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## **Introduction**

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

## **Preface**

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

## **Description**

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

## **THE DELHI BLAST AND THE GAPS IN INDIA'S COUNTER TERRORISM FRAMEWORK: IS UAPA ENOUGH?**

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### **ABSTRACT**

*The recent bombing in New Delhi highlights the importance of the strength of India's structure to combat against terrorist attacks and how significant the Unlawful Activities (Prevention) Act (UAPA) is in this regard. UAPA has become the main piece of legislation utilized by India in the fight against terrorism; however, when applied in recent investigations, there are serious shortcomings in the coordination of intelligence, the use of digital evidence, and the ability to prevent such attacks. This article looks at whether the current provisions provided under UAPA are adequate for dealing with modern terrorism.*

*To assess how far UAPA has progressed, this paper first will look through the history of India's counter terrorist architecture along with the National Investigation Agency Act and the different institutional mechanisms in place including the NIA, the MAC, and state level ATS units. By looking at some recent judicial developments, this paper will investigate how the courts interpret the definitions of "terrorist acts", the restrictive bail provisions for charges under the UAPA, and how the UAPA interacts with constitutional rights. Using the New Delhi bombing as a case study, this paper will also highlight the limitations faced in the response to the bombing, including the long delays in accessing forensics, fragmented intelligence agencies and the lack of a specific response framework for dealing with cyber-terrorism.*

*In light of the challenges discussed, this article will provide an overview of comparable counter-terrorism laws and practices implemented in US, UK and Europe and how they may be applied to India's Federal Government. The conclusion indicates that while the Unlawful Activities Prevention Act (UAPA) is a strong foundation for investigations into Terrorism, the Act does not provide an investigation, supporting technologies such as Real Time Intelligence, Digital Forensic Technologies and Witness Protection programs will complement the investigative laws.*

## INTRODUCTION

The recent Delhi bombings have again placed the issue of terrorism and internal security within the public and legal discussion in India. While Law Enforcement's initial response to these bombings includes investigations into who and or what caused them as well as preventing any further harm, such incidents raise additional issues around whether India's existing system for dealing with acts of terrorism and the use of force by terrorists is adequate. Beyond looking at the immediate incident, these bombings serve to show us that today's terrorism does not only occur via organized groups committing highly-planned, large-scale attacks, but is now also done so by individuals acting independently, using improvised methods and through technologically enabled communication networks.

The rise of modern terrorism presents many legal issues to solve. For example, the threat of the lone-wolf attacker, rising radicalization via the internet, encrypted messaging applications and new financing methods have transformed the terrorist environment in a way that makes it difficult to define a distinct line between criminally-motivated terrorist activity and extremist ideology<sup>1</sup>. The dynamic and vast nature of modern terrorism also makes investigation and prosecution more complex due to a lack of precedent concerning modern terrorist acts; thus, many of the original attitudes toward and methods of combating terrorism have not kept pace with the advancements in the methods employed by modern terrorists.<sup>2</sup>

In India, legislation relating to the fight against terrorism is mainly the Unlawful Activities (Prevention) Act, 1967 ("UAPA"). The provisions of the UAPA have grown over the years to become a comprehensive law to combat terrorism with extreme provisions for investigations, detention, bail and the designation of terrorist organisations and persons<sup>3</sup>. The UAPA is often used as the principal legal instrument for combating terrorism after incidents like the car bombing that occurred in Delhi in 2020. However, many persons have raised serious concerns surrounding the

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<sup>1</sup> Ujjwal Kumar Singh, 'Governing Terror: The Legal Architecture of Counter-Terrorism in India' (2012) 45 *Economic and Political Weekly* 33.

<sup>2</sup> Gautam Bhatia, 'The UAPA and the Death of Due Process' (2020) *Indian Constitutional Law Review*.

<sup>3</sup> Unlawful Activities (Prevention) Act 1967.

constitutionality, due process violations, and human rights abuses associated with the broad construction of the UAPA and its severe procedural provisions.

