



THE STATUTORY APPROACH TO COUNTER TERRORISM IN INDIA: FROM MISA TO THE UAPA

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Introduction

In the modern world, the threat of Terrorism has made every country its victim. There is no corner on the globe which has escaped the growing threat of Terrorism and which has not suffered human and financial loss. It is a growing threat which has devastating impact on life as well as the economy of the target region. For instance the attack in Mumbai on the 26th of November, 2008 left hundreds of innocent civilians dead or injured and caused huge financial loss to both the state as well as private individuals.

Terrorism is a word which has different meanings to different regions, persons, ethnicities, nations, governments and law enforcement agencies. It has different connotations across different time periods as well as geographical locations. In the modern day, apart from the conventional modes of Terrorism such as bombing, shooting or Hijacking, Terrorism may be in the form of Bio-Terrorism, Cyber-Terrorism, Nuclear-Terrorism, Narco-Terrorism and Eco-Terrorism.

Despite the well-recognised threat of Terrorism and its global reach, it is not defined. Even after so many years since the formation of the League of Nations and the United Nations, there is still not a legal definition of Terrorism which is universally approved and accepted. However, there is a broad understanding that Terrorism is “*criminal violence intended to intimidate a population or coerce a government or international organisation*”.¹ It involves the “use of violence or “threat of violence” committed by “non-state actors” in order to achieve “political”, “religious”, “ideological” or “social” objectives. A terrorist attack targets civilians indiscriminately and aims to maximise casualties. Terrorism is generally carried out by a formally or informally structured organisations which may operate within a nation or across international borders. Over the past few decades India has been facing deadly terrorist attacks like hostage taking, bombings, plane hijackings and mass shooting. These attacks have been carried out to achieve religious, social or political objectives and have been carried out by organisations having international linkages.

History of Counter Terrorism Laws in India

Over the years various Counter Terrorism legislations have been introduced in India which deals with intelligence, preventive detention, apprehension, search, seizure, investigation, trial, rule of evidence and punishment. These laws are primarily of three categories i.e. firstly, the laws applicable to the entire nation, secondly the

¹ Ben Saul, ‘Defining Terrorism: A Conceptual Minefield’ 2015 The Oxford Handbook of Terrorism, Oxford University Press

<<https://ssrn.com/abstract=2664402>> accessed 8 May 2021.



laws applicable to specific areas or acts like Anti- Hijacking Act, 1982 and Armed Force (Special Forces) Act and thirdly laws in Individual States.²

Various post-independence legislations have been enacted by the Union Government such as the Maintenance of internal Security Act, 1971, the Terrorist and Disruptive Activities (Prevention) Act, 1987 and the Prevention of Terrorism Act, 2002. These legislations were applicable to the entire territory of India and have been accused of being disproportionately draconian, stringent and prone to misuse for political gains. The provisions of these legislations greatly enhanced the powers of the executive to detain, conduct searches and seizures and arrest persons suspected of committing any act against the National Security of India or against its sovereignty and integrity. With each counter Terrorism legislation, passed by the Parliament, the definitions of the substantive Terrorism related offences became wider and included several acts within their scope which further enhanced the powers of the executive.

The Maintenance of Internal Security Act: The 'Internal Disturbance' Dilemma

The Maintenance of Internal Security Act³ was passed by the Indian Parliament in July 1971. The act came into force on 2nd July and

replaced the Maintenance of Internal Security Ordinance which was promulgated by the President on 7th May.⁴ The legislations, enacted by the Indira Gandhi administration was enacted with the object of protecting the defence of Indian, the security and maintenance of public order and dealing with Terrorism and anti-national elements. However, during the National Emergency declared in 1975, the act was amended several times to make it more stringent and was used against dissenters and political critics and opponents. Although the purpose of the act was to deal with Terrorism and maintenance of public order, during the 1975 National Emergency, it became an instrument to suppress and silence critics and political opponents of the Indira Gandhi administration by exercising the power of preventive detention. Such detention was justified to protect the nation against 'Internal Disturbances', a term too vague and hence subject to misuse. The legislation was enacted for one purpose but used for another and instead of tackling Terrorism and anti-national activities, it became a tool for Indira Gandhi to stifle opposition and dissent.⁵ During the 1975 National Emergency, almost a hundred thousand members, supporters of opposition parties as well as activists and journalists were detained under MISA without any trial.⁶ After the declaration of Emergency, MISA was amended to make it more stringent and rigorous.⁷ Section 16-A

² N. Manoharan, 'Trojan Horses: Counter-terror Laws and Security in India', (2009) 44 (46) Economic and Political Weekly <www.jstor.org/stable/25663783> accessed 7 May 2021.

³ Hereinafter referred as 'MISA.'

