IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No. OF 2021

IN THE MATTER OF:

Amitabha Pande & Ors …Petitioners

Versus

Union of India & Ors …Respondents

PAPER BOOK

(FOR INDEX KINDLY SEE INSIDE)

ADVOCATE FOR THE PETITIONER: ANN MATHEW

SYNOPSIS

Amongst various reliefs sought, the Petition seeks to challenge the validity and vires of the Unlawful Activities (Prevention) Amendment Act, 2019 [Act 28 of 2019] (herein after referred to as UAPA) to the extent that the same has resulted in an arbitrary classification of "terrorists", not emanating from the principal Act or the amending Act, and certainly not permissible under Article 14 of the Constitution of India.

The Petition further seeks to challenge the constitutionality of the Proviso to Section 43D (5 of the Act), inserted by the 2008 amendment, which mandates that a person shall not be released on bail if the court is of the opinion that there are reasonable grounds for believing that the accusation against a person is "prima facie" true. It is submitted that the said Proviso is arbitrary and not based on any reasons emanating from the Act. As such, tested against the principles contained in Article 14, 19 and 21, the offending Proviso is liable to be struck down, especially since the Act is not a law enacted for preventive detention.

The Proviso effectively ensures that a person cannot be released on bail, and has to wait till the conclusion of the trial, which, given the state of the criminal justice system, may take years. The lack of time-bound trials, and the lack of any rules regarding "bad faith" prosecutions, and compensation to be paid if the trial court ultimately finds the accused innocent of the charges against them, results in an utter violation of the right to life and liberty enshrined in Article 21 of the Constitution. Citizens find themselves in a position where they have spent the majority of their productive years incarcerated on false charges, or have even died while remaining incarcerated on account of the mischief of Section 43D(5). The abysmally low rates of successful prosecutions are also a pointer to fact that said proviso is arbitrarily used more to quell dissent than to achieve the actual objectives of the Act.

The Petition also seeks to challenge the manner in which sanctions under the principal Act are granted by the Government. While the Act mandates that the sanction shall only be granted after the evidence and other material is "independently reviewed" by the sanctioning authority, the said independent review loses its meaning, as it has to be carried out within a period of 7 days. Furthermore, the non-supply of the material upon which the sanction is sought,

and the non-supply of the order granting sanction, effectively precludes an accused person from demonstrating that the case against him may be one of "bad faith" prosecution, or motivated in some other manner. In this manner, an individual's rights under Articles 32 and 226 of the Constitution are effectively stultified, which is not permissible under the Constitution.

The last two of the above aspects – i.e., the lack of bail for a person when accused of terrorism charges, coupled with the lack of supply of materials upon which sanction is sought – when combined together result in unfettered and unbridled powers upon the Government, and gives the Government to use its powers under the UAPA in an arbitrary manner.

The inherent arbitrariness in the said Proviso to Section 43D(5), and the absolute power contained therein, effectively ensure that provisions of the UAPA are being used as preventive detention law, whereas the UAPA is not a preventive detention law. It is submitted that even for a preventive detention law, the protections mandated in Article 22 are applicable.

By this Petition, this Hon'ble Court is being asked to strike down, or at the very least, read down, certain provisions of the UAPA, whereby

the arbitrary exercise of power by the Government is reined in, and the fundamental rights enshrined in the Constitution are upheld.

Hence the Writ Petition.

LIST OF DATES

1967	Unlawful Activities Prevention Act enacted.
2008	Amendment made to the said Act, introducing, *inter alia*, Section 43D (5), the proviso to which makes it impossible to be granted bail by the trial court, as the existence of a prima facie case is considered sufficient to deny bail.
2019	Amendment made to the said Act, introducing the concept of the Fourth Schedule, which is to contain the names of people that the Government "believes" to be involved in terrorist acts. Such people have redressal mechanisms available under the Act, to have their names removed from the said Schedule. However, this redressal mechanism is not available to all persons against whom the government proceeds on charges of "terrorism", thus creating two categories of terrorists, which is not envisaged under the said Act.

	The recent events, especially the death, while in custody, of persons accused, has brought to the front the inequities of the said Act, and the arbitrary manner of its application.
24.03.2020	The Member of Lok Sabha, Tiruchi Siva, seeks a response from Minister of Home Affairs, Government of India, regarding the number of individuals arrested under the Unlawful Activities Prevention Act (UAPA) during last five years. The Government of India, in response, replied that the National Crime Records Bureau (NCRB) compiles the data on crime as reported to it by States and Union Territories and publishes the same in its annual publication 'Crime in India'. The latest published report is of the year 2019 and the details were furnished in year wise.
04.10.2021	The Writ Petition filed.

IN THE SUPREME COURT OF INDIA

CIVIL ORIGINAL JURISDICTION

WRIT PETITION (CIVIL) No. OF 2021

(UNDER ARTICLE 32 OF THE CONSTITUION OF INDIA)

IN THE MATTER OF:

1. Amitabha Pande

2. Julio Francis Ribeiro

3. Wajahat Habibullah

4. Kamal Kant Jaswal

5. Hindal Haidar Tyabji

6. M. G. Devasahayam

7. Pradeep Kumar Deb

8. Baldev Bhushan Mahajan

9. Ashok Kumar Sharma

10. Dr. Ish Kumar

11. Harsh Mander

…Petitioners

Versus

1. The Union of India
Through the Cabinet Secretary
Cabinet Secretariat
Rashtrapati Bhavan
New Delhi 110004

2. The Union of India
Through the Secretary
Ministry of Home Affairs
North Block
New Delhi 110001

3. The Union of India
Through the Secretary
Ministry of Law and Justice
Shastri Bhavan
New Delhi 110001 …Respondents

WRIT PETITION UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA

To

The Hon'ble Chief Justice of India and his companion Judges of the Hon'ble Supreme Court of India

Humble Petition of the petitioner above named

MOST RESPECTFULLY SHOWETH:

1. That the present Petition, filed as a Public Interest Litigation, raises certain important issues in respect of certain provisions of the Unlawful Activities Prevention Act, 1967 (herein after

referred to as the said Act or UAPA) in so far as they are contrary to, inconsistent with, or are applied in a manner in antithetical to, certain legal rights and inalienable Fundamental Rights. The said provisions are either in direct violation of Articles 14, 19 and 21 of the Constitution, or, are capable of being used arbitrarily, leading to the violation of the said rights. It is submitted that the great power that is given by certain provisions of the UAPA, needs to be exercised with great responsibility and restraint, in order to ensure that the constitutional rights of individuals are given due consideration and importance, and are not trampled on by arbitrary action.

