for a positive change; however, the wide definition gives broad powers to the enforcement agencies of the State. This, in turn, has the power to cause extreme misuse by construing the terms ‘likely’ and ‘intends’ in a very vague manner. In *A.K. Roy v. Union of India*¹⁷, the court highlighted the requirement of defining crimes with absolute definitiveness because that is the pervading theme of criminal law and the Constitution.

II Speciality of special laws

The General Criminal Laws in India are mainly the Indian Penal Code, 1860, and the Code of Criminal Procedure, 1973. Indian Evidence Act, 1872 is another general law substituting the evidentiary provisions. However, the Indian Legislature has passed a huge number of special criminal laws from time to time, supplementing the general laws.

Many natural law Jurists, such as Lon Fuller, believed that the ‘inner morality of law’ necessarily requires laws to be general¹⁸ because it warrants the general applicability of similar laws to all accused persons. Fuller also advocated for the congruence of laws designed and their implementation.¹⁹ Generally, the special statutes depart pertaining to the procedural aspects. The major defense advanced in favour of special laws is that they deal with a very ‘special class of offences’. There is no parameter to judge the ‘speciality’, and assigning a parameter is not practicable as well. However, there are little to no penological justifications behind these special statutes.

The UAPA is such a special statute that departs considerably from the General Criminal Laws of India. There are certain specific provisions in the UAPA, which clearly shift from the basic fundamentals of criminal law like ‘innocent until proven guilty’. However, UAPA is not the first anti-terror legislation containing such departures; rather, previously, the TADA and the POTA had significant departures from General Criminal Laws. It has been argued that while general laws can also be misused, but special statutes that deny the right to bail to undertrials need not even be misused to subject them to

15 The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), s. 15.

16 *Asif Iqbal Tanha v. State of NCT of Delhi and Others*, 2021 SCC OnLine Del 3253, para 55.

17 (1982) 1 SCC 271.

18 The Rule of Law, Stanford Encyclopedia of Philosophy, *available at*: The Rule of Law (Stanford Encyclopedia of Philosophy) (last visited on May 8, 2023).

19 *Ibid.*

incarceration without proving guilt because that action has been legalized.²⁰ This argument is pertinent as it is very clear that Special Laws themselves legalize certain procedural departures, and so the special laws are not required to be misused, but rather they have the inbuilt capacity of being misused. If we consider the IPC provisions of ‘Waging War against the State’ and ‘Conspiracy of Wage war’, can they not cover the terror activities?²¹ These IPC Offences also provide for the punishment of life imprisonment or death, so the justification of making the punishment harsher in special laws will not hold good. Even in alleged terror cases, IPC provisions are invoked with UAPA provisions. There is no foundation behind the penological distinction between the two sets of offences.

III Departures in the UAPA

The term ‘Departure’ connotes ‘Departure from the General Criminal Laws’. The special laws are created for this sole purpose so that the procedural relaxations contribute to the best ends of justice. This is the rationale mentioned by the Legislature. The tricky part is that the general criminal laws follow the basic criminological and penological doctrines, which the special laws significantly deviate from. This is what is concerning for the ones who are subsequently proven to be innocent and acquitted after many years of incarceration.

The departures in the UAPA are mainly stated under the chapter titled ‘Miscellaneous’.²² A special set of provisions (sections 43-A to 43-F) were added by the 2008 Amendment to the UAPA, which shows a number of departures from the General Criminal Laws. The most remarkable is a provision titled “Modified Application of Certain Provisions of the Code”, which mentions a number of procedural deviations from the norms in the Cr PC.²³ The UAPA clearly states that regarding the procedure of arrests, searches, and seizures, the procedure mentioned in the Cr PC shall apply insofar as those are consistent with the provisions of UAPA.²⁴ However, it has also been declared that the procedures stated in the UAPA will apply in case any other Act or Rule provides anything that is inconsistent with the UAPA.²⁵ It has also been provided that all offences under the Act shall be cognizable, irrespective of what Cr PC states.²⁶

These provisions are very commonly seen in special enactments. UAPA is no exception. TADA and POTA had a number of similar departures, which have been replicated in

20 Kunal Ambasta, “Designed for Abuse: Special Criminal Laws and Rights of the Accused” 14(1) *NSLR* 4 (2020).

21 *See*, S. 121 and 121A IPC.

