

INTERNATIONAL JOURNAL OF LEGAL SCIENCE AND INNOVATION

[ISSN 2581-9453]

Volume 3 | Issue 6

2021

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Democracy & Anti-Terror Legislations: A Comparative Look at India & USA

ADARSH PANDEY¹, AKASH DIXIT², ADITI JAISWAL³ & AKASH JOSEPH⁴

ABSTRACT

When we give a cursory look at India and US to study their anti-terror legislations, the first thing that comes to our mind is that they both share the external and internal threats of terrorism, for which they needed to enact certain legislations to combat it. This necessitates the respective government to give its law enforcement officials the necessary tools to respond to these threats, find terrorists, and prevent future attacks. If we move a step further in our study, we find that they also share the commitments to a democratic form of government where core constitutional values like freedom of speech, civil and political liberties, and human rights are cherished. However, this isn't an unbridled freedom, the security interest will come in play to an extent to justify the curtailment of the freedoms in certain cases but a balance will always be strived to be maintained by the legislators between protections of these rights and national security interest.

The political, historical, and cultural landscape and reality of each country do shapes what laws are made and how they are implemented yet the societal impact of these laws is different because of the role both countries assign to its courts as Sentinel Qui Vive for their response to the call of constitutional conscience. Irrespective of these differences and a different political consideration for which they are being used, a comparison between the two democracies can be drawn which will help us to come at a better understanding of the ways in which the two important concerns can be tackled i.e. National security interest and Constitutional rights. A comparative study of anti-terror legislation of these two states would help us to plug in loop holes of anti-terror legislation and adequately vary the scope and ambit of such legislations.

Keywords: *Terrorism, Security, Liberty, Constitution, Judiciary.*

¹ Author is a LL.M. (Constitution & Criminal Laws) student at National Law University, Delhi, India.

² Author is a LL.M. (Business Laws) student at National Law University, Delhi, India.

³ Author is a LL.M. (Business Laws) student at National Law University, Delhi, India.

⁴ Author is a LL.M. (Business Laws) student at National Law University, Delhi, India.

I. EVOLUTION OF ANTI-TERROR LEGISLATIONS IN INDIA AND US

“Terrorism is the tactic of demanding the impossible and demanding the same at the gunpoint”

- Christopher Hitchens

“Terrorism has become the systematic weapon of war, that knows no border and seldom has a face”

- Jaques Chirac

Terrorism shocks the very root of humanity and any nation be it developed or developing, is equally affected by the destructive terrorist activities. The terrorist activities have increased globally in the past few years and is a cause of concern for the entire global community. At all the times uniformly, terrorism cannot have a definite religion, definite identities, definite boundaries, etc. It could be anti-state or state sponsored, it could be anti-religious or anti-group. The causes are also widespread: separatist movements, irredentism, upholding a specific political philosophy and aiming to destroy the others, religious terrorism, combating perceived governmental oppression, ecoterrorism, etc.⁵ These acts though may have broad targets and high-level motives behind their acts, but thousands of innocent people are sacrificed who are clueless about all this⁶. The other side, justify their acts as being helpless to fulfill their demands by legitimate means, therefore taking illegal and coercive direction to ensure the

realization of same, which has completely zero justification in eyes of logic and practicability as no grudge can justify merciless slaughter of human beings on a large scale.

Since the terrorism is such a crucial issue in global arena today, the governments all across the globe have responded efficiently by tacking various steps to tackle it, so as to safeguard the lives of its people and also, meet their global commitments. The actions taken by the government range from making stringent laws to counter terrorism in multi-directional way, the executive actually implementing those laws and undertaking various steps to tackle it and the judicial organs giving stringent punishment as per the due process of laws to set a precedent for deterring others from participating in similar acts. Each nation develops its anti-terrorist laws in light of its own requirements, tailored to its particular needs and serving the terrorism on its territory.

For the analysis of the issue at hand, the author has opted for two jurisdictions, the democracies of United States of America and India, and would critically evaluate the same following a comparative approach.

A. Evolution of Indian Law

India, one of the major victims of terrorism, currently has many laws to combat the issue of terrorism, such as Chapter VI of IPC, National Security Act (NSA), Unlawful Activities Prevention Act (UAPA), etc. but for the purpose of research at hand, the author would consider the

⁵ Judith Tinnes, *Bibliography: Root Causes of Terrorism*, 11(4) PERSPECTIVES ON TERRORISM, TERRORISM RES. INST. 102, (2017).

⁶ Igor Primoratz, *What Is Terrorism?*, 7(2) J. OF APPL. PHIL., WILEY 129, (1990).

chief anti-terrorism law of India, the UAPA. Before going into the substance or actual ground level working of law, it is necessary to understand its evolution.

Jawaharlal Nehru, the then-prime minister, called a National Integration Conference in 1961 to discuss strategies to tackle communalism, casteism, provincialism, language chauvinism, and other issues. A National Integration Council was established to make recommendations on national integration issues. Following that, in 1966, the Unlawful Activities (Prevention) Bill was introduced.⁷ The original statute was more analogous to a Committee of Inquiry as a fact-finding agency in character and function.

Nevertheless, this Bill expired, and a new Bill was proposed in 1967, that retained the similar elements while somewhat altering the objectives. Because the government had passed other preventive laws in the meantime, such as the Maintenance of Internal Security Act of 1971, the National Security Act of 1980, the Terrorist and Disruptive Activities (Prevention) Act of 1987, and the Prevention of Terrorism Act of 2002, it was nearly never utilised. The 9/11 terrorist attack in the United States affected not just the international order as well as how we, as human beings, saw one other in 2001.⁸ Each Asian and Mohammedan was viewed as a

possible culprit. The United Nations took note of the assault on the United States, and the Security Council initiated and approved Resolution No. 1373/2001, which addresses terrorist dangers to international order and safety. In response to the rise in terrorist acts, Chapter VII of the United Nations Charter declared that all Nations must inhibit and repress financing of terrorism; penalise the wanton stipulation or acquisition of funds by any methods; and explicitly or implicitly thaw accounts and restrict any economic help to terrorist groups.