⁴ Andrew Harding and John Hatchard, *Preventive Detention and Security Law: A Comparative Survey* (Martinus Nijhoff Publishers 1993).

⁵ Vinay Lal, 'Normalisation of Anti-terrorist Legislation in Democracies: Comparatives Notes on

India, Northern Ireland, and Sri Lanka' (1994) Lokayan Bulletin 11 <<https://southasia.ucla.edu/history-politics/independent-india/normalisation-anti-terrorist-legislation-democracies-comparatives-notes-india-northern-ireland-sri-lanka/>> accessed 13 May 2021.

⁶ Ganguli, Diamond and Plattner (n 3) 130.

⁷ Priti Saxena, *Preventive Detention and Human Rights*, (Deep & Deep Publications 2007).



was added so that it was no longer necessary to inform the grounds of detention to any person and this section was held to be Constitutionally valid in *ADM Jabalpur v. Shivkant Shukla*⁸. Further, through amendments a person could be put in preventive detention beyond the twelve month period initially prescribe. The Advisory Board was replaced by a government review which meant that there was no independent body to review whether detention of a person is necessary or not. The right to appeal against the detention order in a Court of Law was removed and the expiry of previous detention did not bar from a subsequent detention against the same person. This resulted in indefinite detention without any redressal from Courts.⁹ To make matters worse, MISA was put in the IXth Schedule of the Constitution to exclude it from Judicial Review.¹⁰ After Indira Gandhi lost the general elections in 1977 as a consequence of the National Emergency imposed by her administration, the Janata Party government removed MISA from the Ninth Schedule¹¹ and finally in 1978, MISA was repealed.¹²

TADA & POTA: Departure from established norms of Criminal Procedure and Rules of Evidence

The Terrorist and Disruptive Activities (Prevention) Act, 1987¹³ was enacted to deal with Terrorism and insurgency violence in Punjab and was one of the first legislations to define terrorist activities in India.¹⁴ The legislation lapsed in 1995 due to allegations of misuse and abuse of its provisions.¹⁵ As in the case of MISA, TADA too was criticised for violating Human Rights as well as fundamental principles of Criminal Justice Administration.¹⁶ There were reports that TADA was being misused by the Police and the Armed Forces and instead of countering Terrorism, the act was used as a means to commit Human Rights violations including coercion, extortion and torture. In Punjab, “*thousands had been arrested under TADA and detained for extended periods without being informed about the grounds of their detention.*”¹⁷ TADA was a spectacular failure in fulfilling the very purpose for which it was introduced. It was both inefficient as well as ineffective. Its ineffectiveness can be measured by the fact that until 1994, only 4 per cent of persons tried under the act were

⁸ AIR 1976 SC 1207.

⁹ Akshayakumar Ramanlal Desai (ed), *Violation of Democratic Rights in India*, (Bombay Popular Prakashan 1986).

¹⁰ Shreeja Sen and Apurva Vishwanath, ‘Five laws that Indira Gandhi wanted to be out of legal scrutiny’ *Livemint* (18 June 2015) <<https://www.livemint.com/Politics/3s1UIcKZz1I3B5LMwAeL2M/Five-laws-that-Indira-Gandhi-wanted-to-be-out-of-legal-scrut.html>> accessed 13 May 2021.

¹¹ Fali S. Nariman, *Before Memory Fades: an autobiography* (Hay House India 2010).

¹² Sumit Ganguli, Larry Diamond and Marc F. Plattner, *The State of India’s Democracy* (JHU Press 2007).

¹³ Hereinafter referred to as ‘TADA’.

¹⁴ Shafi Rahman ‘1985-TADA is passed in Parliament: Strong arm of the law’ *India Today* (28 December 2009) <<https://www.indiatoday.in/magazine/cover-story/story/20091228-1985-tada-is-passed-in-parliament-strong-arm-of-the-law-741617-2009-12-24>> accessed 14 May 2021.

¹⁵ Ramananda Garge, *Jurisprudence of Anti-Terrorism Laws: An Indian Perspective* (Vivekananda International Foundation 2019).

¹⁶ Anil Kalhan, ‘Colonial Continuities: Human Rights, Anti-Terrorism, and Security Laws in India’ (2006) 20 *Columbian Journal Of Asian Law* <<https://ssrn.com/abstract=970503>> accessed 16 May 2021.