This article asks one question: Does the Unlawful Activities (Prevention) Act, 1967 adequately deal with terrorism in the modern day? This paper evaluates the changes to terrorist activity, comparisons of UAPA through time, and potential shortfalls that have occurred due to past events (particularly Delhi bombing). The conclusion drawn is that, although UAPA is important to counterterrorism as part of India's National Security Strategy, its existence does not guarantee its success because structural, procedural, and/or rights-related concerns limit UAPA's effectiveness. Without significant changes to improve the investigative footprints, enhance judicial oversight, and create additional legal mechanisms, dependence on UAPA will ultimately result in both compromising national security objectives as well as diminishing constitutional protections.

## **OVERVIEW OF INDIA'S COUNTER-TERRORISM LEGAL FRAMEWORK**

### **I. Evolution of Anti-Terror Laws in India: From TADA to POTA to UAPA**

India's counter-terrorism legal framework has developed through a succession of extraordinary legislations introduced in response to specific security crises. The Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) marked India's first comprehensive statutory attempt to address terrorism and internal insurgency<sup>4</sup>. Enacted against the backdrop of rising militancy, TADA granted sweeping powers to investigative agencies, including extended detention, admissibility of confessions made to police officers, and diluted procedural safeguards. Although intended as a temporary emergency measure, TADA soon became synonymous with misuse, arbitrary arrests, and large-scale violations of civil liberties<sup>5</sup>, leading to its eventual lapse in 1995. Following a brief reliance on ordinary criminal law, the Prevention of Terrorism Act, 2002 (POTA) was enacted in the aftermath of heightened global security concerns. POTA sought to correct some of TADA's excesses by introducing limited safeguards, such as review committees and procedural checks. Nevertheless, it retained several coercive features, including extended detention periods and broad definitions of terrorist activity. Persistent allegations of political

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<sup>4</sup> Terrorist and Disruptive Activities (Prevention) Act 1987

<sup>5</sup> *Kartar Singh v State of Punjab* (1994)

misuse<sup>6</sup> and discriminatory application ultimately resulted in POTA's repeal in 2004, reinforcing concerns about the compatibility of extraordinary anti-terror laws with constitutional guarantees. In the aftermath of POTA's repeal, the Unlawful Activities (Prevention) Act, 1967 (UAPA), originally a narrowly focused statute addressing unlawful associations, was significantly expanded through successive amendments<sup>7</sup>. Particularly after the 2004 and 2008 amendments, UAPA absorbed many substantive and procedural elements previously found in TADA and POTA, effectively transforming it into India's principal anti-terror legislation<sup>8</sup>. Unlike its predecessors, UAPA was not enacted as a temporary emergency law but as a permanent statute, signalling a decisive shift towards the normalisation of exceptional counter-terror powers within the ordinary legal framework

## II. Institutional Framework and the Consolidation of Counter-Terror Powers

The enactment of the National Investigation Agency Act, 2008 further consolidated India's counter-terrorism framework by creating a specialised central agency to investigate offences affecting national security, including those under UAPA. The establishment of the NIA reflected a policy shift towards centralised investigation and prosecution in terror-related cases, particularly those with inter-state or transnational dimensions.

While the NIA has contributed to improved coordination and expertise, its operational mandate is closely intertwined with the expansive provisions of UAPA<sup>9</sup>. This institutional alignment has reinforced the dominance of UAPA within India's counter-terrorism architecture, leaving limited space for alternative legal or institutional responses. Consequently, India's framework reflects a historical pattern in which powers initially criticised under temporary laws such as TADA and POTA have been reintroduced and entrenched through a permanent statutory and institutional structure, raising enduring concerns regarding accountability, proportionality, and constitutional balance.

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<sup>6</sup> People's Union for Civil Liberties v Union of India (2004)

<sup>7</sup> Unlawful Activities (Prevention) Act 1967.