2. That the Petitioners have not filed any other petition before this Hon'ble Court, or any other Court, seeking the reliefs that are sought herein. None of the Petitioners are involved in any civil, criminal, or revenue litigation which has, or could have a legal nexus with the issues involved in the present Petition.

3. That the Petitioners are all citizens of India, who have held senior positions within the government in the past, and who have since retired from service. None of the Petitioners have any personal interest in the issues involved in the present

Petition. The Petitioners are concerned with the arbitrary manner in which certain provisions of UAPA are being implemented in the country today, contrary to constitutional norms and statutory protections. The arbitrary use of provisions contained in the UAPA, which affect the liberties and rights of individuals, is a matter of great public importance, affecting the Constitutional rights of citizens, and as such the Petitioners have no alternative but to approach this Hon'ble Court to seek an authoritative pronouncement on the issues involved.

4. That the details of the Petitioner No.1, as required under the Rules, are as follows:-

For the sake of brevity in the body of the Petition, the details of the other Petitioners, as required under the Rules, as well as a short write-up regarding the Petitioner, are being given as a separate Annexure to this Petition and is annexed and marked as **ANNEXURE-P1** (at page ...to.....).

5. That the Petitioners are dismayed by the manner in which the provisions of the UAPA, meant to control unlawful associations and terrorists organisations, are being misused to stifle free speech and dissent, and create terror amongst individuals whose social and political thoughts are not in consonance with those of the government.

6. That it is further submitted that while the UAPA is not a preventive detention law, having been enacted to punish unlawful activities and terrorist acts, the stringency of its provisions, especially with regard to bail, make it almost akin to a preventive detention law. However, since it is not a preventive detention law, the protections of Article 22 are not available. Thus an anomalous situation has been created, where the UAPA, without authorizing preventive detention, is being used for preventive detention.

7. That furthermore, the stringent bail provisions contained in the UAPA have created a situation where merely being accused of a crime under the UAPA is considered sufficient to keep a person incarcerated, until the lengthy trial process is over. It is submitted this is completely contrary to all principles of criminal jurisprudence and violates the fundamental right contained in Article 21. The "prima facie" correctness of untested and unproven allegations, cannot be the sole reason to deny a person the fundamental rights enshrined in Article 21.

8. That the present Petition is broadly divided into various parts, viz., Part A - dealing with the lack of protection to the rights of individuals who being tried on charges of being "terrorists"; Part B - dealing with lack of protection to the rights of individuals charged with carrying out "unlawful activities"; Part C – dealing with the process of sanction under Section 45; and Part D – dealing with issues of bail.

9. That in a similar Writ Petition filed before this Hon'ble Court, challenging the provisions of UAPA, this Hon'ble Court was pleased to issue notice. A true copy of the order passed by this

Hon'ble Court in W.P.(C) No.1076 of 2019 dated 06.09.2019 is annexed and marked as **ANNEXURE-P4** (at page .....to.....).

10. That the chapter-wise scheme of the UAPA, as it exists today, is as under:-

Chapter No.	Chapter Name	Sections in Chapter
I	Preliminary	1 and 2
II	Unlawful Associations	3 to 9
III	Offences and Penalties	10 to 14
IV	Punishment for terrorist activities	15 to 23
V	Forfeiture of proceeds of terrorism or any property intended to be used for terrorism	24 to 34
VI	Terrorist Organisations	35 to 40
VII	Miscellaneous	41 to 53

PART A – Relating to protection of rights of individuals accused of being "terrorists"

11. That at the outset, it is necessary to establish who is a "terrorist" as defined in the UAPA. For this purpose, reference may be made to Section 2(k) which reads as under:-

"2(k) "terrorist act" has the meaning assigned to it in Section 15 and the expressions "terrorism" and "terrorist" shall be construed accordingly."

12. That, a plain reading of the said Section 15, which is not extracted here for the sake of brevity, makes it clear that a "terrorist" is a person who:-

(i) In furtherance of specified intentions,

(ii) carries out specified acts.

13. That a reference to the opening words of Section 15 becomes necessary at this stage, which reads as under:-

"Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country…."

14. That thus it is seen that the term terrorist act (and therefore the terms "terrorist" and "terrorism") are firstly defined by the doing of any act with the intention to "***threaten or likely to threaten the unity, integrity, security, economic security or sovereignty of India"***

15. That the term (terrorist act, terrorist and terrorism) is then defined by using the phrase "…***with intent to strike terror or likely to strike terror in the people…"***

16. That therefore the second part of the definition of the term "terrorist act" essentially says that a "terrorist act" is an act whereby terror is caused, with no definition of terror being given in the UAPA.

17. That it is submitted that this loose and almost tautological wording has impacted severely upon the right to life and liberty of individuals, as the same opens up avenues of arbitrary actions by the Government. It is submitted that accusing a person of having committed a "terrorist act", by saying the person "struck terror" cannot be sustained, in the absence of a definition of the word "terror".

18. That in these circumstances, the term "terror" has to draw sustenance from the previous portion of the definition, where a "terrorist act" is one which threatens "…***the unity, integrity, security, economic security or sovereignty of India".***

19. That it is submitted therefore that the term "…***with intent to strike terror or likely to strike terror in the people…"***, is open-ended, ill-defined, and arbitrary. This arbitrariness and lack of precision in a definition which affects the life and liberty of an individual, cannot be sustained, and is required to be struck down.