22 The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), Ch. VII.

23 *Id.*, s. 43-D.

24 *Id.*, s. 43-C.

25 *Id.*, s. 48.

26 *Id.*, s. 43-D(1).

the UAPA. Some stringencies in the earlier laws have been comparatively relaxed in the UAPA as well. However, there are multiple complexities concerning the procedures stated in the UAPA, and many of those are alleged to be excessive. During the era of TADA and POTA, similar allegations were made against those laws being draconian. Let us first analyze the various major departures in the UAPA from the general procedure in criminal laws. Thereafter, we shall proceed to compare the departures with the TADA and the POTA. The major procedural departures in the UAPA are analyzed as follows:

Default bail

The CrPC provides for a provision of default or statutory bail under section 167(2). A default bail is granted to an accused during the period of the investigation if the police are unsuccessful in submitting the charge sheet within a stipulated time frame. As per the General Criminal Law, the Magistrate has the right to authorize the detention of an accused in Police Custody or Judicial Custody for an initial period of Fifteen days. In case the Magistrate is satisfied that there are grounds, then he might authorize detention for a longer period, not beyond sixty days (in case of any other offences) or beyond 90 days (in offences punishable with death sentence/ life imprisonment/ imprisonment for ten years). If the charge sheet is not filed by the police within 90 days or 60 days as per the maximum punishment, the accused person shall accrue a default and unquestionable right to bail as long as he is prepared to furnish Bail.

In the UAPA, section 167 of the CrPC has been modified, and the periods of pre-trial detention have been increased to a certain extent. The period of 15 days, *i.e.*, the initial period for which the Magistrate is authorized to detain the accused, has been doubled to 30 days.²⁷ The accused can be confined in police custody during this period. The period of 60 days, in cases of offences punishable with less than ten years, has been increased up to ninety days; and the period of ninety days for offences punishable with ten years/ life imprisonment/ death sentence remains the same.²⁸ However, there is a special and extraordinary provision for extending the period to 180 days by the court if it is satisfied by the report of the public prosecutor pertaining to the progress of the investigation.²⁹ Another provision has been included, which allows the police to require Police custody instead of judicial custody by stating the reasons *via* filing an affidavit.³⁰

The possibility of an extension of the pre-trial incarceration period to a maximum of 180 days is a shock to the basic principles of Criminal Law. Using this provision, a person can be detained in custody for six long months without any *prima facie* case.

27 *Id.*, s. 43-D(2)(a).

28 *Ibid.*

29 *Id.*, s. 43-D(2)(b).

30 *Ibid.*

The CrPC does not allow police custody beyond fifteen days for a reason. The reasoning is that the investigating agencies are often seen to abuse their powers by torturing the accused persons for information. The removal of this safeguard from the UAPA by allowing the taking of the accused into police custody at any time on filing an affidavit might prove to be detrimental.

Requirement of attendance of prisoners

The CrPC provides that the court shall require the attendance of the prisoner whenever it deems fit for the ends of justice.³¹ The Cr PC also provides for an exception to this, stating that the state government may exclude certain persons from the ambit of such requirement of attendance for ensuring public order in the interest of the public.³² The state government is the only authority that can exclude the persons.

The UAPA replicates the provision with a certain modification, *i.e.*, it assigns the power to the Central Government and not just the state government, as the case may concern.³³

Anticipatory bail

The CrPC provides for a provision empowering the high court and the sessions court to grant Bail to a person who has not been arrested yet but is apprehending arrest.³⁴ This is called 'Anticipatory Bail' in common parlance. The Anticipatory Bail is, however, granted subject to certain conditions.

In the UAPA, it has been stated that if any person is accused of any offences under the Act, the Anticipatory Bail provisions of the Cr PC shall not apply.³⁵ The UAPA totally excludes the possibility of anticipatory bail being granted to the persons apprehending arrest. This is a clear deviation from the general criminal laws of the nation.

Bail

The Cr PC empowers the high court and the sessions court to grant Bail in cases of non-bailable offences but restricts the power by stating that in case of offences punishable upto life imprisonment or by death sentence, or in cases of repeat offenders, such Bail shall not be granted.³⁶ The provision adds that where the accused is below the age of sixteen or a woman, or sick, or infirm, then Bail shall be granted even if they are from the categories of the above two restrictions.³⁷

31 Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 267.

