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NORMALIZATION OF THE EXCEPTIONAL STATE UNDER UNLAWFUL ACTIVITIES AND PREVENTION (AMENDMENT) ACT, 2019 – UMAR KHALID V. UNION OF INDIA

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ABSTRACT

The purpose of this paper is to analyze the validity of the Unlawful Activities (Prevention) Amendment Act, 2019 and the ambiguous language used by the Act along with several stringent provisions that impugn the principle of natural justice has raised several concerns over the misuse of the Act to confine innocents into a battle with a law that was initially formulated to protect them. This paper will first briefly discuss briefly the history of UAPA. Then the paper will attempt to analyze UAPA by applying various frameworks from Constitutional dictatorship to the theory of legal grey holes. It will break down the invalidity of the UAPA and examine them not primarily from a legal standpoint but from a sociological and political justice point of view. It will look into how the politics of terror laws come into play in courts. This paper will look into how bail becomes a tool of oppression or a saviour of individual civil rights under a terror law regime. And how the government and its politics frame certain groups as "suspect communities" through propaganda. The researcher in the present research has adopted doctrinal or nonempirical methods for collecting the required data. This research will base its findings, inter alia, on analytical and critical studies

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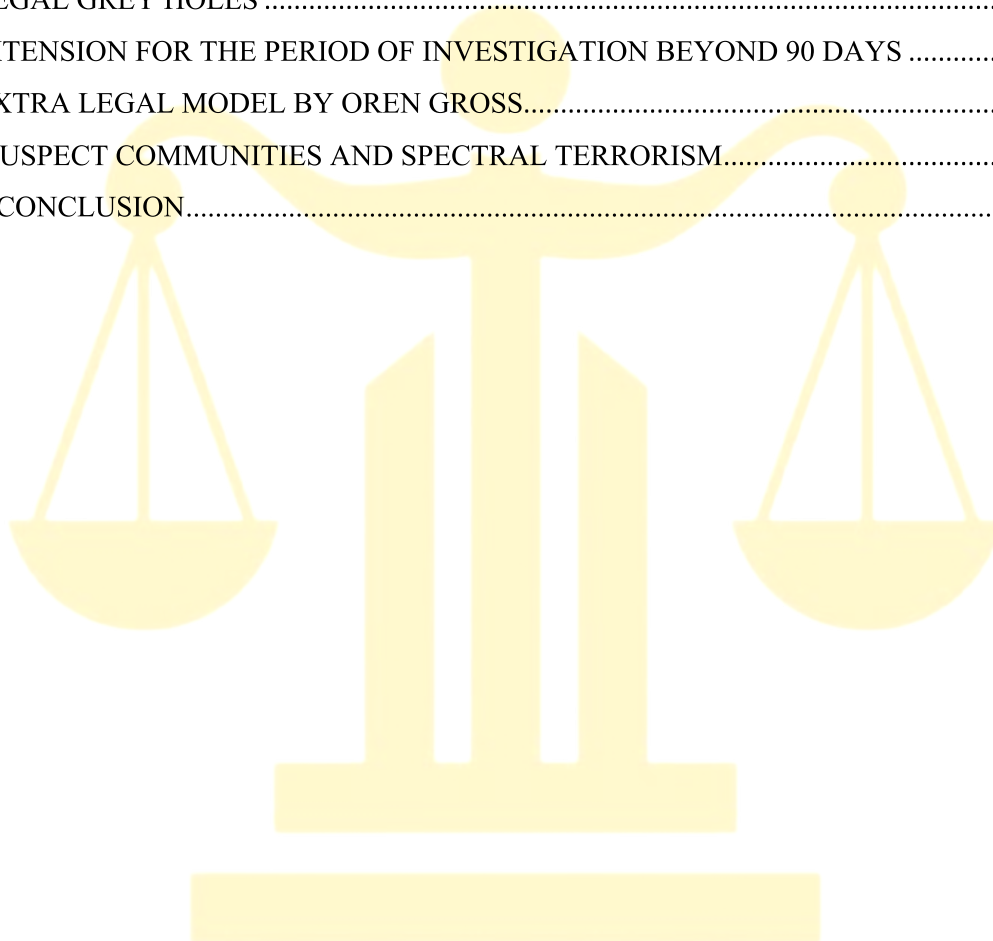

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I. INTRODUCTION

"If our democracy is to flourish, it must have criticism; if our government is to function it must have dissent."

