The Spirit of Democracy and Rule of Law in India: An Analysis of the UAPA & NIA Amendment Bills (2019) with Context to Misuse of Power under the Garb of Anti-Terror Legislations

Prajjwal Tyagi & Ishita Yadav[1]

Abstract

There cannot be a preposterous assumption that in adopting the Constitution the people of India surrendered the most precious aspect of the human persona, namely, life, liberty and freedom to the state on whose mercy these rights would depend. Rather it was intended that India constitutes itself as a democratic state within whose heart lies the basic fundamental rights, liberty, freedom, and subsistence of rule of law. Rule of law means that there should be lacking arbitrariness in state actions. However, these foundations of democracy experience a severe jolt when the government introduces amendments to anti-terror legislation which insidiously aims towards securing political allegiance rather than the rights and liberties of the citizens. Prediction of the similar repercussions of UAPA and NIA amendment bills 2019 have been argued in this paper. This article elucidates how these amendments are designed to enhance the executive's vigour and give sweeping powers to the government in ways that facilitate human rights abuses. An analogy has also been drawn by comparing facts of the previous anti-terror legislation to prove that tougher laws have always threatened the citizens rather than the terrorists. Moreover, the authors have also tried to establish a nexus between the synchronous introduction of both the amending bills in the parliament.

Keywords – Democracy, Rule of Law, Anti-terror laws, Fundamental Rights, Misuse.

I. Introduction

> "No man can be grateful at the cost of his honour; no woman can be grateful at the cost of her chastity and no nation can be grateful at the cost of its liberty." - Daniel O'Connell

After 200 years of the tyrannical rule of the British which was characterized by brute oppression and exploitation of the countrymen, if people still think that yes democracy was surely bestowed as a gift by the English then they are sadly mistaken. The truth is that it had to be snatched and seized away from them. The rights which the Indians were deprived of such as the right to self-determination and individual autonomy in expression, beliefs and opinions, later were considered as the fundamental roots of India's democracy. These rights were proclaimed to be the cornerstone of the very democracy for which the forefathers fought for. Dr. Ambedkar in his last speech in the constituent assembly while elucidating political democracy in India, said- "it means a way of life which recognizes liberty, equality and fraternity as the principles of life."[2] When we say that India is a democracy, we mean not only that its political institutions and processes are democratic, but also that Indian society and all Indian citizens are democratic, reflecting basic democratic values of equality, freedom, fraternity, secularism and justice in the social environment and individual behaviour.[3]Since democracy is founded on the primacy of the law

[1] Prajjwal Tyagi and Ishita Yadav - Secord Year, B.A. LL.B. University of Petroleum and Energy Studies, Dehradun.

[2] B.R Ambedkar, Constituent Assembly Debates, (May12, 2020, 8:57), https://www.constitutionofindia.n et/const itution_assembly_debates/volume/11/1949-11-25.

[3]Vincent Rajkumar, Indian Democracy and Governance, 1(2016).

and the exercise of human rights.[4] The greatest protection of human rights emanates from a sustainable democratic framework grounded in the rule of law.[5]

The term 'Rule of Law' has been derived from a French phrase "la principe de legalite", which means "the principle of legality". It refers to a government that is completely based on the principles of law. This rule comes from England and is best explained by Prof. A. V. Dicey in his celebrated work, Introduction to the Study of the Law of the Constitution (1885).[6] He propounded three principles which are sine qua non for the predominance of rule of law. First is the supremacy of law, second, equality before the law and third is the predominance of legal spirit.

According to the first principle, A. V Dicey states that rule of law means there should be lacking of arbitrariness or wide discretionary power. "Wherever there is discretion, there is room for arbitrariness."[7] That is why there should prevail supremacy of law which requires that the Government should be subject to the law, rather than the law subject to the Government.[8] The rule of law requires that people should be governed by accepted rules, rather than by the arbitrary decisions of rulers. These rules should be general and abstract, known and certain, and apply equally to all individuals.

Stable laws are a prerequisite of the certainty and confidence which form an essential part of individual freedom and security. And if there doesn't exist dominant and well-established laws over the government then they can be easily tilted and swayed to garner political allegiance.
The principle implicit in the rule of law that executive must act under the law, and not by its own decree or fiat, is still a cardinal principle of the common law system.[9] There is no doubt that the rule of law pervades the Constitution as an underlying principle. In fact, the judiciary has considered this principle as the sole raison d'être for the survival of human rights which India is determined to conserve and preserve.

