

JURISPRUDENCE OF THE JUDICIAL RUBBER STAMP

Relevant for: Security Related Matters | Topic: Role of External State & Non-state actors in creating challenges to internal security incl. Terrorism & illegal Migration

Last month, amendments to the Unlawful Activities (Prevention) Act (“UAPA”), India’s signature anti-terrorism legislation, allowing the Central government to designate individuals as “terrorists”, caused a furor. Critics warned that vesting such sweeping powers in the hands of the political executive would prove to be a recipe for abuse, and for political and social persecution. In response, it was argued that the UAPA provided for a system of checks and balances which would ensure that governmental abuse could be swiftly reviewed and rectified.

To what extent is this argument well-founded? A look at how the UAPA functions presently suggests that the defenders of the law are too optimistic in their faith in “institutional correctives”. Before the 2019 amendments, the UAPA could be used to ban associations and not individuals. To this end, the UAPA required, and still requires that the ban must clearly set out the grounds on which the government has arrived at its opinion; and it may then be contested by the banned association before a Tribunal, consisting of a sitting High Court judge. As a number of judgments have held, the task of a UAPA Tribunal is to carefully scrutinise the decision of the government, keeping in mind the fact that banning an organisation or a group infringes the crucial fundamental freedoms of speech and association.

A close reading of UAPA Tribunal orders makes it clear, however, that the requirement of judicial scrutiny is little more than a parchment barrier. In allowing the government vast amounts of leeway in proving its case, tribunals depart from some of the most fundamental principles of fair procedure, and act as little more than judicial rubber stamps. And this is made starkly evident by a recent UAPA Tribunal Order (issued on August 23, 2019) confirming the government’s ban on the Jamaat-e-Islami, Jammu and Kashmir (“Jel, J&K”).

The government’s ban on the Jel, J&K was based on its opinion that the association was “supporting extremism and militancy”, “indulging in anti national and subversive activities”, and activities to “disrupt the territorial integrity of the nation”. In support of this opinion, the government said that there existed a large number of First Information Reports (“FIRs”) against various members of the association. Among other things, the Jel, J&K responded that for almost all of the FIRs in question, the people accused had nothing to do with the association. This, it was argued, could be proven by looking at the association’s membership register, which had been seized by the government.

One would think that such a case can be resolved straightforwardly: had the government managed to prove that there existed sufficient evidence of wrongdoing against members of the Jel, J&K, that would justify banning the organisation altogether. It is here, however, that things began to get murky because the government then fell back on the increasingly convenient “sealed cover jurisprudence”, submitting material that it claimed was too sensitive to be disclosed. Notably, the evidence was not disclosed even to the association and its lawyers, who were contesting the ban.

Now, it would appear to be a very basic principle of justice that if an association is to be banned for unlawful activities, then the material on the basis of which that ban is justified is put to the association so that it has a chance to defend itself. To take a decision on the legality of a ban by looking at secret material that is withheld even from the association itself is exactly akin to condemning a man unheard. It is kangaroo-court style justice, which has no place in a modern democracy. However, this is exactly what the Tribunal did.

Justice Chander Shekhar observed that he had “opened the sealed covers and carefully examined each and every document”, and that it was convinced that these were “credible documents.” To this day, neither the association nor anyone reading the Tribunal’s opinion has any way of knowing what the evidence was. In essence, therefore: the fundamental freedoms of speech and association have been violated on the basis of secret evidence passed from the government to the Tribunal; an association numbering in at least the thousands has been shut down for five years, and all its members made putatively unlawful, potentially criminal without even being told why.

Matters, however, did not end there. The testimony of a senior and former office bearer of the Jel, J&K about the association’s efforts to distance itself from “unlawful activities”, “extremism”, and “terrorism” went un rebutted. More importantly, as the Jel, J&K argued, a look at its membership register would make it clear that its members had nothing to do with criminal activities. The problem, however, was that its membership register had been seized by the government. Consequently, the Jel, J&K made a rather common-sense argument: let the government produce the membership register, since it was in its possession.

The government, however, refused to do so, and instead submitted even this piece of evidence in a sealed cover. And the Justice Chander Shekhar’s response to this was truly Orwellian: he observed that “the respondent Association has not led any evidence to substantiate their defence that their office-bearers or members are not involved in the kind of activities alleged against them”. In short, therefore, the Tribunal wanted the association to prove that their members were not committing illegal activities, while the main source of evidence that the association would rely upon to prove exactly that, was in the hands of the government — and the association was not allowed to rely on it.

If, therefore, we take a step back and look at the Tribunal’s opinion, two aspects stand out starkly. First, a five-year ban upon an association — going to the very heart of the freedom of speech and association, potentially making all persons associated with it criminal — was upheld by a judicial forum on the basis of secret evidence that the association had neither the chance to see, nor to rebut. And second, the most valuable piece of evidence that the association had to defend itself was seized from it by the very government that had banned it; and not only did the Tribunal wink at this, but then used the absence of that piece of evidence against the association that it had been seized from, and in favour of the government that had seized it.

Throughout its opinion, the Tribunal made multiple references to how the UAPA allows for departures from the “strict rules of evidence”, in order to serve larger goals. And this, indeed, is the problem: these “departures” have been made boundless, and boundlessly manipulable to the extent that they have swallowed up the most basic rules of procedural justice and fairness. What we effectively have now, thanks to the interpretation of Tribunals, is this situation: on the one hand, every leeway is provided to the government, loopholes have been created where non existed, and every procedural and evidentiary standard diluted, while on the other, associations (comprising Indian citizens) are held to impossible standards in order to disprove the case against them.

This is not a jurisprudence that respects constitutional democracy or fundamental freedoms such as speech and association. Rather, it is a jurisprudence of the judicial rubber stamp: courts acting to legitimise and enable governmental overreach, rather than protecting citizens and the rights of citizens against the government. It is a situation where in the words of a famous English judge the judiciary has gone from “lions under the throne” to “mice squeaking under a chair in the Home Office” — with “consequences that the nation will one day bitterly regret”.

Gautam Bhatia is a Delhi-based lawyer

Support quality journalism - [Subscribe to The Hindu Digital](#)

Please enter a valid email address.

Support Quality Journalism

Subscribe to our new online experience with zero ads.

Support The Hindu's new online experience with zero ads.

Already a user? [Sign In](#)

END

Downloaded from **crackIAS.com**

© **Zuccess App** by crackIAS.com

CrackIAS.com