¹⁷ *Ibid.*



convicted and nearly a quarter of those arrested were not charged under any offence.¹⁸ The amplitude of the definitions of ‘terrorist acts’ and ‘disruptive activities’ in TADA were so wide that even activities like political opposition, agitations and protests came under the ambit of ‘Terrorism’ and political opponents became ‘terrorists’.¹⁹ The act was in conflict with accepted principles of Criminal procedure and rules of Evidence. It shifted the burden of proving the case on the accused with the Court presuming the guilt of the accused unless proven innocent. It made a confession to a Police Officer admissible in Court which drastically increased the chances of torture and other methods of coercion by the Police. The Magistrate before whom the accused was forwarded could authorise Police custody for a period of sixty days instead of the usual fifteen days prescribed under the CrPC. Additionally the police need not file a charge sheet for a year from the date of arrest which also increased the apprehension of custodial torture by the Police. The application of Anticipatory Bail provision was omitted and appeal was restricted to only the Supreme Court with the High Court bypassed. The trial under TADA could be held secretly at any place by Designated Court and also the identity of the witness could be kept secret.²⁰ Such provisions were inconsistent with

Constitutional safeguards, Human Rights as well as International standards of fair trial.²¹ Strong public opinion against TADA resulted in the Narasimha Rao government allowing the legislation to lapse in 1995.²²

After the repeal of TADA in 1995, there was a lacuna of Counter-Terrorism legislation in India.²³ The Law Commission of India (on the request of the new government) studied whether a new counter-Terrorism law was necessary and in its 173rd report, it proposed a new Prevention of Terrorism Bill.²⁴ However, the efforts of the government to enact a new “Counter Terrorism” law based in the Law Commission’s report were met with stiff resistance and criticism from human rights activists, NHRC and opposition parties citing the misuse of TADA.²⁵ However, after the September 11 attacks in America as well as the attack on Parliament in 2001, the Indian Parliament, in March 2002, passed the Prevention of Terrorism Act, 2002²⁶ into Law through a historic Joint Session.²⁷ On examining the provisions of the act, it can be observed that many of its provisions had been borrowed from TADA. The definition of ‘terrorist act’ had been borrowed from the definition of ‘terrorist activities’ in TADA with some minor differences. Further the provisions related to Special Courts, powers of investigating

¹⁸ ‘Black Law and White Lies: A Report on TADA, 1985-1995.’ (1995) 30 (18/19) Economic and Political Weekly <www.jstor.org/stable/4402712> accessed 16 May 2021.

¹⁹ Ibid.

²⁰ Terrorist and Disruptive Activities (Prevention) Act 1987, s 16.

²¹ Anil Kalhan, ‘Colonial Continuities: Human Rights, Anti-Terrorism, and Security Laws in India’ (2006) 20 Columbia Journal Of Asian Law <<https://ssrn.com/abstract=970503>> accessed 16 May 2021.

²² ‘TADA: Hard Law for Soft State.’ ‘TADA: Hard Law for Soft State.’ (2000) 35 (13) Economic and Political Weekly <www.jstor.org/stable/4409076> accessed 16 May 2021.

²³ Garge (n 22) 85.

²⁴ Kalhan (n 30) 151.

²⁵ Ibid.

²⁶ Hereinafter referred to as ‘POTA’.

²⁷ ‘POT Bill passed by joint session of Parliament’ *rediff* (26 march 2002) <<https://www.rediff.com/news/2002/mar/26poto7.htm>> accessed 19 May 2021.



agencies to search and arrest, presumption by Courts, provisions related to confession, non-application of anticipatory bail etc., were almost identical to analogous provisions in TADA. However, the act differed from TADA as it gave some safeguards to the person arrested. Also the period of detention of an arrested person (without charge sheet being filed) was shortened from a year in TADA to one hundred eighty days. One aspect of POTA which differed from TADA was that it brought terrorist organisations under its ambit by criminalising membership of such an organisation as well as supporting or providing funds to such an organisation. The schedule appended to the Act provided a list of organisations which were unlawful and this list could be amended by the Central Government.

Like TADA, POTA was also controversial as it was often used against weaker sections of the society such as Dalits and religious minorities and to stifle dissent by invoking it against political opponents.²⁸ The invocation of POTA in 2003 by the Mayavati Government against Raghuraj Prasad Singh (@ Raja Bhaiyya), an independent MLA as well as the arrest of Marumalarchi Dravida Munnetra Kazhagam MP, Mr. Vaiko by the AIADMK government of Tamil Nadu are examples of the misuse of POTA against political opponents.²⁹ Further, like TADA, the definitions of offences were of very wide amplitude and their open-ended and sweeping language brought ordinary criminal

acts under its ambit with potential for arbitrary application and misuse.³⁰ Thus, like TADA, POTA was unable to deal with Terrorism and instead was used to terrorise and oppress political opponents, marginalised sections of the society like dalits and adivasis and religious minorities. POTA was repealed through a presidential ordinance on 24th September 2004.³¹ However, its repeal was not retroactive and any investigation, proceeding instituted, or any penalty or sentence incurred under the act was not affected.³² The Courts were barred from taking cognisance of POTA offenses after a period of a year from its repeal.³³

Counter Terrorism Laws Currently in Force in India

The primary Counter Terrorism Statutes currently applicable to the whole territory of India are the Unlawful Activities (Prevention) Act, 1967, which is the primary Counter Terrorism legislation currently in force in India, the National Investigation Act, 1980 which has created a central Investigation Agency to investigate Terrorism related offences and the National Security Act, 1980 which is essentially a preventive detention Act.