In the case of Kesavanda Bharati v. State of Kerala[10], the Honourable Supreme Court held that the Rule of Law is the "basic structure" of the Constitution. In the case of Indira Nehru Gandhi v. Raj Narayan[11], the Apex Court held that Rule of Law embodied in Article 14 of the Constitution is the "basic feature" of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368.

In the case of A.D.M. Jabalpur v. S. Shukla[12], Khanna J. Observed: Rule of Law is the antithesis of arbitrariness. Without such sanctity of life and liberty, the distinction between a lawless society and one governed by laws would cease to have any meaning. Rule of Law is now the

[4] Rana Ishtiaq Ahmed, Democracy in the context of human rights, 1(2015).
[5]Democracy and human rights, UN UNDP & UNHCR (2013).
[6]Albert Venn Dicey, The Introduction to the study of Law of the Constitution (8th ed. ,1915).
[7]id.
[8]William Wade & Christopher Forsyth, Administrative Law34-36 (7th ed., 1994).
[9]Pranav Kaushal, Rule of Law Under Indian Constitution (May 11 2020), https://lawcorner.in/rule-of-law-indian-constitution/.
[10]Kesavanda Bharati v. State of Kerala, (1973) 4 SCC 225.
[11] Indira Nehru Gandhi v. Raj Narayan, (1975) 2 SCC 159.
[12] A.D.M. Jabalpur v. S. Shukla, (1976) 2 SCC 521.

accepted norm of all civilized societies. Everywhere it is identified with the liberty of the individual

There are primarily 4 categories of forms of governments across the globe. These are dictatorship, democracy, monarchy and oligarchy. What sets out democracy from the others is that democracy prioritizes civil liberties as it is for the people, of the people and by the people. Precedence to fundamental rights, the existence of rule of law, absence of arbitrary laws and protection of life and liberty, lies only in the heart of a democracy. In a parliamentary democracy rights and liberties of the citizens are so important that the Parliament ought not to exercise its law-making power to subordinate or subjugate them. In a democratic State, no one is above the law and all are equal before the law.[13] India which is perhaps the world's largest democracy has a peculiar onus of preserving the dimensions of a democratic state.

However, this foundation of rule of law and democracy topples when the government authorizes unaccountable laws that confer despotic and unfathomable powers to the state, which jeopardize the rights and liberty of the citizens.

II. Terror Or Anti-Terror Legislation -Which Is A Greater Threat To Fundamental Rights And Liberty Of The Citizens?

Time and again the Governments have propagated this myth that tougher laws alone can defeat terrorism. But the facts in India suggest a contrary trend. It has been experienced in the past that whenever the governments have brought up stringent laws against terrorism, they have ended up conferring such inexhaustible powers to the government which at times becomes a threat to the very fundamental rights which were intended to be defended by these laws. Therefore, they have proved to be more frightening for the citizens rather than for the people on which they should be subjected to.

TADA[14] and POTA[15] after being amended several times were considered to be the ultimate counter-terrorism laws but the statistics highlight a different result.[16] Under POTA, 4349 cases were registered, out of which 1031 were arrested and only 13 were being convicted. This data was provided by the then home minister in Rajya Sabha on 14th May 2005.[17] Under TADA as of 30 June 1994, 76,166 people were arrested, and only 843 got convicted. Thus, the conviction rate of TADA was less than 1.11%.[18] Finally, both these laws were struck down for the same reason that they were pieces of legislation that were terrorizing precisely those sections of the population which are vulnerable and are victims of gross injustices.

Similarly, the Centre is creating yet another narrative that by amending Unlawful Activities (Prevention) Act,1967 and National Investigation Agency,2008 the country will have a more robust law to tackle terrorism. However, the truth is that like its predecessors (TADA AND

[13] Cherif Bassiouni & David Beetham, Democracy: Its Principles and AchievementV (1998).
[14]Terrorist and Disruptive Activities (Prevention) Act, 1987 (No. 28 of 1987).
[15] The Prevention of Terrorism Act, 2002(No. 15 of 2002).
[16] Ujjwal Kumar Singh, The State, Democracy and Anti-Terror laws (2007)
[17] Parliament of India Lok Sabha House of the People, The Unlawful Activities (Prevention) Amendment Bill, 2019(May 12,2020 11:50), http://loksabhaph.nic.in/Debates/textofdebate.aspx.
[18]ibid.