32 *Id.*, s. 268.

33 *Supra* note 22, s. 43-D(3).

34 *Supra* note 31, s. 438.

35 *Supra* note 22, s. 43-D(4).

36 *Supra* note 31, s. 437.

37 *Id.*, s. 437(1) Proviso.

The UAPA provides for extremely stringent bail provisions. It has been firmly stated that any person accused of any offence under the terror provisions of the UAPA will not be granted Bail on furnishing bond unless and until the public prosecutor is heard.³⁸ It has also been declared that if the court, after perusing the case diary or the charge-sheet, finds reasonable and believable grounds for the case to be prima-facie true, then the court shall not grant bail.³⁹

In case the accused is a foreign citizen who illegally intruded into India, no bail shall be granted except under exceptional circumstances.⁴⁰ The rule of general criminal laws is 'Bail', and the exception is 'Jail'; however, in the UAPA, it is just the opposite. Even in cases of women or sick or infirm persons, there is no special provision, unlike the CrPC.

Reverse onus clause

The denial of Bail in case there is a reasonable belief of prima-facie truth is a clause that overturns the penological principle of 'burden of proof' to be always conferred on the one who alleges. Generally, the evidentiary rule is that the one who has alleged someone to have committed an offence shall have to bear the burden of proof.⁴¹ In paragraph 18 of *K. M. Nanavati v. State of Maharashtra*,⁴² the Supreme Court stated that the basis of criminal law is "innocent until proven guilty". However, in the UAPA, the court presumes the accused to be guilty until proven innocent. It is a total deviation from the penological basis.

Another deviating feature of the UAPA is that in offences of 'Terrorist Acts' under section 15, if any arms or explosives or any other thing is recovered from the possession of the accused; or if finger-prints have been found in vehicles or arms or anything else which have been matched to be the accused's, the onus of proof will shift to the accused.⁴³

Admissibility of intercepted evidence

As per the Indian Evidence Act, intercepted communications are admissible as Secondary electronic evidence only if it comes along with a certificate of an official.⁴⁴ Even if it is admissible, it cannot be the sole ground for conviction. However, in the UAPA, intercepted evidence (via wire, electronic or oral communications) are admissible

38 *Supra* note 22, s. 43-D(5).

39 *Id.*, s. 43-D(5) Proviso.

40 *Id.*, s. 43-D(7).

41 The Indian Evidence Act, 1872 (Act 1 of 1972), s. 103.

42 AIR 1962 SC 605.

43 *Supra* note 22, s. 43-E.

44 *Supra* note 41, s. 65-B(1).

in the Trial against the accused.⁴⁵ Admissibility of such evidence is a clear departure from the General Evidentiary Rules of Criminal Law.

Good faith clause

The UAPA provides for a 'Good Faith' clause where the Central Government, state government, their officers, district magistrate, and any authority on whom power is vested via the Act has been immune to any 'suit, prosecution or legal proceedings' for acts done in good faith in the fulfillment of the UAPA.⁴⁶ Such a 'good faith' immunity is not available to the General Criminal Laws in general. Only section 132 of the Cr PC provides such a clause, but that is not absolute. Therefore, this absolute application 'good faith' clause in the UAPA is a significant departure from the general criminal laws.

IV Comparison of departures in various anti-terror laws

It has been mentioned earlier that, along with the UAPA, the TADA, and the POTA had certain provisions which reflected a considerable departure from the general Criminal laws. There have been certain recommendations directed by the Malimath Committee when the POTA was on the verge of expiring, which called for incorporating the offence of terrorism mentioned in the POTA into the Indian Penal Code.⁴⁷ Such a Recommendation was advanced with the reasoning that after the POTA expires due to its 'sunset clause',⁴⁸ there will be a complete vacuum of anti-terror laws in India, and to avoid this, the incorporation of the provisions in the IPC shall be the suitable way. However, the recommendation was not effectuated; rather, the provisions secured their place in the UAPA, 1967, via an amendment in the year 2004. After TADA was repealed, the procedural provisions were made a little less stringent in POTA. However, the UAPA contains many similar provisions to POTA with slight modifications. Many allege UAPA to be as draconian as the POTA; however, the matter is debatable.