<sup>8</sup> Unlawful Activities (Prevention) Amendment Acts 2004 and 2008

<sup>9</sup> Anup Surendranath, 'Process as Punishment in Terrorism Trials' (2018)

## THE DELHI BLAST AS A CASE STUDY

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### A. Nature of the Incident

The explosion in Delhi is an example of a terrorist act that is not an old-style large-scale terror attacks usually affiliated with a significant terror organization. Early reports show that an improvised explosive device was used, with the device specifically used to create chaos, fear, or panic in a public space rather than to create mass casualties<sup>10</sup>. Characteristics of these contemporary-style attacks include limited resources, no significant coordination among those carrying out the attack, and no known attribution of those network- or organizational-determined characteristics of violent extremist groups that allow investigators to arrest and prosecute suspects who have committed acts of terrorism based on their networks/organizations. Because of these factors, investigating and attributing actions is very difficult.<sup>11</sup>

Investigative priorities in the early stages are to secure the crime scene, determine the nature of the explosive used, and try to ascertain any potential ideological or organizational connection to the event. Investigators are compelled to investigate these types of incidents in urban areas, particularly because of the symbolic relationship of Delhi as the capital of India, as possible threats to national security and/or threats to the national infrastructure. Historically, investigators always treat incidents like those in Delhi, regardless of how they are defined, in a manner that indicates investigators are aware of the changing paradigm that traditional low-intensity terrorism may exist as part of a broader pattern of radicalization<sup>12</sup>.

Typically, investigators operate with incomplete information in the early stages of an investigation. Thus, the legal definitions of terrorism, extremist violence, and serious criminal offenses are often emerging and evolving. However, the potential for perceived serious threats may influence the legal framework used by the State when responding to terrorist acts.<sup>13</sup>

### B. Invocation of UAPA Act

Typically the default prosecutorial response in cases such as the blast in Delhi is the use of the Unlawful Activities (Prevention) Act 1967 - largely because this Act has an extremely broad

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<sup>10</sup> UN Office on Drugs and Crime, *Handbook on Criminal Justice Responses to Terrorism* (UNODC 2014).

<sup>11</sup> Marc Sageman, *Leaderless Jihad: Terror Networks in the Twenty-First Century* (University of Pennsylvania Press 2008)

<sup>12</sup> David Rapoport, 'The Four Waves of Modern Terrorism' (2002) 37 *Anthropoetics*.

<sup>13</sup> Gautam Bhatia, 'The UAPA and the Death of Due Process' (2020) *Indian Constitutional Law Review*.

definition of "terrorist act" under Section 15 so that it allows all investigatory agencies to brand anything they choose as a terrorist act, which is deemed to threaten a State's security or instil fear in a civilian population even at a very early stage of investigation. The breadth of the UAPA permits its usage at the most preliminary nondiscretionary investigatory stage and in conjunction with provisions of the Indian Penal Code, thus enabling law enforcement agencies and courts to grant access to extended periods of imprisonment without trial, conduct specialised types of probes into specific types of offences and issue restrictive conditions on release on bail<sup>14</sup>.

The UAPA has been used very early in the investigatory process by the State on the basis of (1) urgency; (2) deterrent effect; and (3) prevention of more attacks<sup>15</sup>. Nevertheless, early invocation of the UAPA has profound implications from a legal perspective. The procedural protections that are available pursuant to ordinary criminal procedures are dramatically diminished once UAPA has been invoked, particularly with respect to detention and bail conditions. Therefore the accused can be held without charge for prolonged periods (while the investigation continues) even though there is not yet any certainty with respect to the evidence for a particular crime. This places the accused in a structurally imbalanced situation in which the charge against him has much more impact on determining whether or not to deprive him of his liberty rather than the actual strength of the State's evidence against him.

The Delhi explosion is an example of a larger trend in counterterrorism action in India. The UAPA has often been used at the initial stages of investigations, however, it is rare that an individual is convicted under UAPA due to a lack of successful prosecutions<sup>16</sup>. This leads to significant questions regarding proportionality and necessity. The frequent use of UAPA as an investigatory type of tool, instead as a statue reserved for cases of clear terrorism, presents a risk that the UAPA will become a means of preemptive restraining rather than prosecuting individuals. The disparity between the invocation of UAPA and the end result of a final conviction highlights how UAPA is primarily measured by arrests and long detainment rather than successful prosecution<sup>17</sup>.

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<sup>14</sup> Code of Criminal Procedure 1973; Indian Penal Code 1860

<sup>15</sup> Ministry of Home Affairs, *Counter-Terrorism Policy Framework* (Government of India).

<sup>16</sup> National Crime Records Bureau, *Prison Statistics India* (latest edn).