POTA), UAPA too will end up conferring discretional powers and will finally fall prey to the profound exploitation of the Indian masses.

a. The Unlawful Activities (Prevention) Amendment Bill, 2019

The status quo was altered on August 2nd, 2019, when the parliament passed The Unlawful Activities (Prevention) Amendment Bill, 2019. There are three primal provisions in the amending bill through which the government has aspired to attain unbounded powers.

1. Discretion to name individuals as terrorists-

By amending section 35 of the UAPA act, the government has enabled itself to declare, by notification, any 'individual' as a terrorist and add the name of such a person in Schedule 4 of the Act.[19] This alteration no matter how innocuous it seems is full of latent irregularities, namely: Do ends justify means?

The paramount onus of the government before gifting such immoderate powers to itself was to justify the need of bringing such provisions. It had to prove the people, the dire exigency of tagging an individual as a terrorist. Well, the government gave it a nice shot by contending that, the existing power of naming an 'organization' as a terrorist organization was too little for them to punish lone terrorists and that is why it had become essential to name individual persons as terrorists without even a due process. However, the truth is that the UAPA Act,1967 already has ten distinct provisions (Section 16-24A) for punishing "lone terrorists" or "members of a terrorist organization" separately.

Also, the crucial question is that how many lone-wolf attacks have been experienced in this country that this government had an emergency to name an individual as a terrorist. And that how many such terrorist activities have been there where the logistics, planning or execution of the activity has not been done under the umbrella of an organization. So, when already the government has the authority to ban an organization and to punish its members separately then why do it want to procure numerous antidotes for the same disease? Doesn't overdose have side effects?

Article 4 of the International Covenant on Civil and Political Rights affirms that the states can derogate from their obligation to preserve civil and political rights of the citizens only in acute emergency matters.[20] However, in India, the central government has failed to prove the exigency in digressing from its primary obligation of providing civil and political rights to persons. It has failed to qualify the test of necessity in appropriating anti-democratic powers into its hands such as naming an individual as a terrorist.

[19]Amendment of Schedule, etc.-- (1) The Central Government may, by [notification], in the Official Gazette, (a) add an organization to the [First Schedule] [or the name of an individual in the Fourth Schedule].
[20]International Covenant on Civil and Political Rights, OHCHR (2016), (May9,2020)https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.

2. Challenge to constitutionality

The mere existence of an enabling law is not enough to restrain personal liberty. Such a law must also be "just, fair and reasonable."[21] The court established the golden triangle of the constitution and held that a law depriving a person of 'personal liberty' has not only to stand the test of Article 21 but also Article 14 and Article 19.[22]

UAPA amendment bill alters Section 35 (2) which enables the government to name an individual as terrorist only if it believes that such an individual is related to terrorism. This is one of the most irrational provisions of this bill. It means that there will be no F.I.R, no charge sheet filed, there will be no trial in a court and there is no conviction but merely because the government "believes" that a person is related to terrorism he will be named as a terrorist. This provision does not qualify the prerequisites of the trinity articles and puts immense danger on the rights of individuals thus is not "just, fair and reasonable". Once challenged in the court of law the honourable judges at one go will strike this provision down because there prevails an institutional conscience in the Indian judiciary for defending the rights of individuals against arbitrary and unreasonable state decisions.

Again, a fundamental procedural question comes up, that at which stage the government will name an individual as a terrorist? If the answer is before the trial, then the government is making a monumental error because there is a maxim in our criminal justice system that a person is "innocent until proven guilty." Therefore, naming a person as a terrorist even before he is found guilty of terrorism by a judicial court would be against the principle of the justice system and thus unconstitutional. The courts in S. Nambi Narayanan v Siby Mathews & Others Etc.[23], have been continuously upholding the right to reputation as an essential facet of right to life under article 21. The government by tagging a person as a terrorist through an open notification in the official gazette violates the right to reputation of a person. It is understood that the reputation of a person who is a "convicted terrorist" need not be preserved, however, the problem lies in the fact that now the government even without giving a fair trial can tag any person as a terrorist. And what is the remedy if afterward it is proven that this person is innocent? How can the government bring back his tainted reputation? Who is responsible for the breach of his right to 'personal liberty' guaranteed under article 21? These questions which directly challenge the very constitutionality of this amended provision need to be responsible answered.