The UAPA: Old wine in a new bottle

²⁸ 'India: POTA Repeal a Step Forward for Human Rights' (*Human Rights Watch*, 22 September 2004) <<https://www.hrw.org/news/2004/09/22/india-pota-repeal-step-forward-human-rights>> accessed 21 May 2021.

²⁹Ujjwal Kumar Singh "POTA and Federalism." (2004) 39 (18) *Economic and Political*

Weekly <www.jstor.org/stable/4414959> accessed 21 May 2021.

³⁰ Kalhan (n 30) 156.

³¹ The Prevention of Terrorism (Repeal) Ordinance, 2004.

³² The Prevention of Terrorism (Repeal) Ordinance, 2004.

³³ *Ibid.*



The Unlawful Activities (Prevention) Act, 1967³⁴ is an act passed by parliament in 1967 with the purpose and object of “*preventing unlawful activities*”. The act has been amended several times to make it more stringent and to incorporate provisions related to terrorist activities.³⁵ The most recent amendment to the legislation was in 2019.³⁶ Though initially enacted as preventive-detention legislation, after the repeal of POTA, the UAPA was amended in 2004 to make it a Counter Terrorism Legislation.³⁷ The legislation incorporates a wide definition of ‘Terrorist Activities’ and criminalises merely associating with, or being a member of a Terrorism organisation. Further, the schedules appended to the act include the name of designated terrorist organisations as well individual terrorists. Like previous counter Terrorism legislations, the UAPA departs from established principles of Criminal Procedure and Rules of Evidence. A person can be arrested or search and seizure can be made based on mere ‘personal knowledge’ of a Police officer which is a lower standard of knowledge than ‘reasonable complaint’ or ‘credible information’ under the CrPC. This gives the Police a wide discretion to arrest a person and has a potential for abuse. Further, an arrested person can be detained for a prolonged period without filing any charge-sheet. Obtaining bail under UAPA is made

considerably more difficult than ordinary procedure under CrPC while Anticipatory bail is omitted. Also, like TADA and POTA, the presumption of innocence is reversed and if certain facts are proved, the Courts can draw adverse inferences against the accused. The act also provides for “*in-camera trials*” and also allows the identity of the witness to be confidential which goes against international standards of fair trial. The act is extremely stringent with respect to terrorist activities as it criminalises “*merely being a member*” or “*attending a meeting*” of a “Terrorist organisation”. On the other hand, the act has omitted some stringent provisions of TADA and POTA such as those making admissible confessions made to Police Officers. Also arrest, search and seizures under UAPA are governed by the CrPC which means that the procedural safeguards laid down under CrPC are also applicable to arrests, searches and seizure made under UAPA.

According to the National Crime Record Bureau, in 2014, out of 33 cases disposed under UAPA, only nine persons were convicted with a conviction rate of 27%. In 2015, out of 76 cases disposed under UAPA, 11 were convicted with a conviction rate of 14.5%.³⁸ Further, in 2016 the conviction rate for UAPA cases was 33%.³⁹ In the 2018 Crime in India report, the conviction rate for

³⁴ Hereinafter referred to as ‘UAPA’.

³⁵ Unlawful Activities (Prevention) Amendment Act 2004; Unlawful Activities (Prevention) Amendment Act 2008; Unlawful Activities (Prevention) Amendment Act 2012.

³⁶ Unlawful Activities (Prevention) Amendment Act 2019.

³⁷ Garge (n 22) 32.

³⁸ ‘Rajya Sabha: UAPA Bill passed despite Opposition fears’ *The Hindu Business Line* (New Delhi, 2 August 2019)

<<https://www.thehindubusinessline.com/news/uapa-amendment-bill-gets-rajya-sabha-approval/article28796520.ece>> accessed 24 May 2021.

³⁹ Chaitanya Mallapur and Devyani Chhetri ‘Arrested activists: 67% ended in acquittal or discharge under UAPA Act’ *Business Standard* (Mumbai, 14 September 2018) <https://www.business-standard.com/article/current-affairs/arrested-activists-67-ended-in-acquittal-or-discharge-under-uapa-act-118090800801_1.html> accessed 24 may 2021.