<sup>17</sup> South Asia Terrorism Portal, 'UAPA Arrests and Convictions Data' (SATP).

## GAPS IN INDIA'S COUNTER-TERRORISM FRAMEWORK

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### a) Over-Reliance on UAPA: The "One-Law-Fits-All" Problem

In India, the government has increasingly relied on the Unlawful Activities (Prevention) Act of 1967 to address an expanding range of offenses relating to security. In essence, the UAPA has evolved over time from being a relatively narrow statutory prohibition against unlawful associations, to being highly descriptive statute covering the broadest definitions of terrorism and terrorism/terrorist-conspiracy funding and preparation (which covers anything you could ever think of as terrorism-related). In essence, this has created a "one size fits all" approach to terrorism and violent behaviour; as a result, all manner of violent conduct (from individual extremists to larger groups committing acts of terrorism) are effectively lumped into the same statute.<sup>18</sup>

The increasing reliance on the UAPA poses a serious threat to the ability to distinguish between acts of terrorism and other serious types of violent criminal behaviour. At times, it may be appropriate to address cases of terrorism using the normal criminal justice process.

The use of appropriate legal safeguards for addressing a variety of violent acts through UAPA illustrates the preference of many authorities for implementing a 'one-size-fits-all' approach, rather than approaching these instances with a nuanced, case-by-case response. This creates an atmosphere where there is a greater emphasis placed on developing mechanistic means of coercion by way of legal means, as opposed to working to build the capabilities of investigative agencies, to coordinate intelligence resources and to develop general prosecutorial systems. As a consequence, UAPA is finding utility in a growing number of instances as a substitute for instigating systemic reforms, rather than as a discriminatorily focused counter-terrorism resource.

### b) Low Conviction Rates Versus High Arrests: Preventive Detention and Due Process

The fact that arrest rates are much higher than conviction rates demonstrates that UAPA is being used primarily for preventative incarceration, not for obtaining a conviction. The harsh conditions of bail under section 43D(5) UAPA force people to remain in pretrial detention who may ultimately only have circumstantial evidence against them.

This imbalance is further enforced by the Supreme Court's ruling in *NIA v Zahoor Ahmad Shah Watali*, which states that at the beginning of a criminal proceeding, courts must take the

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<sup>18</sup> Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing 1982).

prosecution's version of what happened, which limits courts' ability to fairly assess the strength of evidence against a defendant prior to releasing them from custody. In this way, when national security issues come into play, it is difficult for the trial courts to perform their due diligence in reviewing the evidence presented during the initial stages of a case and evaluating its strength, leaving the possibility for UAPA supporters to remove individuals from society long before finding them guilty, essentially treating the pretrial phase of the proceedings as if it were punitive.<sup>19</sup> The way in which the UAPA operates is detrimental to criminal law and policy's fundamental principles, including presumption of innocence, fair trial rights, and jury selection guarantee that juries will be unbiased. Under the UAPA, pre-arrest detention is authorised by virtue of only suspicion, rather than by evidence showing guilt beyond a reasonable doubt. Therefore, the UAPA diminishes its own legitimacy by elevating the detention of those suspected of crimes over the age-old principle of the rule of law.<sup>20</sup>

### **c) Human Rights and Constitutional Concerns: Article 21 and Prolonged Incarceration**

The widespread use of the UAPA is raising concerns about its constitutionality, as it appears to violate an individual's Article 21 right to life and liberty by keeping them incarcerated for an extended period of time before they are tried. Additionally, while UAPA was intended to address National Security in some instances, the Supreme Court has held that any limitation of Liberty based on National Security must be reasonable and proportionate<sup>21</sup> to the necessity for such limitation of Liberty.<sup>22</sup>

The UAPA cannot deprive a person of their constitutional rights as Post-Conviction Detention becomes excessive, and the Supreme Court of India has defined the right to a speedy trial, which falls under Article 21<sup>23</sup>. Thus, preventing a person from being tried for an inordinate amount of time before trial violates the principles of our constitution. Despite the clear legal precedents established by the courts, the use of UAPA continues to be marked with the issue of prolonged detention before trial<sup>24</sup>.