In response, India enacted the UAPA Amendment Act of 2004. It was noticed with curiosity that POTA provisions had been abused in the previous two years. Nevertheless, because the government was adamant about combating terrorism, especially in light of UN obligations made under Resolution 1373, it felt it was important to criminalise different aspects of terrorism through suitable revisions to the UAPA.⁹ It essentially combined the terminology of 'terrorist' found in TADA, which had expired in 1995, with POTA, which was being abolished due to abuse.¹⁰

After the November 26, 2008 incident in Mumbai by armed militants, further modification to the UAPA was proposed and passed on December 17, 2008.¹¹ The UAPA had further

⁷ Anjana Prakash, *It's Time for the Government To Redeem Itself and Repeal the UAPA*, THE WIRE (Jul.25, 2021), <https://thewire.in/law/its-time-for-the-government-to-redeem-itself-and-repeal-uapa>.

⁸ Prabhaskar K Dutta, *Decoded | Spotlight on terror law UAPA after Stan Swamy's death*, INDIA TODAY (Jul.6, 2021, 11:36PM), <https://www.indiatoday.in/india/story/decoded-terror-law-uapa-stan-swamy-death-1824443-2021-07-06>.

⁹ Rahul Tripathi, *TADA to UAPA, what India's terror*

laws say, THE INDIAN EXPRESS (Aug. 30, 2018, 03:08AM), <https://indianexpress.com/article/explained/tada-to-uapa-what-indias-terror-laws-say-elgaar-parishad-probe-5331777/>.

¹⁰ UJWAL KUMAR SINGH, *THE STATE, DEMOCRACY AND ANTI-TERROR LAWS IN INDIA* (1st ed. Sage Publications 2007).

¹¹ South Asia Human Rights Documentation Centre and Ravi Nair, *The Unlawful Activities (Prevention)*

measures comparable to POTA and TADA in terms of maximal police detention time, imprisonment pending a chargesheet, plus bail limitations.¹² The UAPA was re-amended in 2012, expanding the already broad term of "terrorist act" to encompass crimes that endanger the nation's financial stability.¹³

Both the NIA Act, 2008 and the Unlawful Activities Prevention Act, 1967 were revised by the Union Cabinet in 2019. Following the new modification to Schedule 4 of the UAPA, the NIA will be able to label an individual alleged person with terror associations as a terrorist. Formerly, just institutions could be branded as terrorist organisations, however after the UAPA statute was amended in 2019, any person can be classified as a suspected terrorist.

B. Evolution of USA Law

As aforesaid in case of India, similarly in USA as well, there are plethora of anti-terrorism legislations, such as Homeland Security Act, 2002, Antiterrorism and Effective Death Penalty Act, 1996, SAFETY Act, 2002, etc. but for the purpose of instant research, Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, 2001 would be chiefly take into consideration.

In the '80s terror activities got momentum in the USA due to various reasons, when terrorist groups began engaged in hijackings,

assassinations, bombings, and hostage targeting at US interests in the 1970s, prompting the US government to become concerned.' The frequency of anti-American incidents climbed from 54 to 139.188 between 1968 and 1986. Anti-American terrorism, unlike anti-Indian terrorism, cannot be connected to a single conflict. Rather, it is the product of the US government's more ambiguous policy direction. There are two types of anti-American terrorism: domestic and international.

To begin, anti-American terrorist activity pertains to a movement of anti-government terror that peaked in the 1990s and then faded away. Such domestic terrorist organisations tended to follow radical right-wing ideologies and tried to undermine the US federal government's power.' These beliefs were entwined with millennial anxieties and included white supremacist and isolationist ideologies.

In the early 1990s, awareness level of such groups grew following the bombing of the Alfred R. Murrah Federal Office Complex near Oklahoma City in April 1995. Following retaliation targeting Arab-Americans, this was revealed that the incident was planned out by domestic terrorists, who were ultimately apprehended and charged criminally. Domestic terrorism, on the other hand, looks to be a minimal threat today, following the events of September 11.

Amendment Act 2008: Repeating Past Mistakes, 44(4) ECON. AND POL. WEEKL. 10, (2009).

¹² Christopher Gagné, *POTA: Lessons Learned From India's Anti-Terror Act*, 25(1) BOSTON COLLEGE THIRD WORLD L. J. 261, (2005).

¹³ Arun Ferreira and Vernon Gonsalves, *Fifty Years of Unreasonable Restrictions Under the Unlawful Activities Act*, THE WIRE (Mar. 9, 2017), <https://thewire.in/rights/uapa-anti-terrorism-laws>.

Overseas terrorism on the US has mostly been carried out by Islamic Fundamentalist groups, which many believe are responding to the US's long history of interference in Muslims affairs. First, as Kellner points out, the US interfered in Afghanistan after the invasion of the Soviet Union in the 1970s and 1980s. Following tens of billions in help to the Afghan insurgency, the US government withdrew completely from Afghanistan under George H.W. Bush, allowing a civil war to erupt, leading to the formation of the Taliban. Second, the United States' support of Saudi Arabia's authoritarian leadership in the pursuit of oil-related interests has sparked enormous Muslim resentment of the US.

Thirdly, the United States' role in placing sanctions on Iraq following the 1991 Gulf War, which resulted in a huge humanitarian crisis, has been mentioned as a source of anti-American sentiments. Fourth, terrorist organizations targeting the United States frequently point to Support for Israel in the Palestine problem as a cause of American resentment.'

Finally, the United States Patriot Act, originally called as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, was adopted as a result of the terrorist events on September 11, 2001. In response to an international security threat and a push to arrest terrorists and their assets, the Security Council issued Resolution 1373. As a result, the September 11 terrorist attacks in Washington, New York, and Pennsylvania were classified as acts of global terrorism and threats to

international peace, a first for the UN Security Council.