20. That as will be evident herein below, the UAPA is being selectively applied, in a manner inconsistent with its own provisions. This selective and arbitrary application has resulted in the violation of the most basic fundamental rights set out in Articles 14 and 21.

21. That by the Amendment Act of 2019 brought certain changes to the UAPA. These changes, in so far as this Petition is concerned, were as under:-

(i) Addition of a new "Fourth Schedule" to the Act;

(ii) Power of Central Government to publish the name of an individual in the Fourth Schedule;

(iii) The publication of the name of an individual only to be done only if the Central Government "believes" the individual to be involved in terrorism;

22. That a perusal of the Act, as amended in 2019, reveals that there are certain in-built mechanisms to protect the rights of individuals whom the Central Government "believes" to be involved in terrorism. These mechanisms are:-

(i) An individual shall be "deemed" to be involved in terrorism if such individual commits or participates in acts of terrorism, or prepares for terrorism, or promotes or encourages terrorism or is otherwise involved in terrorism [Section 35(3)]

(ii) By a notification in the Gazette, the Central Government may, by notification in the Gazette, add the name of such individuals to the Fourth Schedule [Section 35(1)(a)];

(iii) The above notification only to be done if the Central Government "**believes**" that such individual is involved in "terrorism"; [Section 35(2)]

(iv) Such individuals, whom the Central Government "believes" are involved in terrorism, and whose names are notified as aforesaid, can apply to have their names de-notified [Section 36(2)(c)];

(v) If such application is rejected, such individuals can ask for a review by a Review Committee [Section 36(4)];

(vi) The Review Committee has to decide such review application on the basis of "principles applicable on an application for judicial review". [Section 36(5)]

23. That it is submitted that it is settled law that this "belief" (that an individual is "involved in terrorism") cannot be mere *ipse dixit* and has to be based on cogent material and evidence.

24. That flowing from the existence of the above mechanisms, a person "believed" to be "involved in terrorism" acquires certain rights under the UAPA. These rights are as under:-

(i) The right to make an application to the Central Government, seeking removal of name from the Fourth Schedule [Section 36(1) and Section 36(2)(c)]

(ii) The right to have the above application decided in 45 days [Rule 2 of the Procedure for Admission and Disposal of Application Rules, 2004]

(iii) The right to apply for a review before a Review Committee in the event that the application aforesaid is rejected [Section 36(4)]

(iv) The right to have the Review Committee headed by a serving or retired High Court judge, and whose other

members are serving or retired Secretaries to the Government of India possessing at least one years' experience in legal affairs/administration of criminal justice [Section 36(3) read with Rule 3 of the Qualifications for the Members of the Review Committee Rules, 2004]

(v) The right to ensure that the Review Committee acts in consonance with the principles of judicial review [Section 36(5)]

25. That it is submitted that above statutory rights contained within the UAPA are expressions of, and flow from, the Right to Life contained in Article 21.

26. That therefore, individuals, "believed" by the Central Government to be "involved in terrorism", by reason of the publication of their names in the Fourth Schedule, have the above rights and access to the in-built redressal mechanisms.

27. That the present Petition is concerned with the arbitrary application of the terrorism provisions of UAPA, whereby individuals, are denied the same rights and benefits of the in-built mechanisms.

28. That these individuals are straightaway put on trial on charges of having being involved in terrorism, without their names being published in the Fourth Schedule. Non-publication of their names in the Fourth Schedule deprives them of the rights and access to the mechanisms described above.

29. That however, as will be seen herein below, even to be put on trial, the Government still needs to have cogent material and evidence in order to grant sanction to proceed against such individuals.

30. That it is submitted while the cogent material and evidence required for sanction should be sufficient for the formation of the "belief" required to publish the names of individuals in the Fourth Schedule, the same is still not done after sanction (which is the same as formation of "belief") is granted. Thus such persons are deprived of the rights and mechanisms contained in UAPA.

31. That therefore, it appears that the arbitrary application of UAPA is creating, without any justification for such classification, two classes of terrorists –

(i) individuals whom the Central Government "believes" (on the basis of cogent material) to be involved in terrorist acts, and whose names are therefore published in Schedule 4;

(ii) individuals, whose trial on charges of being involved in terrorism, is sanctioned by the Central Government (the sanction being granted on the basis of cogent material, and is thus equivalent of formation of "belief" as aforesaid), but whose names are not published in Schedule 4.

32. That it is submitted that in both cases, the Government needs to have sufficient material and evidence to either form a "belief", or to grant sanction for prosecution.

33. That it is submitted that when granting sanction, the Central Government necessarily needs to have belief that the person in respect of whom sanction is being granted was involved in "terrorism". It is only when such belief exists, on the basis of evidence and materials, that sanction can be granted.

34. That yet, in one case the “belief” leads to the publication of the name in the Fourth Schedule, while in the other case, the evidences and materials which are sufficient for sanction, do not result in the publication of the name in the Fourth Schedule.

35. That in this manner, individuals, whom the Central Government “believes” are “involved in terrorism” have the protection of the due process of law as listed above, and have multiple opportunities of removing the stigma from their name, and of being heard. Each process that they have the right to access, in turn, gives further rights to seek judicial review under Articles 32 or Article 226. Thus persons whom the Government “believes” to be “involved in terrorism”, have a plethora of remedies available to them.

36. That unfortunately for individuals whose names do not get included in Schedule 4, but for whom the government has given sanction (based on cogent material and evidence), such individuals have to undergo a lengthy trial process to clear their names, without any application process or Review process being made available to such individuals. Such individuals are

not considered deserving enough to avail of the rights and mechanisms contained with the UAPA.

37. That it is submitted that this classification of “terrorists” into two categories is incorrect and flawed, and not only is permissible under the UAPA, but is also contrary to Article 14.