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<sup>19</sup> Anup Surendranath, 'Preventive Detention, Bail and the UAPA' (2020) 55(34) *Economic and Political Weekly* 45.

<sup>20</sup> K D Gaur, *Criminal Law: Cases and Materials* (7th edn, OUP 2019) ch 12.

<sup>21</sup> *Maneka Gandhi v Union of India* (1978)

<sup>22</sup> Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 153–160.

<sup>23</sup> *Hussainara Khatoon v State of Bihar* (1980) 1 SCC 81.

<sup>24</sup> *Shaheen Welfare Association v Union of India* (1996)

There is a clear disconnect between how the Constitution expects us to approach Counter-Terrorism and what is currently being done under the statutes. Without sufficient protections against excessive pretrial detention, there is a risk of normalising the use of extraordinary methods, which negatively impacts civil liberties. The continued use of this method may potentially have long-term consequences that have a negative impact on the public perception of Counter-Terrorism laws; therefore undermining their moral and constitutional legitimacy.

## **JUDICIAL RESPONSE TO UAPA: SUFFICIENT SAFEGUARD OR ILLUSION?**

### **i. Supreme Court's Approach to Bail and Liberty: "Bail Is the Rule" versus the UAPA Reality**

The Indian Criminal Justice System has always been known for applying the concept of presumption of innocence and personal liberty under Article 21 of the Indian Constitution, which is why Bail is usually accepted as a general rule while Jail is only used as an exception. However, - from the way the UAPA (Unlawful Activities Prevention Act, 1967) is applied, it appears that there has been a move away from this general principle<sup>25</sup>.

According to Section 43D (5) of the UAPA, Courts will only grant Bail if there is a likelihood that the Accused will be convicted based on a Prima Facie Test and therefore will be held in custody following the completion of the investigation<sup>26</sup>. The Supreme Court's Decision in National Investigation Agency v Zahoor Ahmad Shah Watali<sup>27</sup>, supported this position, advising that when considering Bail, the Courts must not determine the probative value of the Evidence presented and accept the Prosecution's Evidence at face value. This Type of Judicial Interpretation reduces the amount of Judicial Discretion available to Courts and gives preference to the continued Imprisonment of an Accused.<sup>28</sup>

Although the justifications given for the Supreme Court's Judgement in this case were based on National Security considerations, the actual effect of limiting Judicial Discretion at Bail Hearings has transformed UAPA Bail Hearings to almost being a "Rubber Stamp" Process and the accused

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<sup>25</sup> Gautam Bhatia, 'The UAPA and the Death of Due Process' (2020) *Indian Constitutional Law Review*.

<sup>26</sup> Unlawful Activities (Prevention) Act 1967, s 43D(5).

<sup>27</sup> National Investigation Agency v Zahoor Ahmad Shah Watali (2019) 5 SCC 1.

<sup>28</sup> Anup Surendranath, 'Bail, National Security and the UAPA' (2020) 55(34) *Economic and Political Weekly* 45.

being held in custody on speculative grounds of risk to National Security. As such, the Guarantee of Personal Liberty as provided for by the Constitution operates differentially in relation to cases in which Terrorism is alleged as a Criminal Offence, raising doubts about whether judicial oversight functions as a meaningful safeguard or merely as a procedural formality within the UAPA framework.

## ii. Presumption of Innocence under Strain: Reading Down versus Legislative Intent

The principle of presumption of innocence is a fundamental element of criminal law and is connected with the right to a fair trial. However, the structure of UAPA creates significant pressure on this principle because of its prioritization of preventive detention (and associated security) over the rights to liberty. The bail conditions placed on the accused and the lengthening of the trial process lead to pre-conviction incarceration akin to punishment.

In light of this, the higher courts, including the Supreme Court, have occasionally attempted to tone down UAPA by virtue of their judicial interpretation. The Supreme Court's emphasis in *Union of India v. K. A. Najeeb*<sup>29</sup> that high courts can grant bail even though the law may prevent it as it violates Article 21, has set a precedent for lower courts.