It seems that the government has forgotten that when POTA was repealed because it was grossly misused, it was not absolutely struck down. Its provisions related to terrorism were transferred to UAPA Act,1967 (Chapter IV, V, VI), and the remaining provisions which were the root cause of such horrendous obliteration of civil and political rights were permanently struck down. Now the government by adding such anti-democratic provisions yet another time into an anti-terrorism law is just making the UAPA Bill, 2019 invalid the same as its predecessors (TADA and POTA). Therefore likewise, that day is not too far when the constitutionality of this act would be called into question and unfortunately the parliament will have to repeal it.

[21] Maneka Gandhi v. Union of India, AIR 1978 SC 597.
[22] id.
[23] S. Nambi Narayanan v. Siby Mathews & Others Etc, (2018) 10 SCC 804.

3. A tool to stifle nonconformists-

"The shrinking space for dissenting voices and humour cannot augur well for the future of Indian democracy."[24]The major reason for obtaining such illimitable powers is not to secure the country but it is to secure the government's political narratives. It has been experienced in the past that such security laws are used more on the political dissenters and human rights activists who dare to speak up against the government. Romila Thapar[25] case is a perfect proof of such exploitation of the dissenting voices where a group consisting of human rights activists, journalists, professors, writers, and a prominent lawyer was arrested under UAPA. Justice D Y Chandrachud pointed out the ill will of the government and held that the arrests have been motivated by an attempt to quell dissent.

It is interesting to know that, "three of the arrested persons were prosecuted in the past for offenses primarily under the Indian Penal Code, 1860, the Arms Act, 1959 and the UAPA Act,1967. Arun Ferreira is stated to have been acquitted in all eleven cases instituted against him. Vernon Gonsalves was acquitted in seventeen out of the nineteen cases instituted against him. Varavara Rao was acquitted in all twenty cases where he was prosecuted."[26] These were some eye-opening facts about how the government tries to persecute dissenting actions through continuous legal reactions. "Dissent is a symbol of a vibrant democracy."[27] But now the real dilemma is that through this amendment the government has an extra tool for choking the disagreeing voices. It will consider both, the dissenters and the terrorists at the same level. However, isn't Gautam Nava lakh different from Hafeez Sayed?

4. Adds fuel to the fire of misuse

It is an undeniable fact that anti-terror laws have a history of tyrannical use. But what facilitates this tyranny is a question that is less asked. Surprisingly the answer is not as enigmatic as it is considered. It is clearly because of amorphous definitions that the provisions of such amending bills lay down. Indefinite phrases such as 'if the government believes', 'urgency', and 'security threat' have given inexhaustible powers to the government. They fade away the limits of the state and in turn, enable flexible use of these laws. Finally, it results in, the government using anti-terror laws in ordinary incidents which 'it believes' to be against the public order and integrity of the country.

Indian courts taking cognizance of such gross misuse have also objected against using special anti-terror laws in ordinary matters where even the normal penal laws can be efficient. In Kartar Singh v. State of Punjab[28], the Supreme Court held that until the alleged acts of an accused could be classified as a "terrorist act" in "letter and spirit", he should not be charged under anti-terror acts but be tried under ordinary penal laws by the regular courts.

[24]Liberty is the bedrock of a polity based on the idea of freedom, The Telegraph, June 14,2019, at A1.
[25] Romila Thapar v. Union of India, (2018)10 SCC 753.
[26]id.
[27] Abhishek Anshu & Ranjit Kumar Sinha, Dissent is a symbol of vibrant democracy: D Y Chandrachud, Outlook (September 28 2018).
[28] Kartar Singh v. State of Punjab, (1994) 3 SCC 569.

The apex court observed in Hitendra Vishnu Thakur vs. State of Maharashtra[29] that "a terrorist activity does not merely arise by causing disturbance of law and order or public order. The fallout of the intended activity must be such that it travels beyond the capacity of the ordinary law enforcement agencies to tackle it under the ordinary penal law."