There are some procedural modifications from the General Criminal Laws in all the anti-terror Laws. The question is, how different is the UAPA from the TADA and the POTA? To answer this, it would be correct to say that there have been procedural modifications, which made the procedures less stringent over time, and also various major Substantive changes. The very fundamentals, such as the definition of 'Terrorist Acts', vary in each of the three enactments; TADA had a relatively narrow definition, the ambit of which has been increased in the POTA and which has been further

45 *Supra* note 22, s. 46.

46 *Id.*, s. 49.

47 Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003), p. 294-295.

48 A 'Sunset Clause' is a provision in an Enactment which automatically repeals in total or in part a particular Statute when the sunset date is reached.

widened in the UAPA.⁴⁹ Another major substantive change is that in the TADA, there was no explicit mention of any definition of ‘Terrorist Organizations’ or any list of such organizations; in the POTA, there was a criterion mentioned regarding the declaration of organizations to be terrorists⁵⁰, and a list of 32 Terrorist Organizations was added⁵¹; however, in the UAPA, a complete Chapter has been dedicated to the ‘Terrorist Organizations’⁵², a separate definition has been included⁵³, and a Schedule has been dedicated to a list of 42 such Organizations.⁵⁴ UAPA is the first and only Anti-terror law that provides a list of 38 ‘Terrorist Individuals’,⁵⁵ added *via* the latest 2019 Amendment to the UAPA. This is a completely new feature, where without any due process, an individual can be named to be a ‘Terrorist’.

The National Investigating Agency Courts⁵⁶ is also another new feature added by the 2008 Amendment to the UAPA in the aftermath of the Mumbai Terror Attack. In the TADA and the POTA, terror against the ‘economic security’ of India was not specifically considered a Terrorist Act; however, in the UAPA, threatening ‘economic security’ [as defined in section 2(ea) of the UAPA] of India has been considered a terrorist act.⁵⁷ These are the major substantive changes implemented in the UAPA, which were not present in the TADA or the POTA.

There are major modifications in the procedural and evidentiary rules in the TADA, POTA, and the UAPA. UAPA is less stringent in many such aspects. One of the major reasons for the criticism faced by TADA is the provision regarding the admissibility of Confessions given in police custody.⁵⁸ TADA mandated that if confession is recorded by a police officer (not below Superintendent of Police) either in writing or by any mechanical device (cassettes, tapes, soundtracks), it is admissible. However, the confession has to be voluntary, and the nature of the evidence shall be explained. A similar provision was replicated in the POTA after the addition of certain safeguards, such as the explanation that he is not bound to confess needs to be written, the right

49 *See*, s. 3 of TADA, s. 3 of POTA, and s. 15 of UAPA. All of them define ‘Terrorist Acts’. Though the basic structure of the definitions remains the same, there are many disparities between the definition; like in POTA, Unlawful Associations are also considered to commit Terrorist Acts; in the UAPA, the damaging of monetary stability of India by smuggling and circulating counterfeit currencies have been considered as ‘terrorist acts’.

50 The Prevention of Terrorism Act, 2002 (Act 15 of 2002), s. 18.

51 *Id.*, The sch.

52 *Supra* note 22, Chapter VI.

53 *Id.*, s. 2(1)(m).

54 *Id.*, Sch. I.

55 *Id.*, Sch IV.

56 The National Investigation Agency Act, 2008 (Act 34 of 2008), s. 11; and the UAPA, s. 2(d) as amended by the Amendment Act, 2008.

57 *Supra* note 22, s. 15.

58 Terrorist and Disruptive Activities (Prevention) Act, 1987 (Act 28 of 1987), s. 15.

to remain silent is to be respected, and the confession is to be produced before (CMM) or Chief Judicial Magistrate within 48 hours.⁵⁹ Such confession is not admissible under the general criminal law if not made before a Magistrate.⁶⁰ In the UAPA, there is no provision pertaining to this. Therefore, the general evidentiary law is to be followed.