In addition, in *Thwaha Fasal v. Union of India*<sup>30</sup>, the Supreme Court also underscored the significance of distinguishing between a person's associations or ideological sympathies<sup>31</sup> from actual terrorist involvement when applying the UAPA provisions and warned against the mechanical application of UAPA provisions. The limited situations in which judges are willing to be neutral or make decisions that reflect the particular facts at the scene do not change the fact that the overarching purpose of the UAPA is still to enable the executive to incapacitate people who could potentially harm national security before they have a chance to do so. This is evident by the fact that courts only engage in a limited amount of substantive review of the underlying evidence that a decision was based upon at the outset of an investigation.<sup>32</sup>

Considering the above, one area of concern arises from determining whether the judicial review process that exists under the UAPA provides protection of individual rights or is merely a process

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<sup>29</sup> *Union of India v K A Najeeb* (2021) 3 SCC 713.

<sup>30</sup> *Thwaha Fasal v Union of India* (2022) 5 SCC 1.

<sup>31</sup> *Arup Bhuyan v State of Assam* (2011)

<sup>32</sup> Kalpana Kannabiran, 'National Security and Judicial Retreat' (2019) 54(48) *Economic and Political Weekly* 38.

to provide protection at the edges, should an individual experience constitutional violations. In addition, the ongoing struggle between protecting civil liberties by limiting the scope of statutory provisions and deferring to the acts of the legislature in relation to protecting national security creates the perception that judicial review under the UAPA acts as a mere façade, rather than providing adequate protection against government power.

## IS UAPA ENOUGH? A CRITICAL ASSESSMENT

The Unlawful Activities (Prevention) Act of 1967 has gradually evolved into a key component of India's counter-terrorism laws, serving as the most significant legal tool available for dealing with terrorist threats, extremist violence, and various other activities considered to threaten the security of the nation. The law has been amended multiple times since it first came into effect, resulting in expanded powers for law enforcement authorities, such as the ability to deny bail, a longer period of detention before trial, and expansive definitions of terrorist acts, and the term "terrorist" as it applies to individuals who provide support for terrorists. In the immediate wake of a particular disaster (i.e., the Delhi blasts), UAPA presents an effective means of protecting the public from becoming victims of future terrorist acts, as it provides the Government with the tools needed to take preventive measures to address potential threats before they occur and cause substantial harm.

Nevertheless, we cannot evaluate whether UAPA represents a complete answer to terrorism, today's version of terrorism, based on just the breadth of what UAPA does from a preventive standpoint. In fact, there are areas of concern within its implementation that negatively affect UAPA's ability to serve as a long term anti-terrorism strategy. The most significant and persistent concern that has been raised about UAPA is the large number of arrests made under UAPA compared to the small number of convictions<sup>33</sup>. This disparity suggests that UAPA is more often used as an incapacitation measure than as an adjudication measure. Preventive detention serves a short-term security purpose but it does not develop or support a long-term deterrent and it does not increase the overall function of the criminal justice system. If we continue to rely on UAPA to offset deficiencies in investigations and prosecutions, then pre-trial detention becomes normalized. This will diminish the credibility of counter-terrorism initiatives.

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<sup>33</sup> National Crime Records Bureau, Crime in India 2021 (NCRB 2022)

The constitutional implications associated with the UAPA's stringent bail regime (including the test of prima facie) are extensive.<sup>34</sup> The rigidity of UAPA's bail regime, particularly the requirement that courts must deny bail where alleged prima facie case of the accused exists, significantly limits judicial discretion and has a direct effect on an individual's right to personal liberty pursuant to Article 21 of the Constitution. Although the constitutional courts have intervened occasionally to provide relief for extreme cases of undertrial detention by granting temporary bail to undertrials awaiting trial, the actions of Constitutional Courts are viewed more as a remedy for exceptional cases than as systemic approaches to providing protections for undertrials. Therefore, judicial supervision in UAPA is usually done in reaction to abuses that occur after significant periods of limited liberty under UAPA, rather than as a preventive measure of safeguarding against future abuses through appropriate review processes relatively early on in the judicial process under the UAPA. This creates significant stress on the presumption of innocence because individuals can be kept in custody (without a finding of guilt) for extended periods of time. The permanence of UAPA distinguishes it from prior anti-terror legislation, including TADA and POTA, both of which were introduced as temporary emergency legislation and phased out over time. UAPA's enacting of many coercive aspects of these laws into a permanent statutory regime marked the institutionalizing of extraordinary powers into the frameworks of ordinary governance, representing a major shift. Over time, the normalisation of extraordinary powers will blur the lines delineating emergency responses from routine criminal justice, raising concerns about proportionality, democratic accountability, and the gradual erosion of procedural safeguards. The use of extraordinary powers and measures will reduce the threshold for invoking such powers; thus there will potentially be a greater incidence of abuse and overreach.<sup>35</sup>