38. That it is submitted that in both cases, the individuals are accused of “terrorist acts”. In both cases, Central Government can proceed only if there is cogent material and evidence. Yet for one category of individuals, the existence of cogent material results in a “belief” that leads to certain rights and protections, while for the other category of individuals, “sanction” (based on an independent review of evidence) by the Central Government does not constitute sufficient “belief” to include their names in Schedule 4 and thus give them the rights and access to the in-built protections under the Act.

39. That it is submitted that the UAPA does not classify or grade or categorise different acts of terror. No classification of terrorists is envisaged under the UAPA. However by not publishing the name of individuals accused of carrying out acts of terror, an anomalous situation is created. Some individuals (“believed” to

be involved in “terrorist acts”) have their names published in the Fourth Schedule and therefore get the benefit of the in-built mechanisms in the UAPA to clear their name. At the same time, other individuals who are charged with carrying out terrorist act, do not get their names published in the Fourth Schedule, and are deprived of the rights and in-built mechanisms contained in the UAPA. Thus this arbitrary classification of “terrorists” into two categories is incorrect, and being in violation of not just the UAPA but also Article 14, is unconstitutional.

40. That it is submitted that the scheme of the Act makes it self-evident that the government cannot prosecute a person for being a terrorist, without first having declared the person to be a terrorist, as envisaged under the UAPA.

41. That it is submitted that the arbitrary application of the UAPA has led to a situation where the Government has arrogated to itself the discretion to either publish the name of an individual being prosecuted for “terrorism” in Schedule 4, or to prosecute the person for terrorism without publishing the name of the person in Schedule 4. It is submitted that this discretionary power does not flow from the UAPA, and is completely

antithetical to not only the UAPA but also the constitutional mandate contained in Articles 14 and 21.

42. That it is submitted that this anomalous situation impacts upon the constitutional and fundamental rights of citizens, who can arbitrarily be picked up, charged under the UAPA and then kept in prison without bail being granted to them for an extended period of time. It is submitted that a person can only be charged with UAPA provisions if there is sufficient material and evidence. The existence of such material and evidence, logically, should also form the basis of the "belief" that such an individual in involved in terrorism. To have the material and evidence to support a charge of terrorism under the UAPA, and yet not have the "belief" that the person has not been involved in terrorism would be an absurdity. Thus, the mandate of the UAPA requires that such individuals be given the protection of the in-built protection mechanism contained in UAPA.

43. The only argument that may be available to delay the publication of the name of an individual in the Fourth Schedule would be to say that in some cases the Government has prior knowledge and materials, and therefore "believed" that an individual is involved in terrorism, whereas in other cases the

role of an individual can only be established after charging the person and carrying out an investigation.

44. That however after the investigation is concluded, there are only two possibilities – (i) either there isn't sufficient material to go ahead with the prosecution; (ii) or the Government is of the opinion that after investigation there is sufficient material and evidence to seek sanction for prosecution.

45. That therefore, at this stage, where after investigation, the Government is in possession of material and evidence on the basis of which it seeks sanction, the Government necessarily has the "belief" that the individual is involved in terrorism.

46. That in these circumstances, the UAPA mandates that the Government publish the name of such an individual in the Fourth Schedule, thereby enabling the individual to seek the benefits of the rights and in-built mechanisms in the UAPA to clear his name, separate from the trial process.

47. That in the alternative, protections, identical to the protections available to persons whose names are published in the Fourth Schedule, should be made available to all people whose

names are not published in the Fourth Schedule, but in whose case sanction for prosecution under the UAPA is granted by the Government.

48. That it is submitted that Article 14 requires that all persons, who are believed to be “terrorists”, or having committed “terrorist acts”, should be treated in an identical manner, and if certain legal protection are made available to some such persons, the same protections should extend to all such persons.

49. Similarly, in so far as the power of the State Governments to sanction prosecution is concerned, it is submitted that in as much as “terrorists” so designated by the Central Government have certain rights under the UAPA, all persons whose prosecution is being sanctioned by the State Government on charges of committing terrorism (and thus being “terrorists”) are also entitled to similar protections. Therefore all the above arguments apply, mutatis mutandis, to prosecutions initiated by the State Governments.

50. That once again it is reiterated that the UAPA does not classify acts of terrorism, or terrorists. As such therefore there is no

distinction between people whose prosecution is sanctioned by the Central Government or the State Government. Thus all persons who are accused of being "terrorists", whose prosecution is sanctioned by any Government, are required to be given identical protections.

Part B - Lack of protection to the rights of people accused of carrying out "unlawful activities"

51. That Section 2(1)(p) of the UAPA defines "Unlawful Association, *inter alia, as*:-

Únlawful association" means any association –

(i) Which has for its object any unlawful activity, or which encourages or aids persons to undertake unlawful activity, or of which the members undertake such activity, or…

(ii) …

52. That the term "unlawful activity" as used in Section 2(1)(p) above, is defined in Section 2(o) as under:-

"unlawful activity", in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),—

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India;

(iii) which causes or is intended to cause disaffection against India;

53. That under the UAPA "Unlawful Associations" have certain in-built mechanisms to protect their rights, viz.,:-

(i) Section 3(1) and 3(4) – procedure regarding notification by Central Government.

(ii) Section 3(2) – Notification to contain grounds

(iii) Section 3(3) – Notification not to have effect till Tribunal passes an order under Section 4

(iv) Section 4 (1) – Government required to refer notification within 30 days to Tribunal

(v) Section 4(2) – Tribunal to issue show cause notice, calling for such further information as may be necessary from the government.

(vi) Section 4(2) – Tribunal to decide whether sufficient cause is made out by Government within 6 months.

54. That no such protections and procedural safeguards are available to individuals who are accused of carrying out an "unlawful activity".

55. That in so far as the penal consequences set out in UAPA are concerned, the same cannot be attracted unless and until an "Unlawful Association" has been declared to be one by the Tribunal.

56. That it is only after such a declaration by the Tribunal that further proceedings against the "Unlawful Association" can commence.

57. That in other words, an "Unlawful Association" cannot be proceeded against under the UAPA, till it has been given an opportunity of being heard by a Tribunal, which is required to follow the due process of law.