A perusal of the various Anti-terror laws show that some of the provisions have remained the same in the TADA, POTA, and the UAPA; for instance, the Reverse Onus clause,⁶¹ the non-applicability of the Anticipatory Bail Provisions,⁶² and the good faith clauses,⁶³ with minute changes, *etc.* However, many new provisions were added to the POTA and subsequently to the UAPA; for instance, the non-applicability of Bail in the case of foreign citizens, the admissibility of intercepted evidence, *etc.* In cases of bail for foreign citizens, there was no specific provision in TADA; however, in POTA and UAPA, there are specific provisions stating that no bail can be granted to non-citizens of India who entered illegally and conducted terrorist acts.⁶⁴ Regarding the admissibility of intercepted evidence, TADA had no specific provision. Therefore, the general criminal laws were applicable, wherein intercepted communications are admissible as secondary electronic evidence only if it comes along with a certificate of an official.⁶⁵ However, POTA and UAPA included provisions by which intercepted evidence (via wire, electronic or oral communications) were made admissible in the trial against the accused.⁶⁶

Some of the provisions were made a little less stringent over time; for instance, the pre-trial detention period was 180 days, extendable upto one year (if the investigation could not be completed) in TADA,⁶⁷ which has been reduced to ninety days extendable upto 180 days in POTA⁶⁸ and UAPA.⁶⁹ The most crucial provision is the bail provision, which has undergone certain changes in the various Acts. In the Cr PC, there is no restriction on Bail, and it is totally upto judicial discretion. This has been modified in the TADA, where Bail can only be granted if, after giving the public prosecutor an

59 The Prevention of Terrorism Act, 2002 (Act 15 of 2002), s. 32.

60 The Indian Evidence Act, 1872 (Act 1 of 1972), s. 26.

61 *See*, s. 21 of TADA, s. 53 of POTA, and s. 43E of UAPA. All the Acts contain Reverse Onus clauses which are to be applied in certain circumstances.

62 *See*, s. 20(7) of TADA, s. 49(5) of POTA, and s. 43 D (4) of UAPA. Anticipatory bail is not permitted under any of the Acts.

63 *See*, s. 26 of TADA, s. 57 of POTA, and s. 49 of UAPA. All the Acts contain good faith clauses.

64 *See*, s. 49 (9) of POTA, and s. 43 D(7) of UAPA.

65 *Supra* note 60, s. 65 B(1).

66 *See*, s. 45 of POTA, and s. 46 of UAPA

67 *Supra* note 58, s. 20(4).

68 *Supra* note 59, s. 49(2).

69 *Supra* note 22, s. 43 D (2).

opportunity of opposing, the court reasonably believes the accused person to be not guilty and not likely to commit such an offence.⁷⁰ In the POTA, this was slightly modified, and the ‘not likely to commit such offence’ part was removed.⁷¹ However, in the UAPA, the provision states that Bail shall not be granted if prima facie truth is found in the allegations after perusing the chargesheet.⁷² In the former TADA and the POTA, reasonably determining the guilt by the court during a premature investigation stage was compulsory to grant Bail. However, in the UAPA, only a perusal of the chargesheet and viewing the prima facie truth or falsehood in the allegations is the only prerequisite. The provision still calls for a lot of allegations of misuse; however, it has been modified to a somewhat better version than the previous anti-terror laws. Therefore, it can be evidently said that the UAPA is significantly different from the TADA and the POTA.

V Justifications of the departures in the light of the statement of objects and reasons

A Statement of Objects and Reasons (SOR) is appended to every Act and Amendments enacted by the Legislature. The purpose of appending the ‘SOR’ is to enumerate the reasons why the legislation has been enacted and the objects that it aims to fulfill. The purpose is to make every law ‘Reasoned’ and not arbitrary. However, the ends of reasoning are not always achieved due to vague and ambiguous connotations.

The UAPA, 1967 stated the purpose of the Act was to provide an effective remedy against unlawful activities conducted by individuals and associations and connected matters.⁷³ Thereafter, in 2004, along with the above, the dealing of terrorist activities was added in the opening statement of purpose.⁷⁴ The 2008 Amendment added a part in the SOR, which mentions a United Nations Security Council Resolution that has been stated to have mandated the states to enact such laws and take such necessary measures for combatting international terrorism.⁷⁵ Resolution 1373 was in the aftermath of the 9/11 incident and was a condemnation of all those terrorist attacks. The UNSC was alarmed by the dreadful terror attacks, which caused the deaths of 2974 people and left thousands injured.⁷⁶ The Resolution urged the States to urgently work on suppressing and preventing terrorism with the help of cooperation and implementation

70 *Supra* note 58, s. 20(8).

