

## 1. Jurisprudence of the Judicial Rubber Stamp

### Context:

- ▶▶ Recently, the government has passed amendments to the Unlawful Activities (Prevention) Act, 1967 (UAPA), India's signature anti-terrorism legislation, allowing the Central government to designate individuals as "terrorists", causing a furore.
- ▶▶ Critics warned that vesting such sweeping powers in the hands of the political executive would prove to be a recipe for abuse, and for political and social persecution.
- ▶▶ In response, it was argued that the UAPA provided for a system of checks and balances which would ensure that governmental abuse could be swiftly reviewed and rectified.

### Background:

- ▶▶ The UAPA – an upgrade on the Terrorist and Disruptive Activities (Prevention) Act TADA, which was allowed to lapse in 1995 and the Prevention of Terrorism Act (POTA) was repealed in 2004 – was originally passed in 1967 under the then Congress government led by former Prime Minister Indira Gandhi. Eventually amendments were brought in under the successive United Progressive Alliance (UPA) governments in 2004, 2008 and 2013.

### Key Features of the Bill:

- ▶▶ The Unlawful Activities (Prevention) Amendment Bill, 2019 was introduced in Lok Sabha by the Minister of Home Affairs, on July 8, 2019. The Bill amends the Unlawful Activities (Prevention) Act, 1967. The Act provides special procedures to deal with terrorist activities, among other things.
- ✓ **Who may commit terrorism:** Under the Act, the central government may designate an organisation as a terrorist organisation if it:
  1. Commits or Participates in acts of terrorism
  2. Prepares for Terrorism
  3. Promotes Terrorism
  4. Is Otherwise involved in Terrorism.
- ✓ The Bill additionally empowers the government to **Designate Individuals as terrorists** on the same grounds.

- ✓ **Approval for seizure of property by NIA:** If the investigation is conducted by an officer of the National Investigation Agency (NIA), the approval of the Director General of NIA would be required for seizure of properties that may be connected with terrorism.
- ✓ **Investigation by NIA:** Under the Act, investigation of cases may be conducted by officers of the rank of Deputy Superintendent or Assistant Commissioner of Police or above. The Bill additionally empowers the officers of the NIA, of the rank of Inspector or above, to investigate cases.
- ✓ **Insertion to schedule of treaties:** The Act defines terrorist acts to include acts committed within the scope of any of the treaties listed in a schedule to the Act. The Schedule lists nine treaties, including the Convention for the Suppression of Terrorist Bombings (1997), and the Convention against Taking of Hostages (1979). The Bill adds another treaty to the list. This is the **International Convention for Suppression of Acts of Nuclear Terrorism (2005)**.

### Why is it Being Opposed?

- ▶▶ This is a potentially dangerous amendment which will empower officials of Union Ministry to brand any person 'a terrorist', without following due process. The name of such a person will be included in the 'Fourth Schedule' proposed to be added in the parent Act. The only statutory remedy available to such a person is to make an application before the Central Government for de-notification, which will be considered by a Review Committee constituted by the Government itself.
- ▶▶ The amendment does not provide any legal consequence in case an individual is designated a terrorist. The inclusion of one's name in the Fourth Schedule as a terrorist per se will not lead to any conviction, imprisonment, fine, disqualifications or any sort of civil penalties. So, this is simply a power for the government to brand any one as a terrorist.
- ▶▶ An official designation as a terrorist will be akin to 'civil death' for a person, with social boycott, expulsion from job, hounding by media, and perhaps attack from self-proclaimed vigilante groups following.

### Judiciary – A Parchment Barrier:

- ▶▶ A look at how the UAPA functions presently suggests that the defenders of the law are too optimistic in their faith in "institutional correctives".
- ▶▶ Before the 2019 amendments, the UAPA could be used to ban associations and not individuals. To this end, the UAPA required, and still requires that the ban must clearly set out the grounds on which the government has arrived at its opinion; and it may then be contested by the banned association before a Tribunal, consisting of a sitting High Court judge.