In Ram Manohar Lohia v. State of Bihar[30] the Court explained the difference between three concepts: law and order, public order, and the security of the state by referring to three concentric circles. The largest circle represented law and order, the next represented public order, and the smallest represented security of the state. The court's view was that every infraction of law must necessarily affect the order, but an act affecting law and order may not necessarily also affect the public order. Likewise, an act may affect the public order, but not necessarily the security of the state. Anti-terror laws applied only to those actions that affected the security of the state.[31]

"A person becomes a terrorist or is guilty of terrorist activity when his intention, action, and consequence all the three ingredients are found to exist together."[32] But the statistics of the UAPA act show that the government has been using it as per its whim's and fancies. The number of pending cases under this act in 2014 was 1,144, trial was completed in barely 33 cases out of which only 9 were convicted and 24 were being acquitted. In 2015 total pending cases were 1209, trial got completed in only 76 cases, out of which only 11 people were convicted and 65 were acquitted. In 2016, 1256 cases were pending, in only 33 cases trial got completed and out of which only 11 were convicted and 22 were acquitted.[33] The incompletion of trials in the majority of cases indicates that the arrested persons had to spend long years behind bars merely because the government has suspicion over them. Poor conviction rates of 27.3%,14.5% and 33% respectively, and on the other hand surging acquittal rates evidently emphasize the vast abuse of anti-terror laws. And how the government misapplies such laws under the garb of security threat. However, the government goes deaf ears to such statistics, and to put the icing on the cake it introduces bills such as UAPA 2019. That further lowers the probability of the government to distinguish between law and order, public order, and security of the state. Which the courts have considered being the most important step towards curbing the menace of misuse.

5. What will be the consequences of naming a person as a terrorist?

"Keep your eyes on the stars, but remember to keep your feet on the ground."
Such centralized powers in the hands of the government have resulted in its 'head in the cloud', completely ignoring what can be its practical reverberations on the ground. It is ironic that predominantly the impact of such measures is felt by law-abiding citizens on account of intrusions they make into individual liberties. Citizens of a democratic state do not expect their governments to enact laws that turn into mere "scarecrow" for "birds of prey" to use as their "perch."[34]

[29]Hitendra Vishnu Thakur vs. State of Maharashtra (1994) 4 SCC 602.
[30] Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.
[31]Judicial Response Towards Terrorism (May12, 2020,11:10PM), https://shodhganga.inflibnet.ac.in/bitstream/10603/93639/6/chapter%205.pdf.
[32]Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
[33] Ministry of Home Affairs, National Crime Records Bureau, The Unlawful Activities (Prevention) Act,1967
[34]Supra note 31.

When a person will be tagged as a terrorist by the government, he will be considered to be so in the society even before a court convicts him, a permanent blot on the reputation of the person would be fixed. "Right to reputation is a facet of right to life of a citizen under Article 21 of the Constitution."[35] But this right would become only an inconsequential text for the victim of the ploy of naming and shaming by the government. Also, if later this individual proves to be innocent, how will the government repay or compensate for that? His family has already been ostracized from society. What will be the recourse for the lifelong stigma which gets attached to a person notified as a terrorist?

Media the so-called fourth pillar of Indian democracy, without thorough investigation and due process will convict them in their courts of law. Watching the media acting such inconsiderately, it is an essential question that what sort of pillars the Indian democracy rests on, it will not be an unprecedented event if this democracy topples one day. Moreover, there are serious legal consequences to it. Absence of bail or anticipatory bail provisions directly challenges the guidelines of the Supreme court that "jail is an exception and bail is a norm." The presumption shifts and it is presumed by the courts that the charges are true. An overarching maxim that goes across the entire criminal system that a person is "innocent until proven guilty" is turned upside down i.e. "you are guilty unless and until you prove yourself innocent."

6. Power of seizure without permission of the state police-

Section 25 of the UAPA act is amended and the Bill adds that if the investigation is conducted by an officer of the National Investigation Agency (NIA), the approval of the Director-General of NIA would be required for seizure of such property. This is antithetic to the foundations of democracy in our country because it directly violates the principle of cooperative federalism. It centralizes the power of policing. For example, if even an inspector of NIA wants to seize any property in the state of Assam, then without even coordinating with the state police it can go further and seize it. This exclusion of the state authorities especially from their own domain is anti-federalism. Rather than making policies separately and those which only gives the Centre an upper hand, cooperative federalism asks for a more collaborative approach by the Central government.

