

2023

EXPANDING THE HORIZONS OF MEMBERSHIP OF A BANNED ORGANIZATION UNDER UAPA WITH A BIRD EYE VIEW ON THE RECENT SHAILENDRA BHADOURIYA BAIL ORDER BY THE CHHATTISGARH HIGH COURT

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Recommended Citation

Aditya Mehrotra, 'Expanding the Horizons of Membership of a Banned Organization under UAPA with a Bird Eye view on the recent Shailendra Bhadouriya Bail Order by the Chhattisgarh High Court' (2023) 2 IJHRLR S.I. 149-154.

Available at www.humanrightlawreview.in/vol-2-special-issue/.

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EXPANDING THE HORIZONS OF MEMBERSHIP OF A BANNED ORGANIZATION UNDER UAPA WITH A BIRD EYE VIEW ON THE RECENT SHAILENDRA BHADOURIYA BAIL ORDER BY THE CHHATTISGARH HIGH COURT

Aditya Mehrotra¹

INTRODUCTION

Context of *Shailendra Bhadouriya and Others v. State of Chhattisgarh*²

A criminal appeal was filed pursuant to Section 21(4) of the National Investigation Agency Act, 2008³, against an order of the Special Judge (NIA Act), whereby the appellant's application for bail for offences under Sections 149⁴, 201⁵, and 120B⁶/34 of the Indian Penal Code⁷, Section 8(2)(3)(5) of the Chhattisgarh Vishesh Jan Suraksha Adhiniyam. The Special Judge denied the appellant's application under Section 439 of the Criminal Procedure Code⁸ (NIA Act).

According to the appellants, they were accused solely on the basis of confessional comments made throughout the inquiry. Nothing incriminating, such as money, clothing, or wireless devices, was retrieved from the present.

In this case, Justices Sanjay Agrawal and Rajani Dubey made remarks while reviewing the petitions of two individuals accused of paying extortion money to prohibited organizations for road development.

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² *Shailendra Bhadouriya and Others v. State of Chhattisgarh*, CrI. Appeal No. 706 of 2022.

³ Section 21(4), The National Investigation Agency Act, 2008.

⁴ Section 149, Indian Penal Code, 1860.

⁵ Section 201, Indian Penal Code, 1860.

⁶ Section 120B, Indian Penal Code, 1860.

⁷ Section 34, Indian Penal Code, 1860.

⁸ Section 439, Criminal Procedural Code, 1973.

Furthermore, referencing *Sudesh Kedia v. Union of India*⁹, the bench noted that payment of extortion money to a banned or terrorist group does not constitute terror funding.

In addition, the court determined that the action must be related to terrorist activities as described in Section 15¹⁰. Additionally, Clause (b) of the proviso to sub-section (1) of Section 38¹¹ states that if a person charged with the offence under sub-section (1) of Section 38¹² proves that he did not participate in the organization's activities during the period in which the organization's name was included in the First Schedule, the offence relating to membership in a terrorist organisation under sub-section (1) of Section 38 will not be attracted.

This provision might be utilised as a defence by the accused. However, in considering the request for bail, the Court granted it.

CRITIQUE

Freedom of speech and expression is a crucial component of a democratic society. Article 20 of the Universal Declaration of Human Rights¹³ and Article 22 of the International Convention on Civil and Political Rights¹⁴ recognise the right to freedom of association as a type of freedom of speech. This right is also specifically recognised by the Indian Constitution, subject to the requisite restrictions.

Since the time of the Magna Carta, it has been an established principle in English law that a prisoner must get a fair trial during which he can present a defence.

Membership in a proscribed organisation alone does not constitute

⁹ *Sudesh Kedia v. Union of India*, AIR 2021 SC 1892.

¹⁰ Section 15, Unlawful Activities (Prevention) Act, 1967.

¹¹ Section 38, Unlawful Activities (Prevention) Act, 1967.

¹² Sub Section (1), Section 38, Unlawful Activities (Prevention) Act, 1967.

¹³ Article 20, UDHR, 1948.

¹⁴ Article 22, UDHR, 1948.

criminal activity.

Under some statutes, such as the Unlawful Activities (Prevention) Act of 1967¹⁵, the government can outlaw an organisation, and a person's mere participation in such an organisation would appear to constitute an indictable offence.