- ▶▶ As a number of judgments have held, the task of a UAPA Tribunal is to carefully scrutinise the decision of the government, keeping in mind the fact that banning an organisation or a group infringes the crucial fundamental freedoms of speech and association
- ▶▶ A close reading of UAPA Tribunal orders makes it clear, however, that the requirement of judicial scrutiny is little more than a parchment barrier. In allowing the government vast amounts of leeway in proving its case, tribunals depart from some of the most fundamental principles of fair procedure, and act as little more than judicial rubber stamps.
- ▶▶ And this is made starkly evident by a recent UAPA Tribunal Order (issued on August 23, 2019) confirming the government's ban on the Jamaat-e-Islami, Jammu and Kashmir ("JeI, J&K").

### Sealed Cover Jurisprudence:

- ▶▶ The government's ban on the JeI, J&K was based on its opinion that the association was "supporting extremism and militancy", "indulging in anti-national and subversive activities", and activities to "disrupt the territorial integrity of the nation".
- ▶▶ In support of this opinion, the government said that there existed a large number of First Information Reports ("FIRs") against various members of the association. Among other things, the JeI, J&K responded that for almost all of the FIRs in question, the people accused had nothing to do with the association.
- ▶▶ This case would have been resolved straightforwardly, had the government managed to prove that there existed sufficient evidence of wrongdoing against members of the JeI, J&K, that would justify banning the organisation altogether.
- ▶▶ It is here that things began to get murky because the government then fell back on the increasingly convenient "sealed cover jurisprudence", submitting material that it claimed was too sensitive to be disclosed. Notably, the evidence was not disclosed even to the association and its lawyers, who were contesting the ban.

### Impact on Fundamental Rights:

- ▶▶ Now, it would appear to be a very basic principle of justice that if an association is to be banned for unlawful activities, then the material on the basis of which that ban is justified is put to the association so that it has a chance to defend itself.
- ▶▶ To take a decision on the legality of a ban by looking at secret material that is withheld even from the association itself is exactly akin to condemning a man unheard. It is kangaroo-court style justice, which has no place in a modern democracy. However, this is exactly what the Tribunal did.
- ▶▶ To this day, neither the association nor anyone reading the Tribunal's opinion has any way of knowing what the evidence was. In essence, therefore the fundamental freedom of

speech and association have been violated on the basis of secret evidence passed from the government to the Tribunal.

- ▶▶ An association numbering in at least the thousands has been shut down for five years, and all its members made putatively unlawful, potentially criminal without even being told why.

### Lions Under the Throne:

- ▶▶ The tribunal observed that the respondent Association has not led any evidence to substantiate their defense that their office-bearers or members are not involved in the kind of activities alleged against them.
  - ▶▶ In short, therefore, the Tribunal wanted the association to prove that their members were not committing illegal activities, while the main source of evidence that the association would rely upon to prove exactly that, was in the hands of the government — and the association was not allowed to rely on it.
  - ▶▶ If, therefore, we take a step back and look at the Tribunal's opinion, two aspects stand out starkly.
1. **A five-year ban upon an association:** going to the very heart of the freedom of speech and association, potentially making all persons associated with it criminal — was upheld by a judicial forum on the basis of secret evidence that the association had neither the chance to see, nor to rebut.
- ▶▶ **No Proper Communication Regarding Evidence :** And second, the most valuable piece of evidence that the association had to defend itself was seized from it by the very government that had banned it; and not only did the Tribunal wink at this, but then used the absence of that piece of evidence against the association that it had been seized from, and in favor of the government that had seized it.
  - ▶▶ What we effectively have now, thanks to the interpretation of Tribunals, is this situation: on the one hand, every leeway is provided to the government, loopholes have been created where non-existed, and every procedural and evidentiary standard diluted, while on the other, associations (comprising Indian citizens) are held to impossible standards in order to disprove the case against them.
  - ▶▶ It is a situation where in the words of a famous English judge the judiciary has gone from “lions under the throne” to “mice squeaking under a chair in the Home Office” – with “consequences that the nation will one day bitterly regret”.

### Conclusion:

- ▶▶ Throughout its opinion, the Tribunal made multiple references to how the UAPA allows for departures from the strict rules of evidence, in order to serve larger goals. And these

“departures” have been made boundless, and boundlessly manipulable to the extent that they have swallowed up the most basic rules of procedural justice and fairness.

- ▶▶ This is not a jurisprudence that respects constitutional democracy or fundamental freedoms such as speech and association. Rather, it is a jurisprudence of the judicial rubber stamp: courts acting to legitimise and enable governmental overreach, rather than protecting citizens and the rights of citizens against the government.

