Supreme Court verdict on UAPA is fraught with risk of making it legal for agencies to act lawlessly while claiming to fight terrorism and preserve State's security

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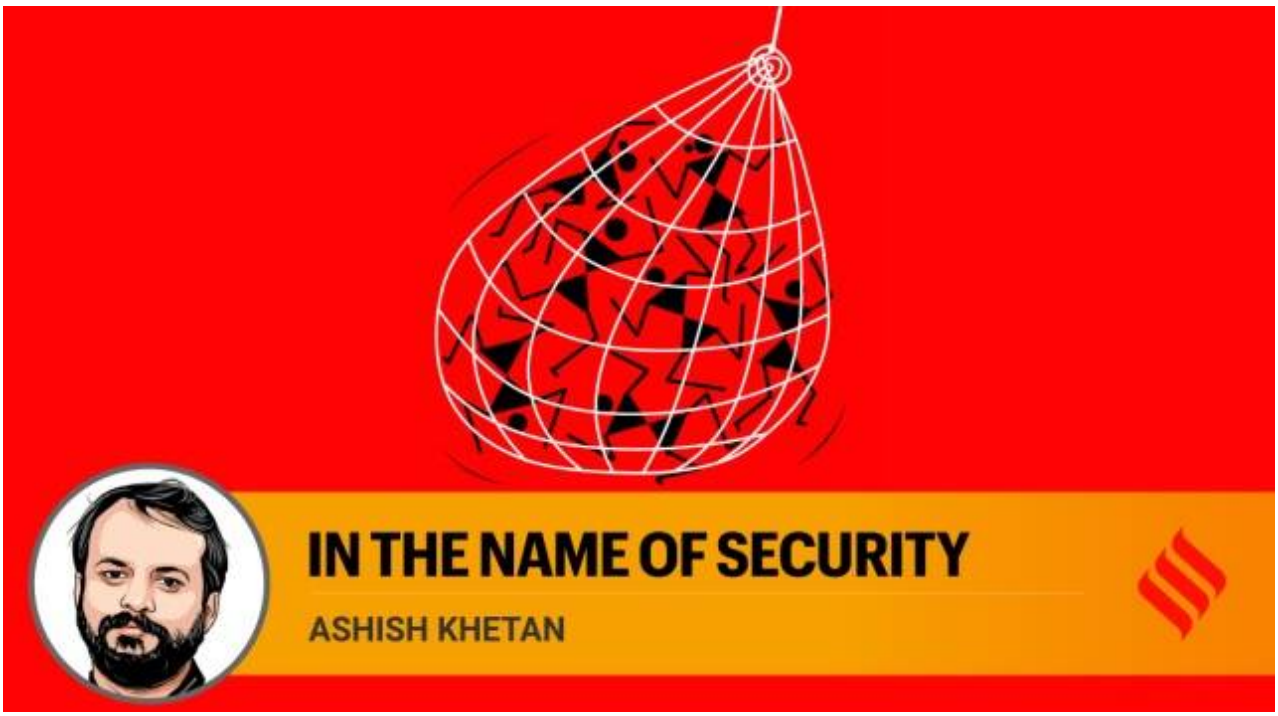

Mislabelling dilutes efforts to combat actual terrorism. (Illustration by C R Sasikumar)

"A major problem of human society is to combine that degree of liberty without which law is tyranny with that degree of law without which liberty becomes license."

– Heraclitus of Ephesus

The **decision by a three-judge bench of the Supreme Court** last Friday (*Arup Bhuyan vs The State Of Assam Home Department*) holding that mere membership of a banned association is sufficient to constitute an offence under the Unlawful Activities (Prevention) Act, 1967, is a severe blow to principles of fundamental justice. The verdict has done away with the distinction between active and passive membership of proscribed organisations, which has been the basis of court rulings since 2011.

The judgment is fraught with the risk of making it legal for agencies to act lawlessly while claiming to fight terrorism and preserve the State's security. Unless there is a specific intent to enhance the material abilities of a terrorist or unlawful organisation, permitting the conviction of a person as a member is abhorrent to the rule of law. The verdict also suffers from substantive contradictions in its reasoning.

The Court has struck down three of its previous rulings from 2011: *Arup Bhuyan vs State of Assam, Sri Indra Das vs State of Assam* and *State of Kerala vs Raneef*. While the Raneef judgment had put a narrow construction on Section 10(a)(i) of UAPA, Arup Bhuyan and Indra Das had read down Section 3(5) of the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987.

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Section 10(a)(i) punishes membership of unlawful organisations with imprisonment for a term which may extend to two years. Section 3(5) of TADA penalised membership of terrorist organisations. Section 3(5), TADA, is in pari materia with Section 20, UAPA, which provides for punishment for being a member of a terrorist gang or organisation.