58. That it stands to reason that an individual, being less powerful than an association, will not be in the same position as an association when it comes to affecting the sovereignty, territorial integrity of India etc.

59. That since the UAPA envisages a protection mechanism for the "Unlawful Association", it is submitted that there has to be a similar protective mechanism for individuals accused of having carried out the same kind of unlawful activity as an "Unlawful Association".

60. That in other words, an individual accused of carrying out an "unlawful activity" and an "Unlawful Association", are both accused of the same act of "unlawful activity". Once again, as in the case of "terrorist acts", there is no gradation of classification or categorization distinguishing between "unlawful activities" created under the UAPA.

61. That therefore the principle of parity would require that a person, accused of having carried out at unlawful activity, should be treated at par with an "Unlawful Association", prior to commencing prosecution.

62. The lack of a protection mechanism for individuals is thus violative of Articles 14, 19 and 21.

Part C – Dealing with the process of sanction under Section 45

63. That the only protection available to such individuals accused of carrying out "terrorists acts" and who do not have their names published in the Fourth Schedule, and individuals who are accused of "unlawful activities", is contained in Section 45 of the UAPA, which reads as under:-

> ***"1. No court shall take cognizance of any offence—***
>
> ***(i) under Chapter III without the previous sanction of the Central Government or any officer authorised by the Central Government in this behalf;***
>
> ***(ii) under Chapter IV and VI without the previous sanction of the Central Government or, as the case may be, the State Government, and where such offence is committed against the Government of a foreign country without the previous sanction of the Central Government.***
>
> ***2 Sanction for prosecution under sub-section (1) shall be given within such time as may be prescribed only after considering the report of such authority***

appointed by the Central Government or, as the case may be, the State Government which shall make an independent review of the evidence gathered in the course of investigation and make a recommendation, within such time as may be prescribed, to the Central Government or, as the case may be, the State Government."

64. That interestingly, while the Review Committee (under Section 35 and 36) is required to apply judicial principles, no such standards are set for the authority granting sanction, thus reducing the "independent review" prior to grant of sanction to a mere administrative exercise, for which no yardsticks are laid down.

65. That at no point in the above process of "independent review" or grant of sanction, does an individual accused of having committed a "terrorist act" or an "unlawful activity" have the right to be heard. Furthermore, the sanctioning authority, who is expected to carry out an "independent review" of the materials against a person, is statutorily given a mere seven days to complete this exercise. Thus it is apparent that the process of "independent review" is a mere eye-wash.

66. That on the other hand, a “Terrorist Organisation” or an “Unlawful Association”, or a person whom the Central Government “believes” to be involved in terrorism, have certain rights that are contained in the UAPA, over and above the “independent review” of the evidence which is mandatory prior to grant of sanction for their prosecution.

67. That under the Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008, the sanctioning authority has been given a period of a mere 7 days to carry out its “independent review” of “the evidence gathered during the course of the investigation”.

68. That no Rules have been made under Section 52 of the UAPA as to how and in what manner the sanctioning authority is required to “independently review” the evidence.

69. That it is submitted that the process of “independent review” inherently implies an application of mind and an appreciation of the evidence, thereafter arriving at a reasoned conclusion regarding sanction.

70. That it is submitted that a meaningful pre-sanction "independent review" process will necessarily require the entire material upon which sanction is sought, being made available to the accused person. The accused individual can then examine the "independent review" process and sanction, in light of legal principles and judicial decisions on the issue, and thereafter, if aggrieved, have the right to seek judicial review of the sanction process.

71. That in as much as the benefit of testing the Government's actions against the principles of judicial review is available to "Terrorist Organisations" and people who are "believed" to be involved in terrorism, the same should also be made available to individuals accused of having committed an "terrorist act" or an "unlawful activity". It is submitted that the only manner in which this can be done is if the accused persons are provided with all the materials that is provided to the sanctioning authority, and who can then challenge the sanction if the same is granted in "bad faith".

72. That since "actions taken in good faith" are protected under the UAPA, by this Petition, the Petitioners are seeking directions from this Hon'ble Court in order to ensure that "bad faith"

actions are minimized, and any individual person accused of having carried out "unlawful activity" or being a "terrorist" has protections similar to the protections afforded to "Unlawful Associations" and "Terrorist Organisations" and persons "believed" to have committed terrorism.

73. That on the 24th of March, 2020, the Government, in response to a question in the Lok Sabha stated that ***"The number of persons arrested and the number of persons convicted under the Unlawful Activities Prevention Act (UAPA) during 2015-19 is as given below:***

Year	***Number of Persons Arrested***	***Number of Persons Convicted***
2015	***1128***	***23***
2016	***999***	***24***
2017	***1554***	***39***
2018	***1421***	***35***
2019	***1948***	***34***

A copy of the reply given by Ministry of Home Affairs in Lok Sabha dated 24.03.2020 is annexed and marked as **ANNEXURE P-3** (at page …. to ….).

74. That assuming that the above statement made in the Lok Sabha is reflective of the average convictions under the UAPA, it appears that the average conviction rate over the five year

period has been 2.19 percent. It is submitted that this statistic alone suggests that prosecution under the UAPA is either initiated in “bad faith”, or the quality of the evidence is not sufficient, bringing into question the entire process of “independent review” prior to grant of sanction.

75. That in as much as the UAPA protects “good faith” actions [Section 49], it is imperative that “bad faith” actions be minimized. It is submitted that “bad faith” actions occur at the very beginning, when an individual is charged under the UAPA either for having committed “unlawful activity” or a “terrorist act”, or both. It is submitted that in such cases, the necessity of deciding whether the action of initiating proceedings against an individual is in “good faith” or not, has to be at the very threshold of such action.

76. That this would necessarily entail the accused individual being given all the materials that are placed before the sanctioning authority at the same time as the said materials are provided to the sanctioning authority, and also the reasoned decision of the sanctioning authority, if sanction is granted.