- Henry Steele Commager

The purpose of this paper is to analyze and examine the validity of the Unlawful Activities (Prevention) Amendment Act, 2019.[2] The ambiguous language used by the Act along with several stringent provisions that impugn the principle of natural justice has raised several concerns over the misuse of the Act to confine innocents into a battle with a law that was initially formulated to protect them. This paper will first briefly discuss briefly the history of UAPA. Then the paper will attempt to analyse UAPA by applying various frameworks from Constitutional dictatorship to the theory of legal grey holes. It will break down the invalidity of the UAPA and examine them not primarily from a legal standpoint but from a sociological and political justice point of view.

This paper discusses primarily the case of Umar Khalid v. State,[3] to look into bail conditions under UAPA through recent case laws from Ka Najeeb[4] to the notorious judgment in the Watali[5] case, and analyse the state's ideology when it comes to handling dissent and terrorist activities by applying relevant theoretical frameworks. As it's in the context of anti-CAA protests and Delhi riots, this paper will focus on liberal democracy and dissent. It will look into how the politics of terror laws come into play in courts. This paper will look into how bail becomes a tool of oppression or a saviour of individual civil rights under a terror law regime. Additionally, it will look into other contemporary problems as well with its usage and application and absence of safeguards. Furthermore, this paper will look into the arbitrary and inconsistent invocation of UAPA laws to stifle dissent and freedom of speech by the government to meet its political agendas. And how the government and its politics frame certain groups as "suspect communities" through propaganda.

The researcher in the present research has adopted doctrinal or nonempirical methods for collecting required data. This research will base its findings, inter alia, on analytical and critical studies.

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[2] The Unlawful Activities (Prevention) Amendment Act, 2019 No. 28 Of 2019.
[3] Umar Khalid v. State of National Capital Territory of Delhi, 2022 SCC OnLine Del 3423
[4] Union of India vs KA Najeeb, (2021) 3 SCC 713.
[5] National Investigating Agency v. Zahoor Ahmad Shah Watali , CRL Appeal 578 of 2019.

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II. BACKGROUND OF UAPA

The Criminal Law Amendment Act was put into effect by the British Raj in 1908, giving colonial times its impetus for the Unlawful Acts (Prevention) Amendment.[6] This statute expanded the definition of "unlawful association" for the first time. The statute was utilized at the time to prosecute the Indian Freedom Struggle's top figures. When India's government gained independence in 1947, the administration chose to leave the Criminal Law Amendment's provisions in place. On the other hand, the Nehru administration started to apply the clause against its citizens, specifically against critics of the Indian National Congress.[7]

In the years that followed, however, the Indian judiciary held in cases like VG Row v. State of Madras,[8] AK Gopalan v. State of Maharashtra,[9] and Romesh Thapar v. State of Madras,[10] in essence, collectively held that fundamental rights of citizens can be restricted only in the most extreme and in the rarest of rare circumstances and that any statute, legislation, or executive decision that seeks to restrict said rights will be deemed unconstitutional. The judiciary determined that Section 124A of the Criminal Law (Amendment) Act was unconstitutional on the basis of these rulings because it placed arbitrary and unreasonable restrictions on the exercise of people's fundamental rights.

The government may impose "reasonable" limits on the interest of the "sovereignty and integrity" of the state, according to the 16th Amendment, which further modified Article 19. This provision was essentially established to allow the government broad discretion to imprison anyone or any group who called for autonomy or seceded from the Union.