C. A Comparative Analysis

The United States is a poor case study of counter-terrorism policy in so many ways. In various aspects, the United States differs from the previous instances, which has an impact on how its counter-terrorism measures should be understood. First, while terrorist organizations have their own set of grievances, anti-American terrorism, unlike the other situations, cannot be linked to a specific struggle. In India, terrorism is a result of ethnic and regional tensions. At most, anti-American international terrorism might be understood as the product of a "clash of civilizations," a notion coined by Samuel Huntington in 1996. In this view, anti-American terrorism is an attack on the West, with America as its superpower. According to one version of this idea, anti-American terrorism is the result of globalisation, with the United States leading a neoliberal Westernization at the behest of transnational companies.

Unlike USA, in India the root cause of terrorism is separatist activities within India along with the Conflict with the Pakistan due to the Kashmir issue. The major legislation in USA in regard to handling problem of Terrorism is Patriot Act, which gives extensive power to the law enforcement agencies.

II. DEMOCRACY AND ANTI-TERROR LEGISLATIONS

"In the name of rule of law, democracy and human rights, we cannot accept the rights of individual be trampled upon or that populations

are targeted and discriminated against in the name of war against terrorism”

- Tariq Ramadan

The war against terrorism is any nation’s most crucial policy upon which the stability, security and order of the nation rests upon. For this, every nation begins with evolving legislation that generally deal with issues of terrorist funding, steps to tackle terrorism, proper trial procedure, etc. But at times, what if, the said legislations are used by government not against terrorists but against its own people to muzzle and stifle dissent. This is not a hypothetical assertion but a harsh reality of our nations. Democracy rests upon the stone of dissent. It is the dissent, that ensures accountability of the power holders towards the power givers. The liberty is the nucleus of any democratic constitution all across the world, but at the same time, reasonable restrictions may be placed on it to maintain stability in the society. The reasonability at times becomes translucent or even opaque, and in the name of national security, public order, etc. ordinary citizens are tagged as terrorists by the executive agencies and this allegation, though later may be refuted, ruins entire life of a person, and even at times, claims life. The tussle between national security justifications of state and constitutionally guaranteed rights of citizens is a matter of debate today in almost all liberal democracies around the globe. For the purpose of instant research,

A. The Indian Legislation and Statistics on its Exploitation

The preamble to UAPA reads as follows: “*An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations and for dealing with terrorist activities, and for matters connected therewith*”. It acts as India’s chief tool against terrorism and hence contains stringent bail provisions, greater power to police officials for search, seizure, arrest, witness protection, etc. There is a strong presumption against accused if he commits “terrorist act” as per S.15 and S.43E. It also provides wide window to police (180 Days) to finish investigation and file charge-sheet. After the latest controversial 2019 amendment, central government is empowered under the act to designate any individual, in addition to organization, as terrorist. It has a separate chapter dedicated to deal with proceeds or property of terrorism. Also, it covers wide variety of terrorist activities such as organizing terrorist camps, raising funds for terrorist activities, harboring, threatening witnesses, conspiracy, etc. and provides specific punishment for each. Provisions also deal with offences committed by companies, societies and trusts and specific punishment for each.¹⁴

Aforementioned were brief details about the law, but for the purpose of instant research, it is more important to analyze the ground functioning of the law rather than its bare provisions. **NCRB Data** reveals, “as many as 1948 persons were

Rights, Terrorism, and Security Laws in India, 20(1) COLUM. J. ASIAN L. 93, (2006).

¹⁴ Anil Kalhan , Gerald P. Conroy, Mamta Kaushal & Sam Scott Miller, *Colonial Continuities: Human*

arrested under the UAPA in 1226 cases registered across the country in 2019. Such cases registered in 2015-2018 stood at 897, 922, 901 and 1182¹⁵ and the number of those arrested¹⁶ was 1128, 999, 1554 and 1421” respectively.¹⁷ Though cases have declined to 796 in 2020¹⁸, but such sharp rise of 72% in UAPA cases¹⁹ in last 5 years cannot be negated by the drop of just one year. Drop would be appreciated if it continues or atleast remains stable for 2021 and onwards. What is even most interesting that the actual conviction rate is just 2.2%²⁰, as per the data revealed by Central Home Ministry in Lok Sabha, which means that people are arrested in large amounts by the police all across the nation, but the prosecution cases could not stand the stringent test of statutory and constitutional safeguards, and hence judiciary discharges the people alleged arbitrarily under the said law.²¹ A total of 5134 cases existed as per the NCRB 2019 report including the pending cases as well as afresh cases that year.²² Since the Jammu &

Kashmir Reorganization by the Central Government in 2019, the J&K executive has booked around 2,300 people in further 1,200 cases under the UAPA, out of which, 46% are still in jail.²³

Father Stan Swamy (84) alongwith 15 others was booked under UAPA in Bhima Koregaon case, and he spent 9 months as undertrial in jail and could not get bail due to stringent provisions, and finally succumbed to death.²⁴ 102 people were booked on a single day under UAPA in Tripura in November 2021 beginning, who expressed their views regarding Tripura violence against a particular religious community on various platforms.²⁵

The “**World Report 2021** published by Human Rights Watch” notes that “*Indian authorities brought politically motivated cases, including under draconian sedition and terrorism laws, against human rights defenders, student activists, academics, opposition leaders, and critics*”.²⁶ The World Report 2020 notes that

¹⁵ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2017), <https://ncrb.gov.in/en/crime-india-year-2017>.

¹⁶ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2018), <https://ncrb.gov.in/en/crime-india-year-2018>.

¹⁷ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2019), <https://ncrb.gov.in/en/crime-india-2019-0>.

¹⁸ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2020), <https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>

¹⁹ Special Correspondent, *Parliamentary proceedings / 2.2 % of cases registered under the UAPA from 2016-2019 ended in court conviction*, THE HINDU (Feb. 10, 2021), <https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece>.

²⁰ *Ibid.*

²¹ Anushka Singh, *Criminalising Dissent:*

Consequences of UAPA, 47(38) ECON. & POL. WEEKL. 14, (2012).

²² NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, CRIME IN INDIA (2019), <https://ncrb.gov.in/en/crime-india-2019-0>.