b. The National Investigating Agency (Amendment) Bill, 2019

National Investigating Agency Act,2008 seeks to establish an investigating agency that principally fights the menace of terrorism throughout India. This agency was formed by passing the NIA bill in the parliament after the 2008 Mumbai terror attacks The parliament on 17th July 2019 passed the National investigation agency bill. This bill puts in two major amendments-

1. Designation of Special Courts-

The bill amends section 11 of the principal act empowering the central government to designate "Sessions Courts" as Special Courts for the trial of scheduled offenses. Introduction of the National Investigation Agency (amendment) bill and the Unlawful Activities Prevention

[35]Board of Trustees of the Port of Bombay v. Dilip Kumar Raghavendra Nath Nadkarni, (1983)1 SCC 124.

(Amendment) bill synchronously in the parliament is not just a coincidence. Once both of the bills are read in conjunction, it can be ascertained that they are interconnected. And that it was not a matter of chance but just another crafty political manoeuvre.

Section 8 of the UAPA amendment bill alters section 43 of the principal act. It states that in the case of the national investigation agency, now an officer of an inspector rank and the above can investigate offenses under this act. Herein lies the problem, that the government has lowered the bar especially for the officers of the NIA when on the other hand no police officer of the state police below the rank of deputy superintendent can investigate in such cases. Previously it only allowed an officer of the rank of DSP to investigate, which acted as a bar so that only meritorious investigation takes place because the National investigation agency is for investigation only special cases. But now the government through amending UAPA in such a manner has insidiously tried to maximize its limits and bandwidth to investigate, as now it can direct even an inspector of NIA for investigation.

However, the abovementioned power only results in discretionary investigation and prosecution by the hands of the government and nothing else because, at the same time by amending the NIA act, speedy judicial adjudication has been hindered. By amending section 11 of the NIA act the central govt. has attained the authority to 'designate' trial courts as special courts. Where previously the government had to 'constitute' a special court now it only 'designates' the existing sessions court into a special court. This amendment is not helping the judiciary but in turn, will only add to the piling up of cases in already overburdened courts. Therefore, on one hand, the government has enhanced its discretion on the investigation (through UAPA 2019) which will result in greater arrests and increased cases while on the other hand by not constituting new courts but only by designating existing overburdened sessions courts as NIA courts (through NIA 2019), it is denying the right to a fair and speedy trial and has taken objective judicial adjudication for granted. Thus, the government under the garb of these amending bills is strengthening its discretional powers in prosecution and investigation but decreasing the probability of an accused of getting upright justice, resulting in disturbing the balance of the criminal justice system.

2. Extraterritorial jurisdiction of the NIA-

The bill by amending sections 1(2), 3(2) and 6 grants the central government the power to order the officers of the NIA to investigate and register scheduled offenses committed even outside India. Prima facie this seeks to strengthen the powers of the NIA but is not of much substance and end up granting wide powers to the government. The bill aims to alter section 1 by inserting sub-clause (d) to clause 2 which states that this act also extends- (d) "to persons who commit a Scheduled Offence beyond India against the Indian citizens or affecting the interest of India."

Giving extraterritorial jurisdiction to this agency is not a matter of concern but adding phrases like "affecting the interest of India" is not only a vague proposition but also opens a pandora box of ambiguities. We have other well-constructed paradigms that are used in these types of legislations e.g. "affecting the national security of India", "affecting the sovereignty of the country" or "against the integrity of India." The problem is that this expression is not focused or well-defined. What does "affecting the interest of India" really suggests? What are its yardsticks?

Hence, if not altered this phrase will open an ocean of unrestricted powers in the hands of the government which will have hazardous repercussions such as blatant misuse.

Yet another provision of the amending bill which seems innocuous but is cleverly put. It inserts clause (8) To section 6 and states— (8) "Where the Central Government is of the opinion that a Scheduled Offence has been committed at any place outside India to which this Act extends, it may direct the Agency to register the case and take up investigation as if such offence has been committed in India." The power given to the Central government to direct the "registration" of the case gives inherent discretion for the prosecution and investigation to the government. This implies that the government itself can have a selective view of cases to be investigated by NIA. It certainly violates the concept which we have imbibed from England that the prosecutorial discretion of the constable is supreme. It means that the superiors or even the Government cannot interfere in the prosecutorial discretion of the investigating officer. Therefore, by this amendment, the government will have unabated authority to direct registration of cases in which "it believes" to be against the "interests of India."