77. That at this stage it would be useful to refer to the example of the Crown Prosecution Services in UK, which is a truly independent body, created to independently review the evidence collected by the investigating authority, and deciding on whether the evidence was sufficient to take to trial or not. It is submitted that in the absence of a truly independent reviewing authority, the entire exercise of pre-sanction review of evidence is reduced to a sham and mere lip service to principles of law.

78. That it is submitted that a law, which permits the continued incarceration of a human being on the basis of mere "prima facie" opinion and does not permit bail, is a truly unjust law, and if the same is to remain on the statute book, the person whose prolonged and indefinite incarceration is sought must be given every opportunity to challenge such incarceration, especially if, as the current statistics seem to suggest, there is a 97.81 percent probability that the person will eventually be acquitted.

Part D – Dealing with issues of bail.

79. That turning now, in the light of the above discussion, to the issue of denial of bail, under Section 43D(5). For ease of reference, the said section is extracted hereunder:-

> ***43D(5)*** ***Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:***
>
> ***Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.***

80. That the above provision comes into play only when an individual is charged with an offence punishable under Chapter IV [Punishment for Terrorist Activities] or under Chapter VI [Terrorist Organisation and Individuals].

81. That therefore in the case of an individual, whose name is not published in the Fourth Schedule, the mere accusation of having been involved in terrorism, is sufficient to bring Section 43D(5) into play, and leads to a denial of the individual's right to bail.

82. That it is once again submitted that the UAPA is not a preventive detention law. That being the case, there is no justification to deny a person the right to bail, merely on the basis of an accusation.

83. That furthermore, the use of the words "…***reasonable grounds for believing that the accusation against such person is prima facie true…"*** shift the onus upon an accused to show that even prima facie no case is made out, in order for the accused to obtain bail.

84. That on the other hand, if bail is to be denied because the Court feels that there are "reasonable grounds" for believing that the accusations are "prima facie true", then it is imperative that the reasonableness of such belief be open to judicial scrutiny.

85. That it is submitted that the golden thread that runs through our common law criminal jurisprudence, i.e., a person is innocent until proven guilty, has been completely upended and given the go-by.

86. That it is submitted that, regarding bail, this Hon'ble Court has held in the case of **CBI vs Amarmani Tripathi**, [(2005) 8 SCC 21] that:-

"It is well settled that the matters to be considered in an application for bail are

(i) ***whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;***

(ii) ***nature and gravity of the charge;***

(iii) ***severity of the punishment in the event of conviction;***

(iv) ***danger of accused absconding or fleeing if released on bail;***

(v) ***character, behaviour, means, position and standing of the accused;***

(vi) ***likelihood of the offence being repeated;***

(vii) ***reasonable apprehension of the witnesses being tampered with; and***

(viii) ***danger, of course, of justice being thwarted by grant of bail"***

87. That it is submitted that thus there are 8 elements that are considered relevant to enable a court to decide whether or not bail is to be granted. This consideration has to necessarily keep in mind the principle that bail is the rule and the jail the exception.

88. That however, it is seen that as far as Section 43D(5) is concerned, the existence of a prima facie case is all that is required in order to keep a person incarcerated, without any consideration for the other 7 elements.

89. That it is submitted that it is in this manner that the UAPA is being used as a preventive detention law, without it being a declared preventive detention legislation, which is impermissible under the Constitution.

90. That furthermore, keeping a person in detention, only because a “prima facie” case appears to be made out, results in individuals being kept in detention while their cases linger for years.

91. That it is submitted that detention is a violation of the rights under Articles 19 and 21. Such a violation of rights can only be done to the extent prescribed under the Constitution. In the event a person is found innocent, thereby showing that the conclusion of a "prima facie" case existing was incorrect, such an individual needs to be compensated adequately, for which no adequate mechanism is in existence.

92. That it is submitted that this Hon'ble Court, being the custodian of the Constitution and the rights of individuals enshrined therein, needs to pass adequate directions ensuring that persons, and especially persons who are charged under the UAPA, without their names being published in the Fourth Schedule [and therefore, who the Government does not "believe" are involved in acts of terror], are not left languishing in jails.

93. That the present Petition is therefore being filed before this Hon'ble Court on, inter alia, the following Grounds, without prejudice to the right of the Petitioners to raise further and other grounds at the time of the hearing of the Petition:-

GROUNDS

A. For the reason that the power of the Central Government set out in Section 35(1)(a), ie, to publish the name of an individual in the Fourth Schedule, when seen along with the provisions of Section 35(2) and the use of the word "shall" contained in Section 35(2), make it imperative that whenever the Government is of the "belief" that an individual is "involved in terrorism", the name of such an individual shall be published in the Fourth Schedule;

B. For the reason that the Unlawful Activities Prevention Act, 1967, does not envisage the creation of two classes of "terrorists" – one, who are "believed" to be "involved in terrorism" and whose names are published in the Fourth Schedule, and the other, who are being prosecuted for terrorism after government sanction but whose names are not published in the Fourth Schedule (and presumably therefore, not "believed" to be involved in terrorism");

C. For the reason that the Act does not distinguish between different "Terrorist Acts" as defined, and there is no differentiation, or gradation, in terms of severity or

otherwise, between the various “Terrorist Act” as defined in Section 15;

D. That in as much as the word “terrorist” is supposed to be construed in accordance with Section 15, and thus a person committing a “Terrorist Act” is a “terrorist”, there is no separate classification or gradation of “terrorists”;

E. For the reason that there is no difference between an individual “believed” to be “involved in terrorism” and an individual who is accused of having carried out an terrorist act. In both cases, a person is presumed to have committed a “Terrorist Act”, which is the *sine qua non* for attracting the provisions of the UAPA;

F. For the reason that in order to visit the penal consequence of the UAPA upon a person, the person has to have committed a “Terrorist Act”. It is not open to the Government to pick and choose to publish the names of one “terrorist”, and not publish the name of another “terrorist”;

