

CONSTITUTIONAL VALIDITY OF THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT 2008 AND NATIONAL INVESTIGATION AGENCY ACT, 2008: A COMMENT

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Unlawful Activities (Prevention) Act or UAPA Act is Indian law aimed at effective prevention of unlawful activities associations in India. Its main objective was to make powers available for dealing with activities directed against the integrity and sovereignty of India.¹

The National Integration Council appointed a Committee on National Integration and Regionalization to look into, the aspect of putting reasonable restrictions in the interests of the sovereignty and integrity of India. Pursuant to the acceptance of recommendations of the Committee, the Constitution (Sixteenth Amendment) Act, 1963 was enacted to impose, by law, reasonable restrictions in the interests of the sovereignty and integrity of India. In order to implement the provisions of 1963 Act, the Unlawful Activities (Prevention) Bill was introduced in the Parliament.²

The Unlawful Activities (Prevention) Amendment Act, 2008³ and the National Investigation Agency Act, 2008⁴ are both violative of the fundamental rights guaranteed under Article 14⁵ and Article 21⁶ of the Constitution of India and that Parliament is not competent to enact the NIA. It is hence implored that both the said Acts should be struck down as *ultra vires* the Constitution.

National Investigation Agency (NIA) is a federal agency established by the Indian Government to combat terror in India. It acts as the Central Counter Terrorism Law Enforcement Agency. The agency is empowered to deal with terror related crimes across states without special permission from the states. The Agency came into existence with the

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¹ The Unlawful Activities (Prevention) Act; Available at: www.nia.gov.in

² Ibid.

³ Hereinafter referred as UAPA

⁴ Hereinafter referred as NIA

⁵ Article 14

⁶ Article 21

enactment of the National Investigation Agency Act 2008 by the Parliament of India on 31 December 2008.⁷

NIA was created after the 2008 Mumbai terror attacks as need for a central agency to combat terrorism were realized. The founding Director-General of NIA was Radha Vinod Raju, and he served till 31 January 2010. He was succeeded by Sharad Chandra Sinha⁸ till March 2013 when he was appointed the member of the National Human Rights Commission of India. In July 2013, Sharad Kumar was appointed as the Chief of National Investigation Agency succeeded by N. R. Wasan.⁹

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008 IS VIOLATIVE OF ARTICLE 14 OF THE CONSTITUTION OF INDIA

Article 14 of the Constitution of India does not only prohibit only unwarranted discrimination it looks down upon unregulated discretion bestowed upon any instrument of the State¹⁰. The Supreme Court has held¹¹ in a catena of cases that the discretionary powers given to the government authorities must contain ample guidelines¹² and that it should not allow excessive subjectivity¹³ to come into it.

The case of *R.D Shetty v. International Airport Authority of India*¹⁴ talks about the fact that that in a democracy that is governed by the Rule of Law, it would be unthinkable if the executive or any of its officers possess arbitrary powers over the rights and interests of any individual. Also, the Hon'ble Court in the case of *Naraindas v. State of M.P.*¹⁵ held that “... *if the power conferred by a statute on any authority of the state is vagrant and unconfined and no standards are laid down by the statute to control the exercise of such power, the statute would be violative of the equality clause, because it would permit arbitrary and capricious exercise of power, which is the antithesis of equality before the law.*” Hence, it is put forth

⁷ “Govt tables bill to set up National Investigation Agency”, *PTI*, Dec 16, 2008, 07.40pm IST (2008-12-16)

⁸ “Sharad Chandra Sinha new NIA chief, *Deccan Herald*, February 2010

⁹ “Sharad Kumar to be new National Investigation Agency chief”, *NDTV*, 30 July 2013

¹⁰ *Sheo Nandan Paswan v. State of Bihar*, AIR 1987 SC 877

¹¹ *Subhash Chandra v. State of Uttar Pradesh*, (1980) 2 SCC 324

¹² *Accountant General v. S. Doraiswamy*, (1981) 4 SCC 93; *R.R Verma v. Union of India*, (1980) 3 SCC 402; *Ramakanya Devi v. State*, AIR 1980 Kant 182; *State of Punjab v. Gurdial Singh*, AIR 1980 SC 319; *Chanderbhan v. S. Kumar*, AIR 1980 Bom 48

¹³ *A.R. Antulay v. R.S Nayak*, (1988) 2 SCC 602; *State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75; *Re: Special Courts Bill, 1978*, (1979) 1 SCC 380