Therefore Section 10(a)(i) and Section 3(5), TADA, do not deal with the same subject matter.

In fact the State argued, "that in case of a terrorist organisation, mere membership is not sufficient but there has to be an act with intention to further the activities of the terrorist organisation which is not the case under Section 10 with an unlawful association." (page 31, 32 of the judgment).

But the Court has set aside the reading down of both Section 10(a)(i), UAPA, and Section 3(5), TADA, which are two different things. UAPA penalises 'terrorist acts' and 'unlawful acts' differently.

But by abolishing the distinction between active and passive membership under Section 3(5), TADA, the Court has obliterated the requirement of mens rea from both membership of an unlawful organisation and membership of a terrorist organisation. This makes the ruling legally incoherent. There is a mismatch between the verdict's reasoning (which focuses on the membership of unlawful association) and its conclusions.

Banned organisations are not known to keep a registry with their members' names, addresses, phone numbers, and email IDs. Even in the case of a lawful entity with records of membership, how will any agency or court conclude "who is and continues to be a member of such an association" even after the entity was banned? In most cases, membership must be inferred. Astonishingly, the 145-page long verdict, (lead opinion by Shah, J. and a concurrence by Karol, J.), is silent on this crucial point.

Jyoti Babasaheb Chorge vs State of Maharashtra (2012) best demonstrates how innocent young men and women can get ensnared as members of unlawful/terrorist organisations merely by association. In that case, as many as 15 people, all young tribal women and men, were charged as members of the Communist Party of India (Maoist), a "terrorist organisation", for possessing Maoist propaganda literature like books, articles and pamphlets. There was no accusation against them of being involved in any terrorist act or act of violence, organising a terrorist camp, recruiting or sheltering people or raising finance for terrorist acts. The Bombay High Court ruled Section 20, UAPA, making

membership of a terrorist organisation punishable with imprisonment for a term which may extend to imprisonment for life, was "widely worded". The Court relied on Arup Bhuyan and Raneef rulings (2011) that such membership cannot be passive.

In Arup Bhuyan (2011) the Supreme Court ruled that "mere membership of a banned organisation will not incriminate a person unless he resorts to violence or incites people to violence or does an act intended to create disorder." The Court relied on the landmark US Supreme Court decision of *Brandenburg vs Ohio*, distinguishing between advocacy and incitement. "Mere advocacy is not per se illegal. It will become illegal only if it incites imminent lawless action," the US Supreme Court ruled. In the Raneef case, the Court referred to the US Supreme Court verdicts in *Scales vs United States*, distinguishing "active knowing membership" and "passive, merely nominal membership", and *Elfbrandt vs Russell,* in which the US SC had ruled "guilt by association" had no place in penal law.

The definitions of terrorist and unlawful organisations in UAPA are circular and vague. The Act merely states that they are organisations involved in "terrorist"/"unlawful activities" and notified as such. The central government has so far notified 44 organisations as terrorist and 13 as unlawful organisations.

States worldwide are grappling with defining terrorism/terrorist acts/terrorist groups with some precision to protect against the improper stigmatisation of those inappropriately labelled as "terrorists," and to curtail the abuse of counterterrorism powers. Mislabelling dilutes efforts to combat actual terrorism. It undermines democratic values and institutions and the gravitas of the security threat terror groups pose.

It is instructive to cite a judgment authored by the Chief Justice of the Supreme Court of Canada, Beverley McLachlin while reviewing the constitutionality of the 2001 Anti-terrorism Act (ATA) of Canada (R. v. Khawaja, 2012).

Like UAPA, the provisions laid out therein are quite extensive, covering everything from the definition of terrorism to proscribing terrorist groups, the financing of terrorism, the freezing, seizing and restraint, and the forfeiture of property.

She ruled the law "required a high mens rea threshold that involves specific intent– the person knowingly participating in and contributing to a terrorist activity" and "that their actions must be undertaken for the purposes of enhancing the ability of a terrorist group to facilitate or to carry out terrorist activity."

She further ruled: "A purposive and contextual reading of the provision confines' participation in' and 'contribution to' a terrorist activity to conduct that creates a risk of harm that rises beyond a de minimis threshold. While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s. 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity." (Section 81.18 defined participating or contributing to a terrorist group).

Instead of being outliers, the three previous rulings (Arup Bhuyan, Indra Das and Raneef) are in accordance with strict judicial interpretations in every liberal democracy of what constitutes terrorist/unlawful activity or being a member of a terrorist/unlawful group. The effect of this heightened mens rea is to exempt those who may unwittingly come in contact with terrorists or groups — for example, in social or professional interactions. The Supreme Court has effectively granted agencies license to ensnare unsuspecting citizens with its latest ruling.

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