Comparatively you can see similarities in many other jurisdictions where there are comparable security concerns and the jurisdictions have created statutory frameworks that contain structured judicial oversight, along with periodic review of the laws by the legislatures. India has concentrated substantive and procedural counter-terror powers within a single piece of legislation, while having very little mechanism for ongoing supervision or oversight beyond the courts through

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<sup>34</sup> Ministry of Home Affairs, *Annual Report 2022–23* (Government of India).

<sup>35</sup> Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing 1982) 89–94.

constitutional adjudication. The concentration of such powers increases the degree of coerciveness associated with the UAPA Law and limits opportunities for accountability. Consequently, the judiciary's role in ensuring accountability after the fact is enlarged to the extent that judicial intervention has become the only means of ensuring accountability for excessive use of power and unlawful detention.<sup>36</sup>

Cumulatively, these factors indicate that UAPA has a significant and, in certain respects, indispensable role in India's counter-terrorism strategy; however, when used by itself, it cannot adequately address the many complex, evolving characteristics of terrorism in our time. To effectively combat terrorism, it is important to combine preventive legislation with strong investigative capacity, prosecutorial competency, institutional accountability, and an ongoing commitment to protecting constitutional values. If UAPA were to be viewed as the exclusive or primary response to terrorism, we would likely miss the broader issues it must respond to, and we may jeopardise both our ability to achieve our security goals as well as preserve the rule of law. Thus, while UAPA is necessary, it is not sufficient.

## RECOMMENDATIONS

Based on the limitations revealed through application of UAPA (Unlawful Activities Prevention Act, 1967) and in particular to events such as the blast in Delhi, it has become apparent that we need to rethink a comprehensive and multi-faceted counter-terrorism approach rather than just relying on a legislative framework that includes UAPA for all cases of terrorism and extremism. Firstly we must return proportionality to the application of UAPA and the standards for when it may be invoked; in other words, we need to draw lines between ordinary criminal misconduct (where violence or extremist activity is suspected) and extraordinary circumstances that could pose a threat to national security or to organised terrorism<sup>37</sup>. As such, unless otherwise noted by evidence of national security threats or of organised terrorism, police would use conventional criminal statutes combined with various investigative methods and techniques and treat those types of cases as normal. As a result, this would give law enforcement agencies in India (as well as other

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<sup>36</sup> Gautam Bhatia, *The Transformative Constitution* (HarperCollins 2019) 153–160.

<sup>37</sup> *Kartar Singh v State of Punjab* (1994) 3 SCC 569

countries) the ability to keep the definition of terrorism limited to those extraordinary events that truly threaten national security and allow this type of legislation to retain the original intent.<sup>38</sup>

Judicial oversight should be included in laws themselves, not just provide a constitutional safeguard after the fact. Therefore, under UAPA, bail needs to be revised. Courts must be allowed to evaluate and determine the strength of evidence early; this is important given the potential time-limited trial process. A limitation on the timeframe of judicial review over the law is helpful in reducing any chance of abusive judicial authority. The requirement for periodic reviews of the state of an investigation would assist in ensuring that individuals who are placed in preventive custody are not later found guilty, and instead reinforce the presumption of innocence for individuals accused of terrorism, and therefore align counter-terrorism strategies with Art. 21's right to personal liberty.<sup>39</sup>

Institutional development and capacity-building, as well as changes to the law regarding counter-terrorism, will be required to effectively combat terrorism. Counter-terrorism success relies on the quality of investigation and prosecution, in addition to the power granted by governmental authority. This will require investments in forensic evidence collection resources and facilities; cyber intelligence tools; electronic payment tracking systems; and coordination among law enforcement agencies, and others. Improving these capacities will result in increased conviction rates and will help rebuild public trust in the ability of the criminal justice system to effectively deal with terrorism through lawful means.