²³ Naveed Iqbal, *2,300 booked under UAPA in J&K since 2019, nearly half still in jail*, THE INDIAN EXPRESS (Aug. 5, 2021, 07:05AM), <https://indianexpress.com/article/india/2300-booked-under-uapa-in-jk-since-2019-nearly-half-still-in-jail-7438806/>.

²⁴ Yashovardhan Azad, *Stan Swamy's Death Exposes Our Broken Criminal Justice System Crying For Reforms*, THE WIRE (Jul. 9, 2021), <https://thewire.in/rights/stan-swamys-death-uapa-terrorism-bhim-koregaon-justice-undertrial>.

²⁵ Shuma Raha, *Tripura UAPA Cases: Why Is Modi's India So Scared of Its Critics?*, THE QUINT (Nov. 10, 2021, 03:16PM), <https://www.thequint.com/voices/opinion/tripura-uapa-cases-why-is-modis-india-so-scared-of-its-critics>.

²⁶ HUMAN RIGHTS WATCH, WORLD REPORT 321 (2021),

“Authorities used sedition and criminal defamation laws to stifle peaceful dissent”.²⁷ The World Report 2019 notes that “Draconian sedition and counterterrorism laws were used to chill free expression”²⁸ in India.

India slipped down ‘free’ to ‘partly free’ in 2021 as per the **Global Democratic Ratings** published by Freedom House.²⁹

Article 19, an English organization founded worldwide in 1987 that works on issues of human rights. It specifically focusses on promoting and expanding “freedom of expression and information. The” “**Global Expression Report 2019-20: The state of freedom of expression around the world**” published by it reveals that since 2009, the liberty of expression has fallen to the lowest in the past year as it stands to be 50/100.³⁰ Now talking specifically about India, it occupies a place amongst the topmost countries alongwith problematic nations such as Iran, China, Russia, Bangladesh, etc. where there was intense decline in aforesaid freedom.³¹ GxR in the said report denotes Global Expression Metric and for India, in 2009 it was 59 which fell to 19 in 2019, thus a loss of 40 points, which is

grievous hence troublesome.³² The report highlights the reason of this decline due to exercise of military, financial and political influence.³³ The report states that 2019 saw 213 Internet cessations across 33 nations, in juxtaposition to 188 shutdowns in 2009. India alone accounted for 50% (121 incidents) of these events.³⁴ All of this is done by censoring civil societies and media or any other watchdogs and killing democratic institutions and then gradually undermining the sanctity of elections.³⁵ A paragraph from the said report which highlights the pathetic state of India and reasons for the same on an international platform is worth noting: “In August 2019, India’s federal government passed legal amendments allowing individuals to be designated as terrorists without due process. The law is routinely misused to target religious minorities, critics of the government, and social activists.”. As of 2021, the aforesaid reports begins with the allegation that the ruling government of India “continues to lay waste to democratic institutions and human rights”³⁶. Situation has not improved and a decline of 38 points has been recorded in the last decade, and currently stands in ‘highly restricted’

https://www.hrw.org/sites/default/files/media_2021/01/2021_hrw_world_report.pdf.

²⁷ HUMAN RIGHTS WATCH, WORLD REPORT 270 (2020),

https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf.

²⁸ *India Events of 2018 – World Report 2019: India*, HUMAN RIGHTS WATCH, <https://www.hrw.org/world-report/2019/country-chapters/india> (last visited Jan. 16, 2021, 11:47PM).

²⁹ FREEDOM HOUSE, FREEDOM IN THE WORLD 2 (2021),

https://freedomhouse.org/sites/default/files/2021-02/FIW2021_World_02252021_FINAL-web-upload.pdf

³⁰ *World freedom of expression rankings for 2019/20*,

ARTICLE 19, <https://www.article19.org/gxr2020/> (last visited Jan. 16, 2021, 10:47PM).

³¹ *Ibid.*

³² ARTICLE 19, GLOBAL EXPRESSION REPORT 2019-20: THE STATE OF FREEDOM OF EXPRESSION AROUND THE WORLD 12 (2020), <https://www.article19.org/wp-content/uploads/2020/10/GxR2019-20report.pdf>.

³³ *Id.* at 14.

³⁴ *Id.* at 24.

³⁵ *Id.* at 70.

³⁶ ARTICLE 19, GLOBAL EXPRESSION REPORT 2021: THE STATE OF FREEDOM OF EXPRESSION AROUND THE WORLD 10 (2021), <https://www.article19.org/wp-content/uploads/2021/07/A19-GxR-2021-FINAL.pdf>.

category. All this has led India to fall to 'highly restricted' category in 2020 as compared to 'restricted' category in 2010.³⁷

This was all about how the anti-terrorism law of India is used to suppress democracy and a tool in hands of government to act at its whims and caprices. The law in its current form and most importantly, its grievous exploitation raises a question of its existence especially in light of the constitutional guarantees given to the citizens.

B. The USA Legislation and its Applicability

“And he moved the tyranny suppression of freedom to his own country, and they called it the Patriot Act, under the disguise of fighting terrorism”

Aforesaid are the words of an infamous personality, late Osama Bin Laden, the Al-Qaeda chief. The author has sarcastically quoted the words of none other than a terrorist himself here, to pose a question that makes readers to think and then author would attempt to answer it. The research at hand would attempt to explore whether there was any sense in his words.

The USA PATRIOT Act was signed into law on October 26, 2001, just 6 weeks after the acts of terrorism of September 11, 2001 that shocked the United States, is the US counterpart to UAPA. It allows for intelligence investigations, the collection of communications, financial, and credit records, and the tracking of communications and funds linked with anyone regarded a national security threat. Previous federal law prohibited electronic eavesdropping

on the mobile phone, face-to-face, or desktop pc, as well as other forms of digital communication systems, unless a court order was obtained, which could only be used for specific crimes and required individuals to be notified of any intercepted conversations when the order expired. The PATRIOT Act gave the FBI more power to seek information using national security letters, which are essentially summons that don't need a judge's sanction. The Act empowered the FBI to obtain consumer information from a variety of sources, including Internet service providers, telephone companies, and financial institutions.