Jawaharlal Nehru, the then-prime minister, established a National Integration Council to provide recommendations on issues pertaining to national integration, the Unlawful Activities (Prevention) Bill was introduced in 1966. Its goal was to combat communalism, casteism, regionalism, linguistic intolerance, and other issues that were prevalent during and after the war against China in 1962 and were seen as a danger to the integrity and sovereignty of the country. It was necessary for a tribunal to be established in accordance with the Code of

[6] The Unlawful Activities (Prevention) Amendment Act, 2019 No. 28 Of 2019
[7] Arkadeep Pal, An Analysis on the Validity of the Unlawful Acts (Prevention) Act, 2 INT'l J.L. MGMT. & HUMAN. 112 (2019).
[8] State of Madras Vs. V.G. Row.Union of India [1952] INSC 19.
[9] A.K. Gopalan V. State Of Madras ,1950 AIR 27.
[10] Romesh Thapar v. State of Madras, 1950 AIR 124.

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Criminal Procedure to identify and prohibit the groups and organizations engaging in the illegal acts previously indicated (CrPC).

But after this Bill lapsed, another one was introduced and was enacted in 1967 with only minor changes to the original provisions. This Act wasn't frequently requested since other preventive measures like the Maharashtra Control of Organized Crime Act (MCOCA) 1999,[11] POTA,[12] TADA,[13] National Security Act (NSA) 1980,[14] and Maintenance of Internal Security Act (MISA) 1971[15] had taken precedence.

Following the 9/11 terrorist attacks, Chapter VII of the UN Charter[16] mandated that all States prevent and suppress the financing of terrorist actions, as well as enhanced information sharing among nations and adherence to resolution protocols like No. 1373/2001. In 2004, India revised the UAPA to reflect this by adding Chapters V and VI, which cover the forfeiture of proceeds of terrorism and terrorist organizations, respectively, in place of the previous miscellaneous Chapter IV. Terms like terrorist actions, their funding, their confiscation, and their freezing became crucial components of Act 15 as a result of this change. [17]

Since TADA and POTA were both repealed, the definitions of "terrorist" contained in each of these Acts were combined into UAPA, converting it from a preventive statute to a substantive law. The word "terrorism" was originally absent from the Act and was only added in the 2004 revision. The UAPA was not a terror statute from its creation in 1967 until 2004.

The 2019 Amendment aimed to add people covered by Sections 35 and 36 of Chapter VI of the Act under the definition of "terrorist," among other things. It gives officials with the level of inspector and above the authority to conduct investigations as well as the Directorate General (DG) of the National Investigation Agency (NIA) the ability to seize property derived from terrorism proceeds. The Central Government also establishes a Review

[11] Maharashtra Control Of Organized Crime Act (MCOCA) 1999
[12] The Prevention Of Terrorism Act, 2002
[13] (The) Terrorist And Disruptive Activities (Prevention) Act, 1987.
[14] National Security Act (NSA) 1980.
[15] Maintenance of Internal Security Act (MISA) 1971.
[16] United Nations Charter, 1950.
[17] Eva Chauhan & K. K. Mahima, Complications of Anti-Terrorism Law: The Unlawful Activities (Prevention) Act, 1967, 2 Jus Corpus L.J. 413 (2022).

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Committee to "de-notify" the person who was reported as a terrorist, eliminating any possibilities for any institutional procedure for judicial review.[18]

A total of 4,231 FIRs were submitted under various provisions of the UAPA between 2016 and 2019, the time frame for which UAPA numbers have been published by the National Crime Records Bureau (NCRB). Of these, 112 cases resulted in convictions. This continuous usage of UAPA demonstrates how frequently it is abused, much like other anti-terror laws in India in the past. Therefore, it follows that UAPA is intended to achieve the same goal as TADA and POTA.

III. MASCULINIST STATE AND THE BAIL ORDER IN UMAR KHALID

Amplification of state authority, its concentration in the executive branch of government, and the unique state practices that have developed in the context of the global war on terror make up the modern security state. It specifically refers to security regimes, which governments promote as essential for combating threats to national security posed by international terrorism. Additionally, it has to do with the methods in which these law-and-order regimes win the support of the populace as well as the historically unparalleled increase in legal measures for combating terrorism.[19]