Legislative oversight of UAPA must also be implemented. Legislative oversight prevents the establishment of exceptional powers indefinitely as well as provides an opportunity to re-evaluate how UAPA aligns with evolving security situations without sacrificing constitutional values. A system for transparency through incentives such as public reporting on UAPA investigations (for example, arrests and subsequent prosecutions/convictions) provides an additional avenue for accountability and encourages dialogue regarding UAPA.<sup>40</sup>

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<sup>38</sup> UN Office on Drugs and Crime, *Handbook on Counter-Terrorism and Criminal Justice Responses* (UNODC 2018).

<sup>39</sup> Anup Surendranath, 'Bail, Liberty and Judicial Review under Special Laws' (2020) 55(34) *Economic and Political Weekly* 45.

<sup>40</sup> Second Administrative Reforms Commission, *Report on Public Order* (Government of India 2007).

Finally, India must take a holistic view of its counter-terrorism efforts, including terrorism as a consequence of the complex interplay between social and political issues. Consequently, a comprehensive approach must include preventive measures to counter radicalisation, misinformation, and socioeconomic vulnerability, in conjunction with legal enforcement. To this end, India must develop a way to combine the respect for individual rights through the legal system with institutional reform and preventive policy measures; in doing so, India can develop a counter-terrorism policy that is effective and constitutionally justifiable.<sup>41</sup>

## CONCLUSION

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The blast in Delhi highlighted the changing face of terrorism and the ongoing challenges which India faces with its counter-terrorism system. The initial use of the Unlawful Activities (Prevention) Act, 1967 is illustrative of the State's instinct to utilise exceptional forms of law in times of perceived crises; it also highlights a number of structural and constitutional weaknesses that exist within India's counter-terrorism laws and practices.

As shown in the analysis, although the UAPA is a significant tool when it comes to defining preventive action and providing for the national security needs of the State, it is legislated within a framework that emphasises preventive detention over judicial determination and the exercise of coercive state power over the establishment of evidentiary credibility. Such an imbalance raises fundamental questions about the long-term impact and legitimacy of any counter-terrorism strategy that is based solely on exceptional forms of legislation.

The intervention of the judiciary has provided limited corrective relief by reaffirming the importance of liberty and the presumption of innocence as found in article 21; however, these interventions have largely been reactive in nature and serve to mitigate the excesses of the legislation rather than being sufficient to reshape the structural design of the law. Therefore, the judiciary's safeguards in respect of the UAPA remain primarily constitutional stopgaps rather than integrated systems of accountability. The problems of lengthy periods of pre-trial detention, the

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<sup>41</sup> United Nations Development Programme, *Preventing Violent Extremism through Inclusive Development* (UNDP 2016).

low rate of convictions, and the broad discretion exercised by law enforcement indicate that the problems with the UAPA are not limited to the way it is applied; they are also in the way the law has been conceptualized.

The Comparative Experience further reinforces this conclusion by demonstrating that the success of an effective counter-terrorism function will not only be based upon essentially unlimited powers of detention, but rather upon the establishment of a framework that is a balance of the utilisation of the legal authority within an institution, judicial opposition, and the accountability to the people through a functioning political system. In particular, India's over-reliance upon the UAPA as the sole response to terrorism will ultimately undermine the necessity of strengthening ordinary criminal law, investigative capacities, and preventive measures to address the radicalisation and funding of terrorist networks.

In conclusion, the primary question is not whether India requires extensive counter-terrorism laws to effectively combat terrorism, but whether the establishment of counter-terrorism laws would be compatible with constitutional values and the rule of law. Although UAPA is a necessary aspect of the terrorist response capabilities of India, it cannot serve as an adequate stand-alone answer to the terrorism of today. Therefore, a recalibration of the framework that not only establishes limitations on UAPA's exceptional usage, but that also builds upon this framework with a greater emphasis on procedural safeguards and institutional reform, is critical to ensure that a secure environment is created and maintained without infringing upon the constitutional liberties of the individual. By making this institutional balance, India will be able to create an effective and democratic strategy to combat terrorism.