G. For the reason that the sanction for prosecution sought by the Government, can only be based on evidence.

Therefore it logically follows that where the Government is seeking sanction or granting sanction, the Government necessarily must have the "belief" that the individual was involved in "terrorism". That being the case, there is no legal or logical justification to not publish the name of such an individual in the Fourth Schedule;

H. For the reason that it further logically follows that the publication of the name of an individual in the Fourth Schedule has to be prior in time to, or contemporaneous with, the seeking/grant of sanction for prosecution, and concomitantly, there can be no grant of sanction without such prior publication;

I. For the reason that therefore the acts of the Government, in applying a pick and choose policy, do not flow from the statute, and the same are ex-facie in violation of Article 14;

J. For the reason that the non-publication of the names in the Fourth Schedule, of persons who are charged with terrorism, unjustly and irrationally deprives them of the statutory rights that are contained in the UAPA, viz, the

right to be heard and to have their names cleared, within a specified time frame;

K. For the reason that the remedies under UAPA, being time bound, give an alternative to accused individuals for clearing their names, without waiting for a long trial to finish;

L. For the reason that non-publication of names in the Fourth Schedule, while not only depriving such persons of the rights as aforesaid, also deprives them of the right to approach the Courts under Article 32 and Article 226, by way of challenging arbitrariness in the statutory remedies processes envisaged under the UAPA, since those remedies and processes are not available to such people;

M. For the reason that it is evident that individuals who have the rights under the UAPA of being heard (because their names were published in the Fourth Schedule), will necessarily have access to all the materials and evidence available with the Government, on the basis of which their names were published in the Fourth

Schedule. In complete contrast, persons whose names are not published in the Fourth Schedule are greatly disadvantaged as they do not have access to the materials and evidence till the stage of trial.

N. For the reason that the scheme of the Act, and the provisions built in clearly indicate that all persons, whom the Government thinks are terrorists, need to have their names published in the Fourth Schedule, and thereby avail of the remedies to clear their names under the processes provided therein in a time bound manner, rather than wait for lengthy trials to be conclude;

O. For the reason that the UAPA does not distinguish between terrorists whose prosecution is sanctioned by the Central Government or the State Governments, as they are all persons who stand accused of having committed “terrorist acts” as defined in Section 15. Therefore extending protections to only one class of “terrorists” (whose names are published in the Fourth Schedule by the Central Government) and not extending the same to persons whose prosecution is sanctioned by the Central Government or State Governments is

completely contrary to the provisions of Article 14 of the Constitution, and constitutes a violation of the Right to Life enshrined in Article 21 of the Constitution.

P. For the reason that persons, whose prosecution under the UAPA is sanctioned by a State Government on charges of terrorism, are entitled to protections that are given to persons whose names are published in the Fourth Schedule, in as much as they are all accused of the same offence under Section 15 of the UAPA.

Q. For the reason that similar to the above, Article 14 is also breached in cases of persons who are accused of “unlawful activities”, with such persons having no redressal mechanism, unlike the remedies available to “Unlawful Organisations”;

R. For the reason that the evidence gathered during the course of the investigation is placed before the sanctioning authority under Section 45, who is then required to carry out an independent review of the same. However, there is no participation of the accused at this stage, which is necessary to weed out “bad faith”

actions. That this lack of participation, in as much as it impinges on the rights of individuals under Article 19 and 21, cannot be sustained, especially in cases where an individual charged with “terrorist acts” does not have his name published in the Fourth Schedule, which in turn would enable him to avail of the statutory remedies under the UAPA;

S. For the reason that any fetters on the rights of an individual available under Articles 19 and 21 have to be exercised with utmost care, and bad faith actions under punitive laws, have to be minimized. It is submitted that the only way in which to ensure such minimization is to not withhold any material or evidence from the individual being accused, and supply them with the materials and evidences, in the same manner and at the same time as it is supplied to the authority from whom sanction for prosecution is sought;

T. For the reason that in matters of bail, the continued incarceration of a person on the basis of a “prima facie” case is unconstitutional and amounts to preventive detention. It is submitted that the UAPA, not being a law

of preventive detention, cannot be used to keep people in jail for indefinite lengths of time, especially since the protection of Article 22 is not made available to such persons;

U. For the reason that in the case of ***CBI* v. *Amarmani Tripathi***, **(2005) 8 SCC 21**, the 8 parameters which are required to be considered while granting bail have been set out. It is submitted that the existence of a "prima facie" case is but one of the said 8 elements, and therefore, cannot be used as the sole ground to deny a person bail, especially in cases which are not under a preventive detention law;

V. For the reason that the denial of bail on the mere existence of a "prima facie" case, completely overlooks the issue of the well-established presumption in law is that the "prima facie" case is rebuttable. Therefore, in cases where the principle of "innocent until proven guilty" applies, and if any statute inhibits or prohibits the application of the principle, then the statute is ex-facie unconstitutional and invalid;

W. For the reason that it is submitted that keeping a person in jail as a “terrorist” and denying them bail on the existence of a “prima facie” but rebuttable charge, without publication of the said “terrorists” name in the Fourth Schedule, steals the valuable rights envisaged under the UAPA from such an individual accused of being a “terrorist”;

V. For the reason that the Supreme Court has, in the case of ***Ranjitsing Brahmajeetsing Sharma* v *State of Maharasthra* (2005) 5 SCC 294** held as under:-:-

“*We are, furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive*

meaning is given, even likelihood of commission of an offence under Section 279 of the Penal Code,1860 may debar the court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea."

W. For the reason that this Hon'ble Court, in the case of ***Deepakbhai Jagdish Chandra Patel v State of Gujarat*** 2019 (16) SCC 547 at para 21 has held thus:-

" At the stage of framing the charge in accordance with the principles which have been laid down by this Court, what the Court is expected to do is, it does not act as a mere post office. The Court must indeed sift the material before it. The material to be sifted would be the material which is produced and relied upon by the prosecution.