The three goals of the PATRIOT Act are to: develop and extend current criminal law designed to fight terrorism (by adding specific provisions and broadening the definition and authority of current laws); authorise state surveillance and encourage private organizations to share the information with the authorities (by attempting to remove legal liability); and strengthen government-to-government information sharing (by attempting to remove legal liability) (by removing restrictions that regulated federal, state, and local law enforcement relations).

The PATRIOT Act's Section 213 provides for delayed notification of search warrants (i.e. Searches without notice), but the authorities need a search warrant under the Fourth Amendment to search and take anything from a home or company (Department Of Financial Services.

³⁷ *Id.* at 142.

Terrorists were thought to be members of a specific group when the Foreign Intelligence Surveillance Legislation was enacted in the 1970s. To assist with terror case scenarios, the FISA court can now be asked to assist in foreign intelligence investigations and order production of the same form of records available via grand jury subpoenas, if the government demonstrates that the documents are needed for an authorised investigation to obtain overseas secret information that does not concern an United States person, or to protect against global terrorism or highly secretive intelligence operations, Amendment, Provided that such an examination of a U.S. individual is not done solely on the basis of First Amendment-protected activity. This is based on the notion that terrorists employ sophisticated communication technologies and modify their tactics constantly to avoid detection.

According to a June 2002 Fox News poll, 63 percent of respondents supported expanding law enforcement powers to combat terrorism, and a 2001 LA Times poll, 61 percent of respondents thought it was acceptable to give up certain civil liberties to combat terrorism.

Though critics claim that the PATRIOT Act infringes on civil liberties, some argue that this is not the case because the Act simply expands what is already in place to include terrorists and terrorist organisations; facilitates information sharing and cooperation between many government agencies so that they can properly identify interconnections; encourages better sharing of information to guarantee that freedoms are not inadvertently violated; and

allows victims of computer hacking to receive compensation.

The government has too much power under USA Patriot to imprison non-citizens accused of terrorism for seven days before pursuing criminal or immigration charges against them. Indefinite detention has been permitted since 1996 in circumstances when the detainee's country of origin refuses to accept the detainee; in effect, USA Patriot allows for the detention without trial of terrorist suspects.

The USA Patriot act is just one component of the US government's wider shift away from democratic principles in counter-terrorism efforts. While USA Patriot allows for the detention without trial of terrorist suspects if their native country refuses to acknowledge them, the government has utilised this power in the past to detain Americans suspected of terrorism participation. For example, Yasser Hamdi, a US citizen who was kidnapped on the battleground in Afghanistan and has now been held in a military prison after the government classified him as a "enemy combatant," is being imprisoned in a detention center. In a separate case, in May 2003, federal agents detained Jose Padilla (a Brooklyn resident) at Chicago's O'Hare International Airport. Padilla is charged with plotting to blow a "dirty bomb" on US soil. Padilla has been imprisoned in solitary confinement by the US government without even a trial or legal representation. Mr. Padilla's situation exemplifies civil libertarians' greatest fears: Because the government suspects him of being a terrorist, a citizen born in the United States who is accused of committing a crime in

the United States and detained on American soil is unable to access the criminal court system.

In addition, also when criminal charges have been brought, the administration has indicated it is willing to investigate prosecution beyond the criminal justice system. For example, Ali Saleh Kahlah Al-Marri, a Qatari student, was accused of lying to the FBI and credit card fraud. Al-Marri were later named like an enemy combatant by the military and imprisoned. This was the first instance an individual was labelled as an enemy combatant after being charged with a crime.

These incidents are consistent with the Bush administration's policy of trying foreign terrorists in military courts rather than criminal courts, which was announced on November 13, 2001. Instead of an independent judiciary, these tribunals would've been composed of military commanders and officials of the executive branch. The rules of evidence have been significantly eased, and the identities of witnesses have been concealed. There is no judicial review allowed.

Combatants apprehended in Afghanistan were held in the US Marine Base in Guantanamo Bay, Cuba. As per the Bush administration, such soldiers were "illegal combatants" because they were neither prisoners of war covered by the Geneva Conventions nor criminals entitled to the benefits of the US criminal justice process.

C. A Comparative Analysis on the Indian and USA Law to regulate Terrorism

Global terrorism has prompted domestic and international steps to minimize the loss of life and property, as well as mutually advantageous

coordination between the world's two greatest democracies, India and the United States. Both countries have experienced devastating terrorist assaults in their own countries and have devised thorough policies to avoid future terrorist acts. The India-US Counter Terrorism Partnership was inked in 2010 to promote successful coordination based on a solid foundation of mutual benefit as an important element of their bilateral strategic alliance. The Unlawful Activities Prevention Act (UAPA) in India and the USA PATRIOT Act in the United States both have comparable techniques for countering terrorism.

The PATRIOT Act and the UAPA (and its predecessors TADA and POTA) share a variety of features, such as: enabling electronic surveillance with very few protections for terror suspects; permitting suspects to be imprisoned for extended periods of time before charges have been filed; economic asset seizure; increased sentencing; including the use of special courts (Designated Courts in Indian, FISA Courts in the US).

The use of secret witnesses and the admissibility of forced confessions are likewise permitted under the UAPA. The PATRIOT Act gives law enforcement considerably more leeway in obtaining communication, financial, credit, and consumer information without a formal search warrant or a judge's permission. The Act also makes it easier for state agencies to share information.

III. THREAT TO NATIONAL SECURITY: A PRESUMPTION OF GUILT?

“If we destroy the human rights and rule of law in response to terrorism, they have won”

- Joichi Ito

In every country, the chief concern of the government is to detect and prevent a potential terrorist attack for the protection of the country's security. If we take this into account then there is a similarity between the USA and India in the drafting of their anti-terror legislation as both countries formulated or made amendments to these security laws in response to tackle certain acts of terrorism. However, the abuse of such legislation can also be seen when too much discretion is given to the executive, the citizen bears the burden by risking the loss of their civil rights as guaranteed by their country's constitution and safeguards provided by judicial pronouncements. Both the countries have witnessed an imbalance of power that tilts more towards the nation's security than its citizen in regard to applications of such anti-terror legislation. In India, the situation worsened by the recent 2019th amendment in the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as UAPA).