The Indian state's masculinist attitude can be seen embodied in the various anti-terrorism law regimes enacted, presently the most noteworthy in this regard is the Unlawful Activities and Prevention Amendment Act of 2019. The UAPA's safeguards were weakened through an amendment in 2004, which is why the POTA and its revised provisions are so similar. These parallels took the form of challenging bail procedures, protracted police detention, etc. However, if one were to concentrate on how this law was used, a clear picture of the use of the UAPA to suppress political dissent would emerge. A philosophy based on "ordered liberty," whereby citizens' freedoms may be restricted to safeguard and advance a nation's interests, and a set of policies encompassing domestic security and defence against external threats makes up the concept of the security state. However, it mostly refers to the political institutionalization of a notion, in which the security state positions itself as a safeguard for everyone's safety and a necessary response to dire circumstances. As a result, it has historically been entwined with statist ideologies and the rai son d'etat, often known as

[18] Soham Vijaykumar Jagtap & Garima Saxena, India's Anti-Terrorism Laws: An Undying Threat,3 INT'l J.L. MGMT. & HUMAN. 1490 (2020).

[19] Anupama Roy, The Masculinist Security State and Anti-terror law Regimes in India, Asian Studies Review, 2015, Vol. 39, No. 2, 305–323.

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"reasons of state," which promote the use of the state's full range of powers in the face of existential threats. Chandra Talpade Mohanty contends that the modern security state mobilizes a "masculinist securitized ideology" rooted in "muscular militarism" that is based not on the defence of the country from an external enemy but rather on the coercion and dominance of its citizens.

The Delhi High Court in bail orders dealing with Asif Iqbal Tanha, Devangana Kalita, and Natasha Narwal in the cases relating to riots in Delhi in February 2020 (the Delhi riots cases), and the Bombay High Court in the bail order of Iqbal Ahmed Kabir Ahmed, have recently rejected the idea that the judiciary's function in a UAPA case is to serve as a stenographer for the Prosecution, mechanically repeat the allegations in the chargesheet, and keep defendants imprisoned for the ten to fifteen years required to complete a trial. These Courts have noted that, given how stringent the UAPA's threshold requirement is for granting bail, it behoves the judge to give the prosecution's case—which is the only one present at the time of bail—an equally stringent examination: both on the requirement that factual evidence be concrete and specific, as well as on the issue of whether the legal standard under the UAPA is made clear.[20]

On the other hand, the Supreme Court's ruling in the infamous Watali case and several trial court rulings (such as in the case of Safoora Zargar) have emphasised the need for courts to consider bail with a light hand when assessing the prosecution's case rather than scrutinising it in great detail. If the outcome is that someone spends more than ten years in jail while awaiting trial, then that is the way things are.

Because it embodies that extreme example of the second strategy, the ruling issued today by the Additional Sessions Judge at Karkardooma Courts in Delhi denying bail to Umar Khalid in the Delhi Riots case is noteworthy. The prosecution's main defence in these instances is that the Delhi riots were the result of a carefully thought-out conspiracy that was "masterminded" by a number of individuals, including Umar Khalid, while they pretended to be protesting the CAA/NRC. There were several obstacles for the prosecution in Khalid's case, including the fact that (a) he had not publicly called for violence—quite the opposite—(b) there was no evidence of his involvement in the funding or transport of weapons, and (c) there had been no recoveries from him—and (d) he was not even in Delhi when the riots broke out.

[20] Tushar Nair, Weaponisation of Sedition and the UAPA to Curb Free Speech in India, 3 INT'l J.L. MGMT. & HUMAN. 1132 (2020).

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The bail order in this case is structured as follows: first, the court records what the prosecution witness said (in most cases, this witness is anonymous and goes by the names "ROMEO" and "JULIET"); second, it records the defence attorney's argument that the statement is ex facie unreliable for a number of well-founded reasons (e.g., it was recorded substantially after the fact, it contradicts another statement, it has already been disbelieved in se); and third, it records the court Fourthly, the witness account must be taken as totally accurate (no matter how implausible, contradictory, or vague in particulars it might be).