¹⁴ (1979) 3 SCC 489

¹⁵ AIR 1974 SC 1232

that unfettered and almost absolute discretion to any executive authority can be said to be the archenemy of the Rule of Law¹⁶. In fact, it has been held¹⁷ and affirmed¹⁸ by the Hon'ble Court that when subjective discretion is fraught without sufficient guidelines, the Court has refrained from upholding the same. If power is conferred on a high official and there is no reasonable restriction on this power conferred then such discretion and arbitrary power would be violative of Article 14 of the Constitution of India¹⁹. Abundant discretion is laden with authoritarian potential even in a high person if reasonable guidelines are not provided²⁰.

The UAPA is full of provisions which confer arbitrary powers onto the executive, which is violative of Article 14 of the Constitution and thus the Act must be declared as *ultra vires* the Indian Constitution. When defining a "terrorist act"²¹, the UAPA includes certain acts that are done with the "intent to strike terror or are likely to strike terror" in the people. The definition has a wide ambit of subjectivity and hence confers unbridled discretion to be exercised by the executive in declaring an act to be a "terrorist act". There is an absence of guidelines to judge as to what act has been committed with the intent to strike terror or is likely to strike terror in people. The same definition also states that apart from the various means mentioned in the section if "by any other means of whatever nature"²² the criteria of the section may be fulfilled then the same may amount to a terrorist act. Hence this, read along with the earlier mentioned statement in the definition imparts a high amount of discretion upon the administrative authorities. The aforementioned clauses bring a wide range of acts within the ambit of the definition and allow the authorities to arbitrarily decide as to what would amount to a terrorist act. Such subjectivity is not permissible²³ and violates Article 14 of the Constitution of India.

Further, the UAPA provides²⁴ that if an officer of the designated authority finds a reason to believe from his "personal knowledge" or from the "information given by any person or any other thing" that an offence under the UAPA may be committed then he can authorize any

¹⁶ *Sudhir Chandra v. Tata Iron and Steel Co. Ltd.*, AIR 1984 SC 1064

¹⁷ *B. B. Rajwanshi v. The State of Uttar Pradesh*, AIR 1988 SC 1089

¹⁸ *V. K. Thomas and Ors. v. Industrial Tribunal and Ors.*, JT 1989 (1) SC 18.

¹⁹ *State of Punjab v. Khemchand*, (1974) 1 SCC 549; *Kishan Chand v. Commissioner of Police*, AIR 1961 SC 705; *Jaswant Singh v. Sub Divisional Officer*, AIR 1982 P&H 69; *State of Punjab v. Chand Gian Chand and Co.*, (1983) 2 SCC 503.

²⁰ *Mohinder Singh Gill v. Chief Election Commissioner*, AIR 1978 SC 851

²¹ Section 4, Unlawful Activities (Prevention) Amendment Act, 2008

²² *Id.*, Section 4(a)

²³ *State of Madras v. V.G Row*, AIR 1952 SC 196; *Ramkrishanaiah v. President, District Board*, AIR 1952 Mad 396

²⁴ Section 12, Unlawful Activities (Prevention) Amendment Act, 2008

subordinate officer to arrest the individual(s) so involved. The aforementioned provision hence gives power to the designated authority to arrest a person under this Act for any reason whatsoever. Additionally, the Officer who has been given such power is not required to explain his beliefs to any authority. Hence, this provision confers unbridled discretion on the State and is violative of Article 14 of the Constitution as per the law mentioned earlier.

The UAPA confers²⁵ upon the Central Government with the power to “freeze, seize or attach the funds and other financial assets or economic resources” of any individual or organization on the mere “suspicion” of them being involved in terrorism. Also on mere suspicion that a person is involved in terrorism the Government may “prevent the entry into or transit through India” of such individual(s) and also disallow any other person or organization from extending financial aid to them²⁶. This clause is evidently arbitrary as it allows the Government to use its subjective satisfaction while implementing this power. Without a check imposed on the Government controlling this power, the said provision is not justifiable on the acid test of Article 14 of the Constitution.