UAPA is 27.2%. Such a low conviction rate indicates that the legislation has proven to be ineffective in being viable counter Terrorism legislation in India as most of the accused charged under it are either discharged or acquitted.

The act has been criticised for giving unbridled executive power to the Police and for being used against political opponents and voices of dissent. Persons associated with organisation which are critical of the ruling dispensation have been booked under UAPA. For instance, Imran Kirmani, an aeronautical engineer from Kashmir was arrested for by the Delhi Police for alleged association with LeT (a banned organisation included in the First Schedule of the Act). He was kept in prison for five years before being acquitted.⁴⁰ Critics of the legislation have pointed out that UAPA criminalises the fundamental right to from association under Article 19 and also blurs the line between dissent and crime by bringing a wide variety of actions under the ambit of ‘terrorist act’.⁴¹ The definition of a ‘terrorist act’ uses ambiguous, sweeping and open-ended phrases such as “*likely to strike terror in the people or any section of the people in India*’ and ‘*overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary*’⁴² etc. which have a potential for misinterpretation and misuse by the investigating agencies. These elements of the definition are extremely subjective and can be used by the authorities to bring almost

any ordinary criminal act within the ambit of the stringent provisions of the UAPA.

Another aspect of UAPA which has been criticised is that after the 2019 amendment, an individual can also be designated as a “terrorist” simply if the “*government believes that such individual is involved in Terrorism*”.⁴³ Critics of the amendment fear that such a designation without a trial would result in violation of right to life and personal liberty enshrined under Article 21 as the person would be designated a terrorist even before any investigation has been done or any trial has been concluded.⁴⁴

An examination of the provision of UAPA, its low conviction rate together with reports of misuse of its provisions indicates that like TADA and POTA before it, UAPA has also proven to be an instrument of oppression in the hands of the government to silence critics and hound political opponents in the name of countering Terrorism and unlawful activities. It is interesting to note that almost all major counter Terrorism legislations have been introduced in haste and as a reaction to significant incidents of mass violence in India and abroad. The definitions of the primary offences in these statutes also have the common trait of being wide and sweeping which allows even ordinary criminal acts to fall under their ambit. Further, the low conviction rates of these legislations indicate that they are not effective in countering Terrorism and instead are being used for other purposes. Further, with each passing

⁴⁰Anushka Singh “Criminalising Dissent: Consequences of UAPA” (2012) 47 JSTOR <www.jstor.org/stable/41720156> Accessed 24 May 2021.

⁴¹ Ibid.

⁴² Prevention of Terrorism Act 2002, s 15(1).

⁴³ Unlawful Activities (Prevention) Act 1967, s 35.

⁴⁴ Tarique Anwar ‘UAPA Amendment: Gateway to Misuse Anti-Terror Law, Say Critics’ *News Click* (New Delhi, 10 August 2019) <<https://www.newsclick.in/UAPA-amendment-gateway-misuse-anti-terror-law-critics>> accessed 24 May 2021.



amendments the laws have been made more stringent and often in violation of principles of Criminal Justice Administration and international standards of fair trial.

The NIA Act: The procedural arm of the UAPA

The National Investigation Agency Act was enacted by the Indian Parliament on 31st December, 2008 after the 26th November Mumbai terror attacks to make provisions for an investigation agency to investigate specific cases of Terrorism under specific acts.⁴⁵ The Statement of Object and Reasons for the act declares that because lately India has been suffering from terrorist attacks, there has been “*a need for establishing an Agency at the Central level for investigation of offences related to Terrorism and certain other Acts*”, “*...which have complex inter-State and international linkages, and possible connection with other activities like the smuggling of arms and drugs, pushing in and circulation of fake Indian currency, infiltration from across the borders, etc.*” Further, the statement declares that several Committees like the Administrative Reforms Commission have also given their recommendations for establishing such an agency. This agency is called the National Investigation Agency.⁴⁶ The preamble to the statute declares that the purpose of NIAA is “*...to constitute an investigation agency at the national level to investigate and prosecute offences affecting the sovereignty, security and integrity of India, security of State, friendly relations with foreign States*

and offences under Acts enacted to implement international treaties, agreements, conventions and resolutions of the United Nations, its agencies and other international organisations...”⁴⁷ Unlike other counter-Terrorism legislations such as UAPA or repealed legislations such as TADA or POTA, the NIAA is more of a procedural law which constitutes an Investigation Agency at the National level and lays down the procedure for investigation and trial of offences which are included in other substantive counter Terrorism laws (‘Scheduled Offence’). It does not create any substantive Terrorism related offence on its own. The territorial jurisdiction of the NIAA extends to the whole of India. Besides Indian citizens within India, it also applies to Indian citizens outside India as well as to persons in Government service regardless of where they are. It also applies to persons on ships and aircrafts which are registered in India wherever they might be.⁴⁸ Further, after the 2019 amendment, NIAA now also applies to persons who have committed a Scheduled offence outside India against any Indian citizen or affecting Indian interest.⁴⁹ The superintendence of NIA is vested with the Central Government which appoints an officer designated as the Director-General for its administration. The Director-General exercises the powers exercised by the Director-General of Police in a State.⁵⁰ While the UAPA itself does not contain any provision with respect to a Special or Designated Court to try offences under it, the schedule under the NIAA includes UAPA. Thus, the offences under UAPA can be

⁴⁵ National Investigation Agency <<https://www.nia.gov.in/about-us.htm>> accessed 27 May 2021.