Essentially, this is the complete bail order. In paragraph 10, the Court documents witness Tahira Daud's testimony that Umar Khalid supported Sharjeel Imam's call for a chakka jam during a meeting in a Jangpura office on a particular date; it also documents protected witness "Bond's" testimony that Umar Khalid called for overthrowing the government when "the time is right" and for a chakka jam; and it also documents Bond's testimony that at a particular meeting. The Court refers to witness "Saturn's" testimony concerning a meeting between Umar Khalid, Khalid Saifi, and Tahir Hussain at Shaheen Bagh in paragraph 10.4 before citing witness "Bravo's" testimony about Khalid's attendance at a gathering at the Indian Social Institute. Regarding assertions made by witnesses "Smith," "Echo," and "Sierra" about a "conspiratorial meeting" involving Umar Khalid, Pinjra Tod, and others at Jafrabad in paragraph 10.5.

This paragraph's reading makes the next statement stand out. First, there is a lack of specificity in the details; it is not obvious who "the others" or the "members" of Pinjra Tod were, and there is no information at all regarding what was discussed in detail or what made the meeting "conspiratorial." In any case, and secondly, there is not even light-touch, but zero scrutiny of the witness statements on their own terms. This is particularly important because even if you were to discount the points that follow and subject the statements to no-touch scrutiny, the vagueness makes these statements incapable of supporting a concrete and specific charge under the UAPA. Thirdly, the defence's criticism of the witness statements is summarily rejected with the remark that this is a topic for trial rather than engaging with it. It is crucial to consider whether a system that professes to uphold the "rule of law" could condone locking up suspects for many years without a trial.[21]

The Court relies on what seems to be a guilt-by-association defense when it comes to the WhatsApp group and the phone calls (ironically, none of the accused has actually been found

[21] Maitreya Sharma & Shivansh Agrawal, Examining UAPA and NIA: Intersection of Human Rights and National Security, 4 INT'l J.L. MGMT. & HUMAN. 664 (2021).

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guilty yet): that Khalid's involvement in the conspiracy is implied by these "links," even though there is no proof of what the precise nature of these links was.

Therefore, the allegations against Khalid are supported by (a) his participation in WhatsApp groups (b) his attendance at numerous meetings (whose specifics are mostly vaguely described by unnamed witnesses), and (c) his mention in a "flurry of calls" that followed the start of the riots. The first and third of these three legs wouldn't be sufficient "to hang a dog on," as the saying goes. Every statement of the second leg, as previously stated, is accepted by the Court without further analysis; in fact, as we have seen above, many of these statements - even taken on their own terms - are allegations of Khalid engaging in constitutionally protected, legitimate speech; when those are removed, what is left is essentially four or five anonymous witness statements alleging that Khalid said X or Y incendiary or unlawful things.[22]

Accordingly, a close reading of the 61-page bail order reveals that the decision to deny bail to Umar Khalid is entirely the result of judicial stenography: the Court repeats the statements in the chargesheet, declines to consider them on their own merits, declines to participate in the defence's examination of them, and - most importantly - fills inferences of guilt where the prosecution's case is ambiguous or lacking details.

IV. OTTO KIRCHHEIMER ON POLITICAL JUSTICE IN COURTROOM

The Judicial stenography demonstrated in this case by the court is exemplar of the political justice in the courtroom talked about by Otto Kirchheimer. The Indian regime is using the legal system to eliminate dissident voices and drag protesters to court under terrorism charges. Far from guaranteeing equality and justice, the country's courts serve as an instrument in the Government's hands to legitimize the persecution of political adversaries while justifying its practices to the West.[23]

The deployment of laws and the devices of justice for oppressive political projects is as old as antiquity. From Socrates to Jesus of Nazareth, from Joan of Arc to Susanne Anthony, from Nelson Mandela to Ethiopia's own Burtukan Midaksa and Eskindir Nega, the site of the courtroom has been used to intimidate, harass, silence, exile, and eliminate political foes

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[22] Asish Gupta and Kranti Chaitanya, Unlawful Activities (Prevention) Act, Economic and Political Weekly , AUGUST 7-13, 2010, Vol. 45, No. 32 (AUGUST 7- 13, 2010), pp. 4-5

[23] Nicole Rogers, Terrorist v sovereign: legal performances in a state of exception, Law Text Culture, Vol. 12 (2008), pp. 159-184.