Aspirations of making this agency a globally proclaimed investigative unit are appreciated. However, what will happen when before permitting NIA foreign countries ask for its credibility? By asserting that since 2014 the NIA has registered 195 cases out of which in only 15 cases, judgments are being passed, permissions to access into foreign territories seem uncertain. The government when it states that the NIA has secured a 100 percent conviction rate convicting all 15 cases out of 195 cases registered, doesn't sound meritorious but surely comic.

- NIA as a tool for discretional prosecution in the hands of the government.

Abovementioned assertions against NIA are not hollow, through highlighting the modus operandi of the NIA in previous cases, an inference can be drawn as to how the government has used this agency for discretional prosecution. One of the most controversial cases investigated by the NIA is the Samjhauta express case. The concluding commentary by the special judge of this case, Justice Jagdeep Singh, clearly highlights the manipulated prosecution of NIA. He states- "I have to conclude this judgment with deep pain and anguish as a dastardly act of violence remained unpunished for want of credible and admissible evidence. There are gaping holes in the prosecution evidence and an act of terrorism has remained unsolved". Also, that "the best evidence, which could have clinched the issue, was withheld by the prosecution."[36]

Moreover, former special director general of the NIA, N. R. Wasan in criticism to the NIA said - "The NIA officers involved in the investigation of the Samjhauta Express blast case are responsible for the poor job they have done. This is quite evidently hurting India's fight against terror, and we have to fix accountability — either on the officers for the poor investigation or the poor prosecution."[37]

Instances have also come up where the investigation and prosecution in selective cases were tried to be influenced by 'superior authorities' Former NIA prosecutor in the 2008 Malegaon blasts case, Rohini Salian in an interview has said that the agency told her to go soft in the case after

[36] Naba Kumar Sarkar v. National Investigation Agency 2011 SCC P&H 11399.

[37] NIA judge on Samjhauta prosecution: Does evidence cover-up hurt India's war on terror? The Print (29 March, 2019 7:38 pm), https://theprint.in/talk-point/nia-judge-on-samjhauta-prosecution-does-evidence-cover-up-hurt-indias-war-on-terror/214367/.

the new government took over at the Centre.

"An NIA officer approached me immediately after the change of government and told me in person to go soft. On June 12, he approached me for the second time and said I would no longer be appearing in the case."[38]

This is also an interesting fact that since past few years some of the terror cases have taken unexpected, though not surprising turns. In Samjhauta Express trial[39], Swami Aseemanand was granted bail by the Punjab and Haryana High Court. The bail was not opposed by the prosecuting agency which was the NIA. It also gave a clean chit to Colonel Purohit who was earlier charge-sheeted by the Anti-Terrorism Squad (ATS) in the case. In 2007 Ajmer blast trial, Aseemanand was acquitted by a local court of Jaipur in 2017, senior RSS functionary Indresh Kumar and Sadhwi Pragya were given a clean chit by the NIA. In Malegaon case[40], the NIA again dropped Sadhwi Pragya's name from its charge sheet, giving her a clean chit. In 2017, the Bombay High Court granted her bail. In the same year, Colonel Purohit, prime accused in the case, also got bail from the Supreme Court and re-joined the army. The Mecca Masjid blast case was the last and the most important part of the series of trials, and it has resulted in acquittals too. A decade after the first arrests were made, all the key people, many of whom would have otherwise received death penalties for the role they played in the violence, are free.

A quick look at the legal status of these cases and the status of all the prime accused highlights two things, first, it proves that there is harsh misuse of anti-terror laws because the prime accused in these cases were being finally acquitted without charge. This definitely proves the above contentions that how these laws are being misused on innocent lives such as Sadhwi Pragya and Swami Assemanand. Second, if the laws are not being misused in these cases then it evidently proves the great reluctance of the government in convicting selective terror accused.

Therefore, as substantiated above, the amendments proposed by the UAPA and the NIA bill 2019 undeniably aim towards granting discretional power to the government. Through these amendments, the investigation becomes the handmaiden of the government in power, prosecution becomes the command-driven performance and therefore, the justice which should be meted out to a person is denied.