⁴⁶ Hereinafter referred as ‘NIA’.

⁴⁷ National Investigation Agency Act 2008, Preamble.

⁴⁸ National Investigation Act 2008, s 1.

⁴⁹ National Investigation Agency (Amendment) Act 2019.

⁵⁰ National Investigation Agency Act 2008, s 4.



investigated by the National Investigation Agency and tried by Special Courts constituted under the NIAA. Over the years since its enactment, several High profile and politically sensitive cases have been transferred to the NIA⁵¹ including the “Malegaon Blast Case”, the 2011 Delhi High Court Blast Case⁵², the *Samjhauta* Express Blast Case, the Hyderabad *Mecca Masjid* Blast Case⁵³, the 2013 *Bodh Gaya* Blast case⁵⁴ and the 2013 Patna Blasts.⁵⁵ Recently the *Bhima-Koregaon* violence case of 2018 has been transferred to the NIA by the Ministry for Home Affairs.⁵⁶ According to the official website of the NIA, as on 5th February, 2020, the National Investigation Agency has investigated 315 cases out of which 60 cases have been decided at the trial stage. Out of these 60 cases, there has been conviction in 54 cases giving the NIA a conviction rate of 90%.⁵⁷ Although, such a high conviction rate indicates that the NIA

has proven to be an effective mechanism for tackling Terrorism related offences, the opposition parties has accused it of targeting religious minorities as well as violating the rights of the State Police in conducting investigation of offences committed within its local jurisdiction.⁵⁸ It is pertinent to note here that NIAA is merely a procedural law which has created a mechanism for investigation and trial of certain specific offences. It is an entirely different matter when it comes to the conviction rates of the specific laws listed in NIAA like the UAPA. As discussed earlier, the conviction rate of UAPA is abysmally low. The primary reason for this disparity is that until a case is transferred to the NIA, the State Police and other Investigation Agencies investigate that case. The consequence is low conviction rates which indicate that State Police are less effective in investigating Terrorism related offences than the NIA. Perhaps this reason

⁵¹ Srijoni Sen and others, *ANTI-TERROR LAW IN INDIA; A STUDY OF STATUTES AND JUDGMENTS, 2001 – 2014* (Vidhi Centre for Legal Policy 2015).

⁵² Sahim Salim, ‘Delhi police sidelined, NIA to probe Delhi blast’ *Rediff* (New Delhi, 7 September 2011) <<https://www.rediff.com/news/slide-show/slide-show-1-delhi-police-sidelined-nia-to-probe-delhi-blast/20110907.htm>> accessed 29 May 2021.

⁵³ HT Correspondent, ‘2007 Mecca Masjid blast case verdict: 10 things to know’ *Hindustan Times* (Hyderabad, 16 April 2018) <<https://www.hindustantimes.com/india-news/special-nia-court-acquits-all-accused-in-mecca-masjid-blast-case-10-things-to-know/story-fKTf117IGPEi8D5nleSh3N.html>> accessed 28 May 2021.

⁵⁴ Madan Kumar and Sayantane Choudhary, ‘National Investigation Agency takes over Bodh Gaya blasts probe’ *Times of India* (Patna, 10 July 2013) <<https://timesofindia.indiatimes.com/india/National-Investigation-Agency-takes-over-Bodh-Gaya-blasts-probe/articleshow/20995605.cms>> accessed 27 May 2021.

⁵⁵ ‘Patna blasts: Third suspect arrested in Ranchi, probe given to NIA’ *Times of India* (Patna, 30 October 2013)

<<https://timesofindia.indiatimes.com/india/Patna-blasts-Third-suspect-arrested-in-Ranchi-probe-given-to-NIA/articleshow/24942521.cms>> accessed 25 May 2021.

⁵⁶ Vijaita Singh, ‘Bhima-Koregaon case transferred to NIA, confirms Home Ministry’ *The Hindu* (New Delhi, 25 January 2020) <<https://www.thehindu.com/news/national/bhima-koregaon-case-transferred-to-nia-confirms-home-ministry/article30651042.ece>> accessed 25 May 2021.