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perceived to be a threat to the authorities of the day. The phenomenon we sometimes identify as 'the political trial' is neither exclusively Eastern nor western, autocratic or democratic. In both democratic and autocratic states, courts adjudicate conflicts irreducibly political or ideological in their nature. We could argue whether it is ever justified to use the court system to get rid of 'the politically obnoxious', but the fact remains that the judicial apparatus is inevitably one of the most irresistible sites of power struggle.

In his definitive scholarship on political trials, "Political Justice: the Use of Legal Procedures for Political Ends", the Frankfurt jurist Otto Kirchheimer describes 'the classic political trial' as "a regime's attempt to incriminate its foe's public behaviour with a view to evicting him from the political scene". Courts have this 'vastly superior' power of truth production and image creation. Because the courtroom is normatively understood as an independent, neutral, and impartial institution of justice elevated above and beyond the expedience of politics, it is sufficient that a defendant 'had his day in court' irrespective of what goes on behind the cloak of legality. The politics at the centre of the trial are obscured and hidden by the courtroom's ritualistic invocation of the language of law and justice. According to De Tocqueville, even when the violence committed in the name of the rule of law and justice is exposed for what it really is, "the mere appearance of justice" still serves to give the spectacles of dominance the illusion of legitimacy and fairness.

Umar Khalid was a dissenter, here the courtroom and interplay of judicial discretion led to the production of the prosecution's case into the bail order, without examination of the arguments on merit. The bail order in Umar Khalid's case showcases, how the courtroom is not an apolitical space and the judicial discretion can be exercised to meet the ends of the politics as desired by the majority government. This is the epitome of a criminal justice system that is broken—broken not only by the UAPA and its terminology but also by judges who—somewhere in the midst of it all—seem to have lost their responsibility to restrain and challenge abuse by the State. Terrorism trials become a playground for nationalistic majoritarian politics that reflect the world outside, where minorities and marginalised groups are targeted.

The Code of Criminal Procedure (CrPC) is disregarded and there are few protections for the accused under the UAPA's alternative criminal justice system. According to empirical data, two-thirds of those indicted are ultimately found not guilty. However, the criminal trial drags on for years, and the majority of those charged spend a sizable period of time behind bars

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before the case is through. This is mostly as a result of UAPA Section 43(D)-5.[24] According to Section 43(D)-5, if the court determines after reviewing the case diary or the report submitted in accordance with Section 173 of the CrPC that there are reasonable grounds for believing that the accusation against the accused is at least presumptively true, the accused cannot be released on bail.

Take note of how low the level of prima facie is. In NIA v. Zahoor Ahmad Shah Watali, it was established that no in-depth examination or dissection of the material was necessary to meet the standard of prima facie. To put it simply, the court needs just consider the words of the investigative agency and determine if the accusations correspond to the crimes. Undertrials had no chance of obtaining bail because of the strict bail laws and protracted trials, even though they might ultimately be found not guilty.

V. HOMO SACER

As a result, the UAPA makes accusations equal to convictions and allows the State to penalize individuals without giving them a fair trial. Roman law established the status of "the sacred man," or homo-sacer, as someone who is prohibited from participating in religious rituals and can be slain by anybody (qui occidit parricidi non damnatur) (neque fas est eum immolari). There are no longer any civil rights for this person.

Those who are detained by the sovereign ban and stripped of all legal standing also find themselves excluded from the political community as a result of the same action. The sovereign chooses which lives are recognized as part of the community of political beings and which are just categorized in terms of biological reality in this way. Agamben discusses the foundation of this divide by drawing on the two categories the Greeks used to categorize different types of life: zoe, "natural reproductive life," restricted to the private sphere, and bios, "a qualified form of life," political life.

The sovereign reduces those who are prohibited from the realm of political beings to existence that is only understood in terms of physiology and only recognizes them as biological beings. As zoe or biological life, is repositioned inside the polis and becomes the centre of the State's organizational power, the separation of zoe from bios and the production of a bare, human existence as a product of sovereign power can be said to change in

[24] G. Haragopal and B. Jagannatham, Terrorism and Human Rights: Indian Experience with Repressive Laws, Economic and Political Weekly , Jul. 11 - 17, 2009, Vol. 44, No. 28 (Jul. 11 - 17, 2009), pp. 76-85.