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 2008 IS VIOLATIVE OF ARTICLE 21 OF THE CONSTITUTION OF INDIA

The right to personal liberty has been assured under Article 21 of the Constitution. The phrase ‘personal liberty’ as used in Article 21 does not only protect an individual against bodily arrest but is of the widest possible amplitude and covers many rights which constitute the personal liberty of man²⁷. Further, the principle of reasonableness applies with equal magnitude to a procedure contemplated under Article 21 and hence has to be fair, just and reasonable and not fanciful, oppressive and arbitrary²⁸. The explicit law under the Constitution law cannot be arbitrary or irrational²⁹ and no man shall be deprived of his life or personal liberty except according to a fair just and reasonable procedure established by law³⁰.

²⁵ Section 14, Unlawful Activities (Prevention) Amendment Act, 2008

²⁶ *Ibid.*

²⁷ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295

²⁸ *Ibid*; *R.C Cooper v. Union of India*, (1970) 1 SCC 248; *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

²⁹ *Maneka Gandhi v. Union of India*, *supra*, n. 18; *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360; *Ram Narayan Agarwal v. State of U.P.*, (1983) 4 SCC 276; *Kartar Singh v. The State of Punjab*, (1994) 3 SCC 569

³⁰ *Jumman Khan v. State of U.P.*, (1991) 1 SCC 752; *Bachan Singh v. State of Punjab*, (1979) 3 SCC 727; *Mithu v. State of Punjab*, (1983) 2 SCC 277

As the Hon'ble Court scrutinized in *Joginder Kumar v. The State of Uttar Pradesh*³¹ that “...arrest can cause incalculable harm to a person's reputation and self-esteem. Arrest should be made only after a reasonable satisfaction is reached after some investigation as to the genuineness of the suspicion regarding a person's complicity in the matter”. Thus, the Hon'ble Court drew a line between the power to arrest and the justification to arrest and lay down that the justification should be in harmony with procedure established under Article 21. It is hence, put forward that the impugned Act provides that if an officer of the designated authority finds a reason to believe from his “personal knowledge” or from the “information given by any person or any other thing” that an offence under the UAPA may be committed then he can authorize any subordinate officer to arrest the individual(s) so involved.³² Such a clause granting the arrest of a person without investigation but on a mere reason to believe on grounds that allow heavy discretion to the State is violative of Article 21 of the Constitution.

THE PARLIAMENT IS NOT EMPOWERED TO ENACT THE NATIONAL INVESTIGATION AGENCY ACT, 2008

Under Article 246³³ of the Constitution of India the Centre has the exclusive power to make laws in relation to matters enumerated in List I provided in the 7th Schedule, whereas the States have the Exclusive right to make laws in respect to the matters enumerated in List II attached in the 7th Schedule to the Constitution.

The doctrine of Colourable Legislation states that the legislature cannot enact an Act which is beyond its competence to enact. In *K.C. Gajapati Narayan Deo and Anr, v. The State of Orissa*³⁴ the Hon'ble Court held, and duly affirmed³⁵ in subsequent cases, that “... the whole doctrine resolves itself into the question of competency of a particular Legislature to enact a particular law. If the Legislature is competent to pass a particular law, the motives which impelled it to act are really irrelevant. On the other hand, if the Legislature lacks competency, the question of motive does not arise at all. Whether a statute is constitutional or not is thus always a question of power. The crucial question to be asked is whether there has

³¹ *Joginder Kumar v. The State of Uttar Pradesh*, AIR 1994 SC 1349.

³² *Supra* note 17

³³ Article 246

³⁴ *K.C. Gajapati Narayan Deo and Anr, v. The State of Orissa*, AIR 1953 SC 375

³⁵ *State of Kerala and Anr. v. The Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. etc.*, AIR 1973 SC 2734; *K. Rajendran and Ors v. State of Tamil Nadu*, AIR 1982SC 1107; *B.R. Shankaranarayana and Ors v. The State of Mysore and Ors*, AIR 1966 SC 157; *P. Vajravelu Mudaliar v. Special Deputy Collector, Madras and Anr*, AIR 1965 SC 1017; *Karimbil Kunhikoman v. State of Kerala*, AIR 1962 SC 723; *The Board of Trustees, Ayurvedic and Unani Tibia College, Delhi v. The State of Delhi and Anr.*, AIR 1962 SC 458.

been a transgression of legislative authority as conferred by the Constitution.” Therefore, if a statute, apparently enacted under one Entry in the List, falls in plain truth, not of that Entry but of one assigned to another legislature, it can be struck down as colourable even if the motive were most commendable³⁶.