The sifting is not to be meticulous in the sense that the Court dons the mantle of the Trial Judge hearing arguments after the entire evidence has been adduced after a full-fledged trial and the question is not whether the prosecution has made out the case for the conviction of the accused. All that is required is, the Court must be satisfied that with the materials available, a case is made out for the accused to stand trial. A strong suspicion suffices. However, a strong suspicion must be founded on some material. The material must be such as can be translated into evidence at the stage of trial. The strong suspicion cannot be the pure subjective satisfaction based on the moral notions of the Judge that here is a case where it is possible that accused has committed the offence. Strong suspicion must be the suspicion which is premised on some material which commends itself to the court as sufficient to entertain the prima facie view that the accused has committed the offence".

X. For the reason that the Supreme Court has held in ***Nikesh Tarachand Shah* v *Union of India* 2018 (11) SCC 1**, that where "manifest arbitrariness" exists in

legislation such legislation is lacking in Constitutionality. It was pointed out in ***Nikesh Tarachand Shah*** (supra) that from the time of ***Maneka Gandhi* v *Union of India* 1978 (1) SCC** the Supreme Court has recognized the due process aspect of laws as opposed to a blind acceptance that procedure established by law means any procedure established by any law regardless of the nature of the law or the procedure and its impact on fundamental rights.

Y. For the reason that in the case of *Nikesh Tarachand Shah (supra),* this Hon'ble Court, citing the case of **Indian Express Newspapers (Bombay) (P) Ltd. V Union of India** [(1985) 1 SCC 641], said that *"Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.".*

Z. For the reason that manifest arbitrariness in a law violates Article 14 and in the case of such arbitrariness leading to delays in grant of bail, also violates Article 21.

In the case of the UAPA the arbitrary categorization of persons and /or associations accused of the same crimes into two groups thereby allowing one group recourse to a pretrial redressal mechanism and denying the other group this mechanism, is manifestly arbitrary and therefore in violation of Article 14 and requires redressal by this Hon'ble Court.

AA. For the reason that this Hon'ble Court has held in ***Bikramjit Singh* v *State of Punjab* (2020) 10 SCC 616** that *"the right to default bail, as has been correctly held by the judgments of this Court, are not mere statutory rights under the first proviso to Section 167(2) of the Code, but is part of the procedure established by law under Article 21 of the Constitution of India, which is, therefore, a fundamental right granted to an accused person to be released on bail once the conditions of the first proviso to Section 167(2) are fulfilled".*

AB. For the reason that both "Unlawful Associations" and persons accused of carrying out "unlawful activities" stand accused of the same crime – "unlawful activity". In so far as the Unlawful Activities Prevention Act, 1967

creates a redressal mechanism for "Unlawful Associations", but not for persons accused of carrying out an "unlawful activity", the said Act violates the principle of parity contained in Article 14;

AC. For the reason that this Hon'ble Court in the case of ***Union of India* v. *K.A. Najeeb*** **(2021) 3 SCC 713**, has held as under:-

"It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA per se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised."

It is therefore submitted that this Hon'ble Court, in exercise of its powers under Article 32, has inherent and implicit powers to frame guidelines as to grant of bail in cases under the UAPA to be followed by Courts to ensure that the provisions of the UAPA are not applied arbitrarily, indiscriminately and in a mala-fide fashion, merely to curb dissent.

AD. For the reason that it is the constitutional right of persons to be provided with the materials upon which they are sought to be proceeded against, in order to test the bona-fides (or mala-fides) of the action against them. As such therefore, persons against whom sanction for prosecution is sought, need to be supplied with all the materials that are placed before the sanctioning authority, so that their rights under Article 226 and Article 32 are not impaired.

AE. For the reason that extremely low rates of conviction under the UAPA are a clear pointer to the fact that the provisions of the Act are used indiscriminately and arbitrarily. It is therefore just and proper that a scheme of compensation be formulated to adequately compensate people who are eventually acquitted, for the loss of their freedom.

AF. For the reason that the provisions of the Act, which form the subject matter of the Petition, are unconstitutional and violate the provisions of Articles 14, 19 and 21.

PRAYER

That in view of the facts, circumstances and grounds contained herein above, it is most respectfully prayed that this Hon'ble Court be graciously pleased to:-

A. Declare and hold that the Proviso to Section 43D(5), as manifestly arbitrary and ultra vires Article 21 of the Constitution of India;

B. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the creation of appropriate redressal mechanisms for persons who face prosecution under the UAPA without having their names published in the Fourth Schedule, in the same manner as persons whose names are published in the Fourth Schedule, in accordance with the principles set out in Article 14;

OR IN THE ALTERNATIVE TO B ABOVE

B. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the Respondents to publish the name of every person against whom prosecution under the Unlawful Activities (Prevention) Act, 1967 is

sought to be initiated (whether by the Central Government or the State Government), in the Fourth Schedule of the said Act, at the time of grant of sanction;

C. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the Government to set up a redressal mechanism for people accused of carrying out "unlawful activities" to have the same opportunity of clearing their name as is statutorily available under the UAPA to "Unlawful Associations";

D. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the Respondents to provide to all persons accused under Chapter IV and Chapter VI of the UAPA all the materials that are placed before the sanctioning authority contemporaneously with providing the same to the sanctioning authority, in order to ensure that there are no "bad faith" actions by the Government, to protect the rights of such persons under Article 32 and Article 226;

E. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the Government to provide

the detailed sanction order containing reasons reflecting the independent review of the material by the sanctioning authority, to all persons in respect of whom an order of sanction for prosecution is passed;

F. Issue a Writ of Mandamus, or any other appropriate Writ, Direction or Order, directing the Government to set up a suitable scheme for compensating people who are incarcerated under the UAPA and who are eventually acquitted, with the quantum of compensation increasing in proportion to the time spent in jail;

G. Pass such other Order or Directions as may be deemed necessary and appropriate in the facts and circumstances of the case.

FILED BY:

(ANN MATHEW)
ADVOCATE FOR THE PETITIONERS

FILED ON:

NEW DELHI