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modernity. According to Agamben, this process, which has its roots in classical politics and continues into the present, shows that Western politics has always defined itself as biopolitics.

Under UAPA's anti-terror regime, the individual is stripped of his civil rights and he is reduced to a homo-sacer. The stringent bail conditions and onerous burden of proof imposed on the defence lead to the nullification of the civil and political rights of the individual and his being reduced to homo-sacer existence.

VI. C.L. ROSSITER ON CONSTITUTIONAL DICTATORSHIP

In his classic study of contemporary democracies in crisis, Constitutional Dictatorship, Clinton Rossiter stated the "inescapable reality" that "no form of governance can exist that excludes dictatorship when the life of the nation is in danger." According to Jefferson, the highest duty is to save the nation. [25]The astounding idea that dictatorships can be constitutional was added by Rossiter. Based on the most extensive examination of the usage of emergency powers in modern democracies—Weimar Germany, France, England, and the United States—Rossiter came to the conclusion that, on occasion, constitutional dictatorship has been an essential component of preserving constitutional democracy.[26]

Clinton L. Rossiter in his conceptualization of the theory of Constitutional Dictatorship, agrees with the common belief that "the sophisticated system of government of the democratic, constitutional state is fundamentally designed to function under normal, tranquil conditions, and is frequently insufficient to the necessities of a grave national crisis." It follows that democratic administration "must be temporarily adjusted to whatever degree is required to overcome the risk and restore normal conditions" in times of crisis. Therefore, crisis governance must be powerful but constrained. It must only serve the goals of "preserving the state's independence, upholding the current constitutional order, and defending the political and social liberties of the people." Professor Rossiter believes that a

[25] Lynford A. Lardner, Constitutional Dictatorship by Clinton L. Rossiter, Louisiana Law Review, Volume 9, Number 1, November 1948.
[26]SAHRDC, Stifling Freedom of Expression and Opinion, Economic and Political Weekly , AUGUST 7-13, 2010, Vol. 45, No. 32 (AUGUST 7- 13, 2010), pp. 19-22.

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government that meets these criteria must resemble, if not be the same as, a "constitutional dictatorship."[27]

Here, the dictatorship is sought to have a constitutional or legal basis. According to Rossitter, in times of exigency, a state can have legal suspension of the rule of law. But the question that remains is can we have the perpetual state of affairs regarding inescapable public disorder be turned into grave exigencies? What qualifies as an exigency, when do they continue, who decides the parameters, and how and when is a state of emergency to be suspended?

However, the essence of constitutional dictatorship is that it is temporary. What is noteworthy for our examination is that all previous emergencies have been more often not for a well-defined purpose that could be accomplished fairly quickly. The enactment of the anti-terrorism law regime in the Indian scenario was also in the context of dealing with a particular social-political reality, as was UAPA. But the exception became the norm. The temporary suspension of civil liberties and basic procedural safeguards has been normalized and made permanent. Preventive detention laws have now become the norm and this can be seen embodied in how various states like Gujarat[28] continue to enact similar laws.

VII. CARL SCHMITT ON THE STATE OF EXCEPTION

Carl Schmitt had given a similar idea of Sovereign Dictatorship where he argued that the precise details of an emergency cannot be decided, or anticipated and nor can one decide what can be done to control the situation. Thus, as a pre-condition, the power of the sovereign must be unlimited, and there can be no constitutional guidance in such situations. The powers of the sovereign are unfettered in these situations to deal with the exigency at hand. The sovereign can “create” a new rule of law and a new legal system, as he deems fit. [29]

The exception, according to Carl Schmitt’s idea of the state as an exception, is a circumstance that jeopardizes the state's fundamental existence and is, by definition, something that neither can be anticipated nor "circumscribed factually and made to correspond to a preexisting law." An adversary who does not respect the law or who may even manipulate the law to further an

[27] Jess Boersma, What About Schmitt? Translating Carl Schmitt's Theory of Sovereignty as Literary Concept, Discourse , Spring & Fall 2005, Vol. 27, No. 2/3, Hostly and Unhostly Mediums (Spring & Fall 2005), pp. 215-227

[28] Gujarat Control of Terrorism and Organised Crime (GCTOC) Bill, 2015.

