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Bhima-Koregaon and the fault in our laws

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The Unlawful Activities (Prevention) Act must be cleansed of its vast discretionary powers

On December 1, 1948, Professor K.T. Shah rose to make an impassioned speech in the Constituent Assembly. "The autocrat, the despot," he warned, "has always wished, whenever he was bankrupt of any other argument, just to shut up those who did not agree with him." Along with many other members of the CA, he was objecting to the wide range of restrictions that had been imposed upon fundamental rights in the draft Constitution. Drawing attention to the multiple "Public Safety Acts" and "Defence of India Acts" that had been the favourite weapons of the colonial regime, speaker after speaker expressed the concern that, despite the best intentions of the Assembly, the Constitution could easily be interpreted to authorise the continuation of these hated **laws.**

The **arrest of five individuals in early June**, ostensibly for instigating the **riots at Bhima-Koregaon at the beginning of the year**, throws the fears expressed in the CA into sharp relief. The accused, who include activists and lawyers, have been booked under the Unlawful Activities (Prevention) Act (UAPA). An examination of the UAPA shows how, in one overarching "anti-terrorism law", vast discretionary powers are conferred upon state agencies, judicial oversight is rendered toothless, and personal liberty is set at naught.

Boundless discretion

The UAPA authorises the government to ban "unlawful organisations" and "terrorist organisations" (subject to judicial review), and penalises membership of such organisations. The problems begin with the definitional clause itself. The definition of "unlawful activities" includes "disclaiming" or "questioning" the territorial integrity of India, and causing "disaffection" against India. These words are staggeringly vague and broad, and come close to establishing a regime of thought-crimes. The problem of excessive breadth is then carried over into the "membership clauses", which are the heart of the UAPA. "Membership" of unlawful and terrorist organisations is a criminal offence, and in the latter case, it can be punished with life imprisonment. But the Act fails entirely to define what "membership" entails. Are you a "member" if you possess literature or books about a banned organisation? If you express sympathy with its aims? If you've met other, "active" members? These are not theoretical considerations: chargesheets under the UAPA often cite the seizure of books or magazines, and presence at "meetings", as clinching evidence of membership.

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In 2011, the Supreme Court attempted to narrow the scope of these provisions, holding that "membership" was limited to cases where an individual engaged in active incitement to violence. Anything broader than that, it ruled, would violate the constitutional guarantees of freedom of speech and of association. The application of this ruling, however, has been patchy and arbitrary: one judge of the Bombay High Court invoked it to grant bail to some members of the

Kabir Kala Manch music troupe, while another judge ignored it and refused bail to other members of the same troupe (they were ultimately granted bail by the Supreme Court).

Despite the verdict of the Supreme Court, therefore, the wide and vague provisions of the UAPA allow governments great and virtually unbridled power to arrest people under boundlessly manipulable justifications, such as "having suspected Maoist links". At this point, the second serious problem with the UAPA regime kicks in: Section 43D(5) of the Act prohibits courts from granting bail to a person if "on a perusal of the case diary or the [police] report ... [the court] is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true."

Effacement of personal liberty

The case diary and the charge sheet is the version of the state. Therefore, under the UAPA, as long as the state's version appears to make out an offence, a court cannot, under law, grant bail. When we juxtapose this with the inordinately slow pace at which criminal trials progress, Section 43D(5) of the UAPA is effectively a warrant for perpetual imprisonment without trial. This is not a theoretical concern either: on more than one occasion in recent years, terror accused have been acquitted after spending more than a decade in jail. This is something for which there can be no compensation or restitution; and it is only made possible because the law places an unbreakable shackle upon personal liberty.

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This too was something that the framers of the Constitution foresaw, and wished to avoid. Maulana Hasrat Mohani, the great freedom fighter and poet, commenting on the same set of provisions as K.T. Shah, observed that "so long as you do not prove anything openly against anybody in a court of law, it should not be lawful to detain anybody." His concern was discarded when the CA decided to have a specific provision that authorised preventive detention (Article 22). However, as the CA debates reveal, the provision was meant to be used in rare and exceptional cases. The framers did not intend — and the Constitution does not contemplate — the kind of perfect storm that exists when broad and vague provisions of public security laws are combined with statutory bars upon the grant of bail, and a legal system that takes years to complete a criminal trial.

This is not to say that the state always, or even often, abuses its power. The purpose of a Constitution and a bill of rights, however, is to establish a "culture of justification" where the state cannot abuse its power. Civil and political rights are based upon the understanding that at no point should so much power, and so much discretion, be vested in the state that it utterly overwhelms the individual. The women and men who occupy the high offices of the state may have the best of intentions, but they are human like the rest of

us, and therefore imperfect. The Constitution exists to protect us from the consequences of those imperfections.

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This is why the traditional argument in defence of laws such as the UAPA — that the state must be given a strong hand to control terrorist and other violent and disruptive activities — proves too much. It proves too much because it subordinates every other constitutional value — freedom of speech, personal liberty, the right to a fair trial — to the overarching concern of order. Such an attitude can be justified only in times of war or Emergency (and even then, subject to safeguards). But what the UAPA does is to normalise this "state of exception", and make it a permanent feature of the legal landscape. One of our great judges, Justice Fazl Ali, expressly warned against it when he declared, "I do not think that it was ever intended that Parliament could at its will treat the normal as the abnormal or the rule as the exception."

The transformative Constitution

The Bhima-Koregaon arrests provide us with yet another opportunity to rethink a legal regime that has obliterated the distinction between the normal and the abnormal. The power to keep citizens incarcerated for long periods of time, on vague charges, and without affording them an opportunity to answer their accusers in a swift and fair trial, is an anathema to democracy and the rule of law. The UAPA's stringent provisions should go the way of its predecessors — the Terrorist and Disruptive Activities (Prevention) Act and the Prevention of Terrorism Act. They should be removed by Parliament, and, in the alternative, struck down as unconstitutional by the Supreme Court. And if that is not feasible, then there must at least be a change in the legal culture, with the courts following the example of the Bombay High Court in the first Kabir Kala Manch case, and granting bail unless the state can produce some cogent proof of criminality.

It is only that which will ensure the continued survival of "the one precious right to personal liberty" that the CA believed marked the transformation from a colonial regime to an independent democratic republic.

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