71 *Supra* note 59, s. 49(6) and (7).

72 *Supra* note 22, s. 43-D(5).

73 *Supra* note 22, Statement of Objects and Reasons.

74 *Supra* note 3.

75 UN Security Council, SC Res 1373, SCOR, UN Doc S/Res/1373 (Sep. 28, 2001).

76 September 11 Attacks, United States [2001], Encyclopedia Britannica, available at: <https://www.britannica.com/event/September-11-attacks> (last visited on May 12, 2023).

of international conventions. The resolution specifically stated that the States should criminalize all sorts of terror funding and storing of explosives. The 2008 Amendment to the UAPA in India was brought as a result of the Mumbai Blasts, and after that, it was definitely necessary for India to incorporate the UNSC Resolution as a result of the alarming nature of those blasts.

A number of other UNSC Resolutions are mentioned as well, which have been stated to have required States to take certain actions against some terrorist groups and organizations, such as freezing economic resources, preventing entry or transit, supply, sale, and transfer of arms and ammunition.

The Resolutions and their basic contents are as follows:

- i. Resolution 1267:⁷⁷ The Resolution particularly condemned the humanitarian situation in Afghanistan and directed States to take certain steps to stop the Taliban.
- ii. Resolution 1333:⁷⁸ The Resolution is also regarding the Taliban, by which the UNSC urged all States to maintain diplomatic relations with the Taliban.
- iii. Resolution 1363:⁷⁹ The Resolution also condemned the peace and security situation in Afghanistan and urged the States to strengthen domestic laws to prevent and punish terrorist entities.
- iv. Resolution 1390:⁸⁰ The Resolution also criticized the Al-Qaida Network and Taliban and urged States to cooperate with the U.N. and strengthen domestic laws.
- v. Resolution 1455:⁸¹ The Resolution calls for the complete implementation of Resolution 1373 (discussed earlier) and punishing the organizations or individuals working with the Al-Qaida network.
- vi. Resolution 1526:⁸² The Resolution again calls for the complete implementation of Resolution 1373 and calls for freezing funds and any resources to Al-Qaida and related entities.
- vii. Resolution 1566:⁸³ The Resolution condemned terrorism in every form and manifestation and directed States to take steps against any persons who participate in, support or facilitate, or fund any such operation. However, it

77 UN Security Council, SC Res 1267, SCOR, UN Doc S/Res/1267 (October 15, 1999).

78 UN Security Council, SC Res 1333, SCOR, UN Doc S/Res/1333 (December 19, 2000).

79 UN Security Council, SC Res 1363, SCOR, UN Doc S/Res/1363 (July 30, 2001).

80 UN Security Council, SC Res 1390, SCOR, UN Doc S/Res/1390 (January 16, 2002).

81 UN Security Council, SC Res 1455, SCOR, UN Doc S/Res/1455 (January 17, 2003).

82 UN Security Council, SC Res 1526, SCOR, UN Doc S/Res/1526 (January 30, 2004).

83 UN Security Council, SC Res 1566, SCOR, UN Doc S/Res/1566 (October 8, 2004).

reminded the States that the actions against terrorism shall be in compliance with international human rights law.

- viii. Resolution 1617:⁸⁴ The Resolution again dealt with Usama bin Laden, Al-Qaida, and Taliban entities and urged States to report as to what measures have been taken and the listing and delisting procedures. It also calls for the implementation of recommendations of FATF (Financial Action Task Force).
- ix. Resolution 1735:⁸⁵ The Resolution again discussed the grave problems regarding the Taliban and Al-Qaida. It urged States to prevent the entry of external forces and to stop the circulation of illegal arms and ammunition.
- x. Resolution 1822:⁸⁶ The Resolution dealt with the problems of internet misuse by Al-Qaida and other terror organizations and condemned terrorism in every manifestation. It again urged the implementation of Resolution 1373. It also reminded the States of the importance of human rights and urged States to respect human rights while prosecuting terrorism.