A. National Security: An Alibi For Uapa/Patriot?

Every time the national security of a country is threatened, we see its direct impact on civil liberties. In such crises, at least one out of every two cases will reflect upon an encroachment on civil rights. History is a testament to that. It can provide us an insight into the evolution of such

encroachment with respect to the anti-terror legislation. We can evaluate Patriot Act and UAPA in this backdrop.

A country for preventing a potential terror activity will allow its law enforcement authorities to gather any possible information, even the one remotely related to terrorism. Criminal law mandates requirements of “reasonable cause and suspicion” yet when it comes to investigative searches for the purpose of preventing terrorist activities, the scope of investigation for the protection of the nation's security knows no bound.

Amendments in UAPA serve as a classic example. Since it took place of POTA it started encroaching upon civil liberties and threw the fair trial and due process measures out the window. It concerns itself with the protection of national security and this gives the government a tool to claim legitimacy to make the sweeping arrests of anybody who dissent. Its problematic amendment now deems an individual a terrorist by giving him a fair trial under the justification that their act poses a threat to society. It has given rise to cases of human rights violations in India.

B. Uapa/Patriot: A Tool For National Security Or Political Safety?

The anti-terror legislation has a tendency to use invasive surveillance with an aim to criminalize the dissent of its opposition. In the USA for example, Patriot Act has been used by the government to label indigenous American protestors as domestic terrorists. It doesn't shy away from imposing penalties on criminal acts that can be protected by the First Amendment.

The use of the Patriot Act in the USA has already established that long pre-trial custody doesn't guarantee the effectiveness or improvement in the investigation process and neither does it improve the likelihood of convictions. In fact, if at all, it demonstrates that it results in breeding incompetence in investigating authorities. An extended period of detention only leads to normalizing an informal plea-bargaining. Such is a horrifying reality where an accused prefers to plead guilty to save himself from indefinite detention that exceeds the life of the sentence of the crime imposed. This gives power to investigative authorities to maintain that justice has been done when in reality it's an abuse of law. The Indian government has started following the line and is using UAPA as a tool to stifle dissent instead of serving its national security objectives. The real perpetrators of terrorism thus roam freely when the innocents with legitimate dissent are getting tagged as a terrorist. USA and India both countries have become a victim of dangerous right-wing political violence, these anti-terror legislations are being weaponized against people with opposing ideologies.

C. Anti-Terror Legislation: Has Undermining Human Rights Become A Trend?

Universal Declaration of Human Rights (UDHR) provides in its Article 29 a principle that human rights cannot be restricted arbitrarily. The UN Global Counter-terrorism Strategy (which is a resolution) also provides that counter-terrorism measures must not violate human rights. Various examples of indiscriminate use of the Patriot Act

and UAPA show that it sacrifices democratic values and compromises the political freedom and liberty of its opponents. Patriot Act has been seen compromising with the human rights of US's immigrants and even the natural citizens aren't spared since a large surveillance power has been given to the executives, it is used by them to carry out personal vendetta and cut off dissent.

In India, the government's efforts to curb the free-speech with the rampant use of UAPA have resulted in the arrest of a number of civil rights activists, students protestors, and human rights defenders. There are even academicians, RTI leaders, journalists booked under the anti-terror legislation, for instance, the arrest of Assam's MLA activist Akhil Gogoi, Safoora Zargar, and Pinjra Tod student activists and protestors against the anti-Citizenship Amendment Act, from Jamia Milia Islamia University. Umar Khalid, a student activist was also arrested in the Delhi riots case under the same Act. The list isn't exhaustive. The arrest of activists involved in the Bhima-Koregaon case in 2018 is a prime example, and the death of an octogenarian Adivasi rights activist Father Stan Swamy tells us a story of the denial of bail to the aged and ailing undertrials reflects the draconian and anti-constitutional nature of the law. It violates the basic human rights, right to bail because this indefinite detention without any link to the discovery of evidence of terrorist act but solely on account of the investigative process, which is being loosely used by the authorities without any protection against its misuse is a major cause of concern.

D. Uapa/Patriot: Catastrophic For Civil Liberties?

In a democratic state, certain reasonable restrictions on fundamental rights are a norm but it's the basic principles of the democracy that individuals' rights are to be protected. India and USA in this regard share this idea. Both countries criminalize the association of people and the speech if it supports terrorism yet the approach taken by them in criminalizing such conduct is different. These legislations empower the executives to have the technical wherewithal. In the USA, the Patriot Act legalizes the government's conduct to mass surveillance and collect personal data to produce it in the court of law against the people. American Civil Liberties Union criticizes this anti-terror legislation and maintains that it runs counter to the first amendment and "turns a regular citizen into potential suspect".

India's recently amended UAPA also redefines this boundary between state and citizen's human rights when the government tries to use its overarching power to violate individual rights. It casts doubt on the scope of civil liberties guaranteed by the constitution and developed by the judiciary in a democracy.

E. Is An Individual A Terrorist? The Case Of Vague Provisions In Uapa And Patriot Act

Section 35 (2) of the UAPA gives the power to the government to categorize an individual as a terrorist if it believes that such individual is involved in terrorism. What follows from such a

provision is that there is no need to file an FIR or charge sheet. There is no regular trial in a court. Without trial, there will be no conviction. A citizen can plead no defense if there is no trial, even the evidence that an individual has no link to any terrorist organization can't be easily proved without a trial. Anyone who is in any manner even remotely connected with the arrested person can be roped in under UAPA. A vague definition of terrorism can in itself encompass even the non-violent political activity like a political protest. Supreme Court in A K Roy vs Union of India³⁸ emphasized the cardinal principle in law that a person's life and liberty cannot be put on perils on account of ambiguity. The charges framed on the accused should correspond to the accusations made against him. The broadly framed act is catastrophic to civil liberties as it can sweep in all kinds of suspected people. Excessive discretion in the hand of executives can even lead to construing a mere social media post as a terrorist act "which can cause or is intended to cause disaffection against the state". Neither the act provides any sunset provision nor any safeguard against its potential misuse.