⁵⁷ National Investigation Agency <<https://www.nia.gov.in/about-us.htm>> accessed 24 May 2021.

⁵⁸ Manasa Rao, ‘NIA amendments Bill: Why the opposition raised objections, but voted for it anyway’ *The News Minute* (New Delhi, 22 July 2019) <<https://www.thenewsminute.com/article/nia-amendments-bill-why-opposition-raised-objections-voted-it-anyway-105910>> accessed 23 May 2021.



justifies the creation of a specialised agency which is independent of the States.

The National Security Act: What is ‘public order’?

The next legislation in our discussion is the notoriously well known National Security Act, 1980. The National Security Act⁵⁹ is a preventive detention act which was enacted by the Congress government in 1980 as a replacement to the repealed MISA and contains similar and even identical provisions to the Preventive Detention Act of 1950 as well as the pre emergency un-amended MISA.⁶⁰ The NSA repealed the National Security Ordinance, 1980.⁶¹ The NSA empowers the Central as well as the State Government to “*make an order directing a person to be detained if they are satisfied that the detention of such person is necessary to prevent him from acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, or the security of India...*”⁶² Further, the Central or the State Government may also detain any person to prevent him from acting “*prejudicial to the security of the State*”, or “*against the maintenance of public order*” or from acting “*prejudicial to the maintenance of supplies and services essential to the community*”.⁶³ A person who has been detained under a detention order must be, within five days from the date of detention, informed about the grounds on which the detention has been made and has to be provided the opportunity of making a

representation against the order. However, the authority making the order need not disclose facts which it considers “*against the public interest to disclose.*” This provision is nearly identical to one in MISA. Under NSA, the maximum period for which a person can be detained is twelve months from the date of detention.⁶⁴

A careful examination of the provisions of NSA reveals that the provisions of NSA are almost similar and sometimes even identical to the notorious MISA. However, the more draconian provisions which were inserted in MISA to give effect to the National Emergency of 1975 have been omitted from the NSA.⁶⁵ Having said that, phrases such as “public order” are too vague and ambiguous, and can easily be misused by the authorities. Further, the fact that a person detained has no right to legal representation while appearing before the Advisory Board makes it very difficult for him to properly present his case. Also the authority did not disclose facts which it considers “*against public order*”, making it more difficult for such person to challenge his detention. The act has been criticised for being used as an “extra-judicial” power of the government to detain individuals who speak against it. Apart from intellectuals and Human Rights activists in India, the act has also been criticised from many international organisations working in the field of Human Rights such as The South Asia Human Rights Documentation Centre and Amnesty International.⁶⁵ Some notable

⁵⁹ Hereinafter referred as ‘NSA’.

⁶⁰ Surabhi Chopra, ‘National Security Laws in India: The Unravelling of Constitutional Constraints’ (2015) 17 (1) Oregon Review of International Law forthcoming <<https://ssrn.com/abstract=2441652>> accessed 29 June 2021.

⁶¹ National Security Act 1980, s 18.

⁶² National Security Act 1980, s 3(1).

⁶³ National Security Act 1980, s 3(2).

⁶⁴ National Security Act 1980, s 13.

⁶⁵ Kartikay Agarwal and Arjun Sharma, ‘National Security Act, 1980-Iniquitous Act and Constitutional Tyranny or a Justified Piece of Legislation?’ (2020) JURIST-Student Commentary <https://www.jurist.org/commentary/2020/05/agarwal->



examples of the misuse of NSA include the twelve month detention of a Journalist from Manipur, who posted an allegedly offensive Facebook posts against the Chief Minister, N. Biren Singh.⁶⁶ Another example is of the detention of Dr Kafeel Khan for his alleged hate speech made in Aligarh Muslim University which led to violent protests and stone pelting.⁶⁷ Retired Justice Markandey Katju has opined that the provisions of IPC are sufficient to deal with Dr Kafeel Khan's hate speech and his detention order under NSA is "*clearly illegal, and should be struck down by the court.*"⁶⁸ The various detention orders passed in the last few years indicate that the act has been consistently misused by the governments and have been applied to cases where ordinary penal laws are sufficient. Also the fact that, no FIRs are registered under the act makes it almost impossible to ascertain the effectiveness of NSA is countering Terrorism or anti-national activities as there is no official record of detentions made under the act. NSA has become quite another example of legislations which are enacted for the purpose of defending the security of India but end up being a means of oppression in the hands of the ruling dispensation which misuses its power to detain individuals who criticises it or speak against it.

Conclusion

sharma-national-security-act-1980/ accessed 30 May 2021.

⁶⁶ Soibam Rocky Singh, 'What is National Security Act' *The Hindu* (16 February 2019) <<https://www.thehindu.com/news/national/what-is-national-security-act/article26292232.ece>> accessed 10 May 2021.