A perusal of all the above UNSC Resolutions reveals that most of them are regarding extremist groups like Taliban, Al-Qaida, *etc.*, in which cases the requirement of harsh laws is a sine qua non. However, some of the Resolutions clearly remind the States regarding respect for human rights. Therefore, stringent Anti-terror laws such as UAPA are required, but while implementing them, respect shall be given to basic human rights. Some of the Resolutions condemn terrorism in every form and manifestation, and therefore, the definition of 'terrorist act' is necessarily made to cover a huge field of subjects. Though the requirement of stringent laws is mentioned, there is no specific direction for any procedural stringencies.

The Act provides for the genesis of the UAPA, 1967, from the recommendation of the National Integration Council effected by the Constitution (Sixteenth) Amendment Act (1963); and states that it has allowed the imposition of reasonable restrictions, on freedom of speech and expression, assembly without arms, associations or unions, due to the interest in sovereignty and integrity of India.⁸⁷ These are sometimes necessary because the security of a State shall be the first priority, and sometimes restricting certain liberties are the only possible means to stop terror. However, the term 'reasonable' is of crucial significance, and such liberties cannot be curtailed in every trifle situation. There has to be enough justification as to the threat to the security of India before curtailing such liberties. A particular act might affect law and order but not public order, or it might affect public order but not the security of the State.⁸⁸

84 UN Security Council, SC Res 1617, SCOR, UN Doc S/Res/1617 (July 29, 2005).

85 UN Security Council, SC Res 1735, SCOR, UN Doc S/Res/1735 (December 22, 2006).

86 UN Security Council, SC Res 1822, SCOR, UN Doc S/Res/1822 (May 30, 2008).

87 *Supra* note 22, Statement of Objects and Reasons.

88 *Ram Manohar Lobia v. State of Bihar*, AIR 1966 SC 740, para 55.

The Act also provides that POTA has been repealed as government was concerned regarding its gross misuse in the two years, and to replace that, UAPA is a necessity as the government has resolved not to compromise national security to terrorism.⁸⁹ The requirement of it was also supported by the reason of the UNSC Resolution 1373, which required all States to combat terror. The supporting reason is definitely valid, as the States are bound to oblige to the UNSC Resolutions; however, that cannot be the sole reason for enacting such stringent procedural aspects with practically no safeguards. Considering the fact that some UNSC Resolutions focused on respect for human rights, that should have been kept in mind while enacting the laws.

The Act also provides that the 2008 Amendment has been enacted with a view to the concerns expressed in the POTA, and because India is one of the frontrunners in the global terrorism fight so it must appropriately implement UNSC Resolution 1373.⁹⁰ The major focus was given not only to armed terrorism but rather to terror financing. This was mainly because of some of the major terror attacks in India just before the 2008 Amendment. Various committees and commissions gave certain recommendations, and therefore, the object of the Act was to further speedy investigation, prosecution, and trial of cases, while not misusing those.⁹¹ The reasoning is supported by action because the Special NIA Courts were constituted *via* the NIA Act, which has the capacity to ensure a speedy trial. However, the various procedural departures added has the potential to disrupt speedy Trial and create unnecessary delays. At present various data from NCRB and other resources show the excessive delay in the Trial and abuse of human rights due to prolonged incarceration pending trial. Therefore, in light of the Objects and Reasons, investigation, prosecution, and Trial should be made in a speedy and time-bound manner.

The Act also provides that the 2013 Amendment has been enacted with the view to combat money laundering and terror financing and to implement the recommendations of the FATF as per the UNSC Resolutions.⁹² These were also included in the definition of 'terrorist acts'. This Amendment also stated the requirement for attachment and forfeiture of proceeds of terrorism. The object was to bring clarity to the existing regime and to remove deficiencies in implementation by the government and intelligence agencies.⁹³ The inclusion of the terror financing provisions is justified in the light of objects and reasons; however, the bringing clarity and removing deficiencies part has not been justified in detail.

89 *Supra* note 3, Statement of Objects and Reasons.

90 The Unlawful Activities (Prevention) Amendment Act, 2008 (Act 35 of 2008), Statement of Objects and Reasons.

91 *Ibid.*

92 *Supra* note 10, Statement of Objects and Reasons.