However, organizations/associations can be either legal or illegal. There is no disagreement on membership in legal organisations even Anti-government organisations are intrinsically important for democracies. However, participation in an illegal organisation is subject to legal and political debate. Terrorist organisations, by their very nature, are "*harder to dissuade*" than other organizations, which necessitates the enactment of legislation to prevent their proliferation.

DECODING THE LEGALITY

In *Arup Bhuyan v. State of Assam*¹⁶ and *Sri Indra Das v. State of Assam*¹⁷, Supreme Court bench ruled that Section 3(5) of TADA¹⁸ and Section 10 of UAPA¹⁹, which incriminate mere members of a banned organization, cannot be read literally and must be read in conjunction with Article 21 of the Constitution²⁰, and must be read down.

By thus interpreting these clauses, it must be determined that participation in a proscribed organization does not automatically indict a person until he engages in violence or incites others to imminent violence. Following the prior ruling in *State of Kerala v. Raneef*²¹, the theory of "guilt by association" was rejected in the case of Sri Indra Das.

¹⁵ Unlawful Activities (Prevention) Act, 1967, No. 37 of 1967.

¹⁶ *Arup Bhuyan v. State of Assam*, (2011) 3 SCC 377 (India).

¹⁷ *Indra Das v. State of Assam*, (2011) 3 SCC 380 (India) (Division Bench decision).

¹⁸ Section 3(5), Terrorists and Disruptive Activities Act, 1987.

¹⁹ Section 10, Unlawful Activities (Prevention) Act, 1967.

²⁰ India Const. art. 21.

²¹ *State of Kerala v. Raneef*, (2011) 1 SCC 784 (India) (Division Bench decision).

In Arup Bhuyan's case, reliance was placed on the US Supreme Court's decision in *Brandenburg vs. Ohio*²², in which it was held that merely advocating or teaching the duty, necessity, or propriety of violence as a means of achieving political or industrial reform, or publishing, distributing, or displaying any book or paper containing such advocacy, or justifying the commission of violent acts with the intent to exemplify, spread, or advocate the propriety of the It will only be deemed criminal if it incites impending lawlessness.

Subsequently, In the *Thwaha Fasal case*²³, several sections of the UAPA Act were examined, and a multitude of rulings with tremendous persuasive power were issued. To prosecute an individual under Sections 38²⁴ and 39²⁵, the judges have emphasised that two prerequisites must be met: first, there must be an association with or support for the terrorist organisation, and second, there must be the intent (*mens rea*) to further the activities of the terrorist organisation.

It is also important to note that the court reemphasised the need for Constitutional Courts to protect the fundamental rights and liberties of an individual if reasonable grounds cannot be found to be *prima facie* true, which cannot be negated by Section 43D (5)²⁶, as cited in the *K.A. Najeeb case*²⁷, thereby upholding the supremacy of the Constitution and the independence of the judiciary.

CONCLUSION

To conclude, The UAPA has been changed multiple times to match new terrorist methods, including shifting the burden of evidence and conducting extraterritorial arrests. The basic principles of law must be

²² *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²³ *Thwaha Fasal v. Union of India*, CRL.A.No. 705 of 2020.

²⁴ *Id.* At. 10.

²⁵ Section 39, Unlawful Activities (Prevention) Act, 1967.

²⁶ Section 43D (5), Unlawful Activities (Prevention) Act, 1967.

²⁷ *Union of India vs KA Najeeb*, (2021) 3 SCC 713.

taken into consideration while creating laws to safeguard India's sovereignty and integrity. The relevance of the depth of basic rights as interpreted by courts of law, as well as the differences formed between rights and limits, should not be disregarded. The provision of the UAPA under consideration is in disagreement with the rulings discussed in this article.

Furthermore, inverting the burden of evidence may have far-reaching repercussions and a devastating impact on essential rights. It apparently takes away the rights of the accused and provides them with no path to show their innocence.

An Act of this sort should be replaced by legislation that allows for openness and judicial review. As noted in the prior articles, major action should be made in the direction of police reforms, including community and religious sensitization, as well as attempts to restrict the police's massive arbitrary powers.

Political dissent legislation should be enacted in order to clearly define what comprises and does not constitute political dissent and those persons who have been detained under the UAPA for a lengthy period of time and have been found innocent should be compensated.