Also, according to the doctrine of Pith and Substance the actual nature and character of the legislation in question should be seen to establish which List it relates to³⁷. The doctrine of Pith and Substance is used in determining the true character of a statute. Due regard must be given to the statute as a whole and to the scope and effect of its provisions³⁸. The word of the Hon’ble Supreme Court in *Kartar Singh v. State of Punjab*³⁹, which was duly affirmed in a catena of cases⁴⁰, is relevant here. It was held that “On a scrutiny of the Act in question, if found, that the legislation is in substance one on a matter assigned to the legislature enacting that statute, then that Act as a whole must be held to be valid notwithstanding any incidental trenching upon matters beyond its competence, otherwise the same is invalid.”

It is contended that the pith and substance of the NIA falls within the ambit of Entries 1⁴¹ and 2⁴² of List II attached to the 7th Schedule. Various provisions of the Act⁴³ confer the powers of police onto the National Investigation Agency and empower the Agency to carry out police functions. It is reiterated that police is a State subject and its functions cannot by a Parliamentary law be bestowed on an existing or a new central force⁴⁴. Further, investigation of crimes forms an integral part of maintenance of public order which is a matter under the State List. Hence, in pith and substance the NIA relates to entries in List II of the 7th Schedule and thus the Parliament cannot enact the same.

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³⁶ *Ashok Kumar v. Union of India*, AIR 1991 SC 1792; *Naga People’s Movement of Human Right v. Union of India*, (1998) 2 SCC 109

³⁷ *Subramaniam Chettiar v. Muthuswami Goudan*, AIR 1941 FC 47; *Prafulla Kumar v. Bank of Commerce*, AIR 1947, PC 60; *A.S. Krishna v. State of Madras*, AIR 1957 SC 297

³⁸ *Central Bank of India v. State of Kerala*, (2009) 4 SCC 94; *State of Maharashtra v. Bharat Shantilal Shah and Ors.*, 2008 (12) SCALE 167

³⁹ *Kartar Singh v. State of Punjab*, (1994) 3 SCC 569

⁴⁰ *State of Maharashtra v. Bharat Shantilal Shah and Ors.*, 2008 (12) SCALE 167; *Jamshed N. Guzdar v. State of Maharashtra and Ors.*, AIR 2005 SC 862; *E.V Chinmaiah v. State of Andhra Pradesh and Ors.*, AIR 2005 SC 162; *M.P Vidyut Karamchari Sangh v. M.P Electricity Board*, (2004) 9 SCC 755; *Union of India and Ors. v. Shah Goverdhan L. Kabra Teachers College*, AIR 2002 SC 3675

⁴¹ Seventh Schedule, List II, Entry 1

⁴² Seventh Schedule, List II, Entry 2

⁴³ Sections 3(2), 3(3), 6(5) and 6(6), National Investigation Agency Act, 2008

⁴⁴ *Prakash Singh v. Union of India*, (2006) 8 SCC 1

The Right to equality as enumerated in Article 14 of the Constitution of India prohibits the conferring of arbitrary, unfettered and unbridled subjectivity on the Executive. Such discretion endowed upon the executive should be bounded by sufficient safeguards and guidelines else such discretion is in violation of the Constitution.

Accordingly, a provision⁴⁵ of the NIA enumerates that the Central Government can, *inter alia*, on the basis of 'other relevant factors' decide as to whether a particular matter is to be referred to the Agency or not. There are absolutely no guidelines to decide as to what the 'other relevant factors' may be. It is therefore submitted that expansive and free-for-all discretion has been allowed to the Executive to decide which matter may be referred to the Agency. Hence the provision is *ultra vires* Article 14 of the Indian Constitution.

CONCLUSION

It is safe to say that the provisions of the UAPA and NIA Act are draconian in nature and are against the principle of natural justice as they are against the principle of fair trial. It can be said that if these laws are permitted to exist they can and will be misused to no end. These acts are *ultra vires* the constitution which through its articles provides for fair trial, equality before law and right to life.

In light of the articles of the constitution these acts should be struck down, as they are or be amended to an extent wherein the provisions of the act are no longer against the provisions of the constitution of India.

It has been held⁴⁶ that the constitution of India is the basic structure of our country and no laws can be made against the constitution unless the constitution has been amended to make the laws valid.

⁴⁵ Sections 6(3), National Investigation Agency Act, 2008

⁴⁶ (1973) 4 SCC 225