Even in the USA, in the case, Humanitarian Law Project vs. Ashcroft³⁹, District Judge, Audrey Collins ruled that section 805 of the Patriot Act is unconstitutional. the part that provides a ban on giving expert or assistance to groups that have been designated as International Organization is impermissibly vague and it violates the 1st and 5th Amendments.

³⁸ 1982 AIR 710.

³⁹ 352 F.3d 382 (9th Cir. 2003).

F. Is Repeal The Only Way Forward?

The NCRB report data points out that only 2% are found guilty in UAPA cases, rest are illegally detained, for instance between 2016 to 2019, 132 cases are resulted in convictions out of 5,922 individuals arrested⁴⁰. Even the charge sheet is filed in only 9% of cases, in the remaining, the investigating agencies incarcerate the suspects without even framing of charge. The cause of this is that the word “Terrorism” in Section 15 is itself a vague term, this gives the officials the power to mold its meaning as they please to target any individual they suspect. It defines a terrorist act as any act that threatens the unity, security, sovereignty, and integrity of the nation. If such acts strike or are likely to strike terror on people or overawe or by the show of criminal force is a terrorist act. This means that any conduct that displeases the executives could be read into these terms to make an arrest. Even the Delhi High Court in the Asif Iqbal Tanha vs State of NCT Of Delhi⁴¹ case doubted the constitutional validity of this section because of its inherent vagueness. There’s another Section 43D(2) that allows a person till the time investigation is pending to be placed in police custody by the investigating authority for up to a period of 180 days. CrPC, even in the most heinous offenses provides for only a 90-day custody period during the investigation. Section 43D(5) does not permit the release of an accused on bail by the court if there appear to be grounds that the accusations are “prima facie true”, this can result in a person

linguishing in jail for several months or years, awaiting trial and deprived of bail as such provisions render the grant of bail almost impossible. The twin cases, Ranjit Singh Brahmajeetsing vs. the State of Maharashtra⁴², and the Sajjan Kumar vs. CBI⁴³, Supreme Court maintained that there is a shallow requirement of the standard of proof in such cases as in no detailed examination of evidence is needed, mere prosecution arguments would suffice to prove that accusation against accused are prima facie true. As demonstrated by the above cases, the logical conclusion follows is that when these provisions are taken together, their cumulative effect on individual liberty is alarming.

These grave and serious penal provisions under UAPA give power to the government to silence its critics and confine them behind bars on whims for a period the same or even longer than a sentence for the alleged crime without proving their guilt. This undermines the intent of the lawmakers and its objectives to address the threats to the very existence of the country and subvert the purpose behind the enactment of the law by Parliament.

IV. COURT’S ROLE IN REGULATING THE USE OF ANTI-TERROR LAWS

Courts have always been the last bastion of hope that one looks towards to when rights guaranteed to them by the constitution are denied. Citizens and persons are generally not too involved in the decisions by the court even though these

⁴⁰ <https://www.thehindu.com/news/national/22-of-cases-registered-under-the-uapa-from-2016-2019-ended-in-court-conviction/article33804099.ece> (last visited on 30th November, 2021)

⁴¹ MANU/DE/1124/2021.

⁴² 2004 CriLJ 3743.

⁴³ (2010) 9 SCC 368.

decisions play an important role in shaping individuals right. It is only when the rights guaranteed to a person are denied that one turns towards the court. The response of court in protecting the liberties of people as against the executive and legislative overreach can be seen when the law or particular provisions of it are challenged as being unconstitutional for infringing the fundamental rights.

The approach taken by the supreme court of the land in both America and India has been to ascertain that the individual liberties of its citizens are not curtailed. When it comes to anti-terrorism legislation the courts have taken a cautious approach of balancing the individual freedoms while considering the security of state. This has in certain cases also led to situations where the courts are reluctant to address gross violation of human rights when the security of state is concerned. In some cases, the courts have looked away from cases when such violations are challenged by not taking it on a priority basis. Nevertheless, the role played by the courts in protecting individual liberties can't be undermined.

Here with the help of certain cases the author seeks to show how the apex courts in the countries under consideration have ensured the protection of individual liberties when anti-terrorism laws have been slapped on people. Firstly, a few cases where the Supreme Court of the United States have protected persons on whom the USA PATRIOT Act was charged are dealt. In *Hamdi v Rumsfeld*⁴⁴ a US citizen was

detained in Afghanistan as being an enemy combatant and was subsequently transferred to US and detained without him having provided legal counsel and other basic rights. Here the Supreme Court while reversing the dismissal of habeas corpus plea by the lower court held that the government has power to detain enemy combatants under the law, including US citizens but the US citizens have to be given an opportunity to challenge them being classified as enemy combatants. It is interesting to note that soon after this decision the accused was left off without any charge back to Saudi Arabia, where his family had settled, on the conditions of him renouncing his US citizenship and with added travel restrictions. One can easily gather from such an act of the government here that the accused was detained without any concrete evidence as to his guilt, this shows the overreach of the anti-terrorism law. Had the court not taken the stance of giving an opportunity to the US citizen to challenge his being characterized as an enemy combatant, it would have left the accused to be detained without any solid evidence.

In *Al-Maari v Spagone*⁴⁵ before the Supreme court could have decided on the legality of indefinite detention of the accused on the suspicion of committing terrorist activities but the government transferred him from military custody to that of Advocate general before the case was taken up and so the case was dismissed as moot by the court. The lower court had however held that the detention on suspicion of commission of terror acts by a resident was not proper. Here again one is faced with the reality

⁴⁴ Hamdi v Rumsfeld, 542 U.S. 507 (2004).