⁶⁷ Vatsala Gaur, 'NSA slapped on UP's Dr. Kafeel Khan' *The Economic Times* (Lucknow, 15 February 2020)

<<https://economictimes.indiatimes.com/news/politics>

In the past few decades, terrorism has emerged as a global threat to the peace and security of nations. Yet, despite this common acknowledgment, there has been no consensus in a general, binding and universally acceptable definition which incorporates both the *mens rea* (physical element) as well as the *actus reus* (physical element) of the offence of terrorism. While several attempts have been made by the International legal community, there has been no breakthrough in adopting a "Comprehensive Convention on International Terrorism". This has led to nations defining 'terrorism' or 'terrorist acts' in their domestic Counter-Terrorism legislation based on different prevailing circumstances and interpretations of National Security.

After going through the history of Counter-Terrorism legislations enacted by the Indian Parliament such as TADA and POTA, some common traits emerge. These legislations were introduced, often in haste, in the name maintaining the "Public order" and defending the "security, sovereignty and integrity" of India. However, they contained stringent provisions which were often misused by the executives for stifling voices of dissent and to intimidate and harass political opponents and critics of the ruling dispensation. The definition of substantive terror related

-and-nation/nsa-slapped-on-ups-dr-kafeel-khan/articleshow/74144891.cms?from=mdr> accessed 11 May 2021.

⁶⁸ Markandey Katju, 'OPINION: Dr Kafeel Khan's detention under NSA illegal, should be struck down by court' *The Week* (15 February 2020) <<https://www.theweek.in/news/india/2020/02/15/opinion-dr-kafeel-khans-detention-under-nsa-illegal-should-be-struck-down-by-court.html>> accessed 11 May 2021.



offences were wide in scope and often included ordinary criminal acts under the purview of terrorist acts and often used ambiguous phrases having potential for misuse by the law enforcement agencies. These legislations contained provisions which departed from established principles of Criminal Justice administration and removed the safeguards available to the accused with little or no judicial oversight. This resulted in a large number of persons being detained or arrested under these laws only to be later discharged or acquitted because of lack of evidence. The abysmally low conviction rates also points to the failure of these legislations.

An examination of Counter-Terrorism legislations currently in force in India such as the UAPA and the NIAA reveals similar shortcomings. The definition of ‘terrorist act’ under UAPA has remained mostly unchanged from those in TADA and POTA with vague and open ended words and bringing a considerable number of activities within its ambit. A person can be kept under pre-trial detention for an extended period of time and obtaining bail has been made extremely difficult. Further, in trial, the presumption of innocence is reversed and the Courts presume that the accused is involved in the offence. The fact that it is often invoked against activists and protestors and has a low conviction rate points to the fact that instead of being used to protect the security and sovereignty of Indian against Terrorism, the act is being used as a political tool to suppress dissent. The NIAA, constituted after the Mumbai attacks of 26th November has its own share of problems and has been criticised for “*undermining the federal spirit of the Constitution by ignoring State Governments in the investigation and trial of*

Terrorism related offences.” These issues and shortcomings reveal that Indian needs to completely overhaul its “Counter-Terrorism” mechanisms to ensure the security and sovereignty of India is protected against the threat of Terrorism without compromising the Constitutional guarantees of liberty and freedom.

Suggestions

- Amending the definition of a ‘terrorist act’ under the UAPA to remove ambiguities and confining it strictly to activities which are considered terrorism under various international conventions. Further, omitting activities from the definition which can be dealt with by ordinary criminal laws.
- Constitution of a federal Independent Commission with members from all States and Union Territories to oversee and make recommendations to the Government for Counter-terrorism measures including amendments to existing laws.
- Amendment of UAPA and the NIAA to bring them in line with safeguards provided in the Constitution as well as ordinary criminal laws such as the CrPC. For instance, the pre-trial detention in police custody should be limited to the first fifteen days as provided under Section 167 of the CrPC.
- Limiting the period of preventive detention to a period of 6 months with no scope for extension under any circumstance.
- Incorporation of time limits for completion of investigation of terrorism related offences and departmental action for failure to do the same.
- Incorporation of time limits for completion of trials of terrorism related offences.
- Non-interference of political considerations in invoking Counter-terrorism laws against a person or an organisation.



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- Circumscribing the powers of the executive in invoking Counter-Terrorism laws against certain class of persons such as journalists and students.
 - Constitution of a specialised agency dedicated to investigation of terrorism related offences with special emphasis on forensic science.
 - Creation of a robust mechanism for “*mutual legal assistance and extradition*” between Indian and other countries on the basis of mutual consent and reciprocity.