III. Conclusion

It is an established fact that there are no dissimilar voices as far as tackling terrorism is concerned. 1.38 billion people of this country stand in solidarity against terrorism. Thus, the purpose of these highlighting arguments is not to thwart the investigations or convictions of terrorists but to ensure that the investigations are fair and impartial, to make sure that the rudiments of democracy remain intact. Undoubtedly so far, the principles of rule of law have been majorly upheld in the anti-terror legislations of India. The national security policy of our

[38] Rohini SalianNIA acted like a "shield' to accused in Malegaon case, The Economic Times (Jun 30, 2016, 08.56 PM), https://economictimes.indiatimes.com/news/politics-and-nation/nia-acted-like-a-shield-to-accused-in-malegaon-case-rohini-salian/articleshow/52993816.cms.
[39] Naba Kumar Sarkar v National Investigation Agency 2011 SCC P&H 11399.
[40] Sadhwi Pragya Singh Thakur v. State of Maharashtra, (2011) 10 SCC 445.

country has always striven for zero tolerance for terrorists and towards enacting procedural safeguards to minimize the encroachment on liberties and to maximize the edifice of rule of law. These safeguards include provisions relating to protection of witnesses, for example section 44 of the UAPA Act 1967 provides for the court not to disclose identity and address of the witnesses. Also, it provides for the proceedings to be held in camera. Moreover, for speedy and upright dispensation of justice in terror cases, the National Investigation Agency Act renders the trial for such offences to be conducted by special courts. Anti- terror legislations in India also enable mechanisms of appeals against; the order of forfeiture of property, the judgement of the special courts and also against order of refusal of bail.

However, sometimes the governments enact certain laws such as the UAPA and NIA bills 2019, that enables the government to "tag a person as a terrorist" without even a due process (UAPA) and to prosecute individuals merely "if it is believed" that their acts are against the "interests of India" (NIA). Such amendments to the anti-terror legislations directly go antithetic to the foundations of a democratic state and to the subsistence of rule of law. Because "protection and promotion of human rights under the rule of law is essential in the prevention of terrorism."[41]Therefore, there is a need to conceptualize these anti-terror laws in terms of what they purportedly combat, and what they actually combat because India's experience with these laws manifests that what they actually protect is the ruling dispensation's ability to bypass human rights. If these amendments are not rectified then sooner or later, they will result in a soulful requiem to liberty. Hence the authors propose the following rectifications-

- To repeal the amendment to the UAPA Act which confer power to the government in naming a person as a terrorist since there are already numerous provisions for prosecuting individual members of an unlawful organization.
- Amend the phrase such as "affecting the interests of India" since 'interests' of India is not properly defined and can lead to gross misuse. There are many well defined phrases to be used such as "affecting the national security of India" or "affecting the sovereignty of the country".
- Refrain from using phrases such as 'if the government believes' because it does not have a determined focus and end up giving unbounded powers to the government. The government can prosecute even a silent protest or dissent only if it 'believes' it to be against the 'interests' of India.
- Not to delegate sessions courts as special courts as they are already clogged up with arrears of pending cases. But to constitute additional special courts with fresh judicial appointments.
- Not to empower an officer of an 'inspector' rank of the NIA to prosecute scheduled offences since such offences need to be prosecuted only by specific rank of officers such as DSP (as in the case of the state police).
- A scheme of compensation should be constituted for those who are wrongly incarcerated.
- The central government should initiate mechanisms that provide for better administrative and judicial oversight to scrutinize investigations and prosecution of terror related cases.
- Establish a relevant committee to oversee the human rights violations during the prosecution of an accused in terror cases.

[41] People's Union for Civil Liberties v. Union of India, AIR (2003) SC 2363.

- The government should take an active step towards empowering NCTC- National Counter Terrorism Centre and NATGRID- National Intelligence Grid, that are the other two limbs of the tripod on which anti-terrorism rests upon.

Lastly, the criticism which the authors have brought forward, if some of it gets registered with the government then it's not harmful but will result in India being a better democracy. But if they are avoided, then to that extent the world's largest democracy, despite what its citizens claim, would merely be a façade for a non-democratic rule. Therefore, to restrict this country from becoming a moribund society and to enable it to grow holistically, individuals should not stop to defend their rights and to interject the government on its erroneous decisions. Because as Dr. B.R Ambedkar said- "Lost rights are never regained by appeals to the conscience of the usurpers, but by relentless struggle."