⁴⁵ Al-Maari v Spagone, 555 U.S. 1220 (2009)

that the government actively tries to avoid cases being heard before the Supreme court as to avoid any adverse inferences.

*Boumediene v. Bush*⁴⁶, can be said to be landmark case in the protection of legal rights of detainees. Here Supreme court discarded the justification given that the jurisdiction of the courts won't extend to the detainees at Guantanamo Bay detention camps in Cuba as it falls outside the soils of US. The court by considering the facts of the cases found de facto jurisdiction of US over Guantanamo bay and held that the detainees there could not be denied the fundamental rights given by the US constitution.

If we move to the Indian scenario the situation is similar. Here also the Supreme court of the country intervenes when the provisions of the Anti-terrorism laws are misused and takes care that the individual is not incarcerated and denied of her liberty on superficial grounds. In *Union of India v. K.A. Najeed*⁴⁷, were the accused was charged with sections under UAPA along with other charges, the Supreme court refused to interfere with the bail granted by the Kerala High court were the undertrial was detained for over five years. The Supreme court held that the rigours of the anti-terror law can't be used to repeatedly deny bail and violate of fundamental right of the accused under Article 21.

The Supreme court in *Bikramjit Singh v. State of Punjab*⁴⁸, held that the Magistrates power to extend time for investigation under the first

proviso in section 43-D(2)(b) of UAPA is non-existent. This decision shows the apex court ensuring that the power given for the extension of the time for investigation is not used lightly by the magistrates. This having an effect of prolonging incarceration of accused can only be exercised by special magistrate under the Act.

One has also to note that the supreme court has been hesitant in dealing with some cases where the government has already made a huge endeavour to incarcerate the people by using UAPA and other law. The most recent in them being the continued incarceration of the people involved in the Elgar Parishad-Bhima Koregaon case, were activists continue to be detained on flimsy grounds⁴⁹. Stan Swamy, a Jesuit priest, one of those arrested, died in custody⁵⁰.

By taking into consideration the above cases it can be seen that the courts have tried their level best that the provisions of law are not misused and the individual liberties are safeguarded. Even where the government in question have tried to avoid legal scrutiny by the courts, the courts both in US and India have ensured that the rights of people guaranteed under the Constitution are not taken away except according to the due process of law and the procedure established by the law respectively. The courts may not always have been able to safeguard the liberties but by a large extent they have done so. The role that the courts of the country play in ensuring the preserving the liberties can't be undermined. A strong judiciary is one of the ways of ensuring that the balance

⁴⁶ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁴⁷ *Union of India v. K.A. Najeed*, (2021) 3 SCC 713.

⁴⁸ *Bikramjit Singh v. State of Punjab*, (2020) 10 SCC 616.

⁴⁹ Explained Desk, *a quick recap of Elgar Parishad case that the NIA has taken over*, IE, Jan 24,2020.

⁵⁰ Editorial, *I will probably die*, IE, July 6,2021.

between the need for strong security measures for security of state and liberty of people is maintained.

V. CONCLUSION & RECOMMENDATIONS

The anti-terrorism legislation in both India and United States have emerged as a reaction to the need for ensuring the security of the states. The stringent provisions contained in both the USA PATRIOT Act and UAPA have been justified as restrictions for the betterment of the State. It has been seen from the evaluation of the ways in which these laws are used that these laws are often misused and individual liberty is compromised. The data analyzed in this article show that there has been a huge number of cases registered in India with respect to anti-terror law, UAPA in particular, also, the rampant use of the USA PATRIOT Act after the twin tower attacks, in the United States. These huge number of cases when unaccompanied by lack of successful prosecution itself are sufficient to show fault in the legislations. The ambit of these legislations has been so wide that it picks up within itself acts which may not even be related to terrorism in certain cases. Such a large web not only affects the liberty of the individuals but also hampers the judicial process with a large number of cases making the actual ones which fall within the terror acts to be shadowed away.

The Supreme Court of the United States and The Supreme Court of India along with the subordinate judiciary has ensured that the balance between the rigor of the anti-terror legislation and the individual freedoms is

maintained. Though in some cases the apex courts have shown reluctance in coming forward to safeguard the freedoms but still it remains the sole institution between the excessive executive power and the people.

Fundamental rights in every country are not absolute, few compromises are allowed to be made in both the USA and India but the lawmakers in both these developed democracies should not let the mere threat to the safety of the nation make changes to tenets of the public policy. This puts the very freedom guaranteed by democracy at the stake. A balance cannot be maintained when there is rampant abuse of such legislation It's imperative on the free democratic states to then raise their voice against misuse of anti-terror legislation. They should stand up for the fundamental rights of their citizens in such exceptional cases if they are to preserve their international commitments to human dignity. The countries must not at any cost allow such legislations to survive if they follow rule of law. It should not bind the judiciaries' hand with such strict penal provisions. In fact, it ought to determine whether there can be an alternative that is less invasive which can accomplish the same objectives. The judiciary has to act like a watchdog, it cannot abandon its oversight obligations in the name of mere threats to national security but it ought to come up with constitutional assessment and tests to balance the conflict between national security and civil liberties of its citizens. The government's attempt to stifle dissent that bears down the constitutionally guaranteed liberties must be subject to scrutiny. The USA-PATRIOT Act and

India's UAPA do not survive the test of time of effectively balancing these two competing interests.

In light of aforesaid problems identified highlighted, the author recommends the following:

a) Strong amendments must be brought in anti-terrorist laws, especially in light of statistics of its contemporary misuse, so as to give executive less power to exploit the same. The provisions which are highly being misused must be targeted vehemently. In stringently combating terrorism, care must be taken so that the innocent ones do not get prosecuted as that would frustrate the very basis of law.

b) The judiciary must lay down strict precedents to discipline the executive against misuse of law. The ones responsible for filing frivolous cases, must be strictly penalized so as to create an atmosphere of deterrence.

c) Measures must be taken for the rehabilitation of the persons who find it difficult to lead a normal life even after being acquitted by courts.

d) Courts must be given more and more powers to effectively tackle the misuse of the said laws.

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