93 *Ibid.*

The Objects and Reasons of the 2019 Amendment include the removal of difficulties of the NIA in conducting investigations and prosecution in cases pertaining to terror, which the NIA faces for the reason of certain legal infirmities, and the implementation of some UNSC Resolutions.⁹⁴ The exact UNSC Resolutions have not been mentioned, and the exact difficulties faced by the NIA have also not been laid down. The additions include empowering the director-general, NIA to grant approval pertaining to the seizure and attachment of properties acquired by or used in terror; amending certain provisions to empower the Central Government to enlist names of ‘individual terrorists’ in the Fourth Schedule; and empowering inspector rank officers of NIA to investigate terror offences.⁹⁵ Regarding the empowering of NIA Inspectors and Director General for certain tasks, it is supported by the reasoning of removing procedural difficulties of the NIA. However, the enlisting of ‘Individual Terrorists’ in a Schedule by the Central Government without any trial or laid down procedure is not supported by any particular reason and has the potential of being grossly misused due to the excessive and unfettered power of the Central Government.

Therefore, on the perusal of the objects and reasons to the major Act and the Amendment Acts, it has been clear that stringent anti-terror laws are a must, but that does not mean the enacting of provisions containing unreasonable procedural lapses depriving humanitarian rights without any proper basis. Thus, it can be said that extremely stringent anti-terror laws like the UAPA are definitely required because of national security and to comply with international commitments, but certain necessary safeguards are very much required so that innocent persons are not subjected to endless incarceration and deprivation in the name of national security.

VI Conclusion

The UAPA has been seen to have certain similarities with previous anti-terror laws like the TADA and the POTA. However, the UAPA differs in many aspects from the TADA and a few aspects from the POTA. All the anti-terror laws reveal significant departures from the general criminal laws, which have been discussed widely in this paper. In the Statement of Objects appended to the 2004 Amendment to the UAPA, it has been mentioned that POTA has been repealed due to its misuse, and to fill the void and to conform to various UNSC Resolutions and International documents, the UAPA was enacted. However, the procedural aspects of UAPA have extensive similarities with the POTA. After perusing and analyzing the Objects and Reasons, the enacting of the UAPA cannot be said to be completely unjustified. India, due to its complex geo-political situation, has faced the wrath of multiple violent terror attacks, and securing national security is justified to be a priority.

94 *Supra* note 7, Statement of Objects and Reasons.

95 *Ibid.*

The government is working extensively to protect national security against terror in every form and manifestation, as recommended by the UNSC in multiple Resolutions. However, sometimes such desperate attempts to safeguard national security and combat terror lead to the violation of basic principles of criminal jurisprudence and human rights. The Indian Government observes anti-terrorism day every May 21 to show the horrors and victimization caused by terrorism so that the youth wean away from the cult of terror and violence.⁹⁶ The Indian Government also observes December 10 as Human Rights Day to respect the UDHR.⁹⁷ National security is definitely the topmost priority, but in the process of securing National Security, we cannot forget what we owe to human rights. Certain aspects of the UAPA, such as the power of the government in enlisting 'terrorist individuals' without any proper procedure or criteria, are a clear violation of human rights. A perusal of the list of terrorist individuals reveals that it does not include any innocent persons yet; however, it has the potential of being misused against dissident voices because using it can frame anyone to be a 'terrorist' without the basic decency of a criminal trial.

Stringent anti-terror laws are a necessity today when terrorism has manifested itself in different forms. However, such stringencies shall not lead to abuse and shall have proper safeguards so that innocent persons do not fall prey to the system. The presence of an extended timeline for default bail; stringent conditions of bail; reverse onus clause; etc., shall be justified if these are coupled with necessary safeguards pertaining to a speedy and time-bound trial. The implementation of the UAPA needs to be given importance, which shall necessarily increase the accountability of the investigating agencies.

*Shameek Sen**
*Arjita Mukherjee***

96 Anti-Terrorism Day, Ministry of Home Affairs, *available at*: https://www.mha.gov.in/sites/default/files/AntiTerrorismDayEnglish_13052022.pdf (Last Visited on May 9, 2023).

97 Human Rights Day, Press Release, Ministry of Home Affairs, *available at*: https://www.mha.gov.in/sites/default/files/PressRelease_HumanRightsDay_10122019.pdf (last visited on May 9, 2023).

* Sen is an Associate Professor at the West Bengal National University of Juridical Sciences, Kolkata.

** *Arjita* Mukherjee is a Research Fellow at the West Bengal National University of Juridical Sciences, Kolkata.