[29] Adrian Vermeule, Our Schmittian Administrative Law, Harvard Law Review , Feb., 2009, Vol. 122, No. 4 (Feb., 2009), pp. 1095-1149.

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anti-democratic goal cannot be effectively countered by a state bound by the rule of law. Schmitt's argument holds that the only solution is an indivisible sovereign with unrestricted authority to determine whether or not an extraordinary emergency exists. If not, he continues to be subject to the generally accepted legal system. However, if there is, he must choose what steps to take to stop the exception, even if doing so requires breaking the law (such as suspending the Constitution) until the regular circumstance can be restored. Schmitt's prescriptive solution to the dilemma, a sovereign dictatorship, has the potential to and does result in the eradication of the very laws and individual rights that the sovereign was charged to defend. [30]

The declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government under modern liberal democracy. This tendency gave the totalitarianism that emerged in the 20th century the framework by which rule by a permanent state of emergency was possible. The UAPA through its enactment creates a state of exception which has been made a permanent social fact. The existence of the state of exception is argued by the State as a justification for enacting such draconian preventive detention laws with hardly any procedural safeguards.

VIII. AMBIGUITY IN THE DEFINITION OF TERRORIST ACT

The definition of a "terrorist act" under Section 15 of the Act is arbitrary, vague and overbroad, which is the first flaw that permits the abuse of the strict anti-terror statute. This clause, which specifies whose acts can be considered terrorist acts and whose offenders may be subject to the Act's unbending penalties, is essential to the proper application of the law. [31]According to this definition, a terrorist act is "done with the intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with the intent to strike terror in the people or any section of the people in India or any foreign country." The section does away with the necessity of mens rea, which is a prerequisite to conducting terrorist actions, by using arbitrary and nebulous phrases like "likely to threaten" or "likely to strike fright in people." The term goes on to say that any conduct "likely to cause

[30] John Ferejohn* and Pasquale Pasquino, The law of the exception: A typology of emergency powers, Oxford University Press and New York University School of Law 2004, I.CON, Volume 2, Number 2, 2004, pp. 210–239.
[31] Sneha Mahawar, Terror of Unlawful Activities Prevention Act, 1967 (UAPA), 21 Supremo Amicus [103] (2020).

the death of or injury to, any person or individuals" is also sufficient grounds to prove that a terrorist attack is likely to occur.[32]

The provision's vagueness has been utilized to broaden the definition of "terrorist acts" to encompass peaceful demonstrations by activists, students, and residents under the pretence that they may result in injuries or fatalities if taken violently. However, there is no distinction established between the crime of committing violent activities against the state and the freedom to protest and free expression. This gives the State broad authority to detain and arrest anyone who expresses opposition to its policies or conduct or calls for any type of accountability. This violates the citizens' Fundamental Right to Freedom of Speech and Expression, Right to Protest, Right to Liberty and Free Movement, and Right against Illegal Detention.

IX. LEGAL GREY HOLES

When laws or regulations "either explicitly insulate the executive from the obligations of the rule of law or openly exclude judicial review of executive action," legal black holes" result. Contrarily, grey holes "arises when there are some legal restraints on executive activity, but they are so insubstantial that they essentially let the government to do as it pleases". In a legal black hole, the judges simply refuse to hear a matter and to review actions of the executive, beyond the powers of jurisdiction. The judiciary dismisses questions being too political or belonging to the executive's area of performance. [33]

Legal Grey Holes are more common than black holes, there is procedural review but substantive questions are ignored, there exists some constrain on the executive but the executive still gets away with their acts. And the judges pretend to enforce the rule of law even though it is explicit that they are not doing so. The provisions formulated under UAPA embody legal grey holes, by allowing judicial review although at the same there are little to no restraints on the government's attempts to do so. With ambiguous definition of what constitutes a terrorist activity among various other things, it leads to the police or the government in effect having a wider scope regarding who can and cannot be held under this act and tortured for bail even before the trial even commences.

[32] Chandrika M. Kelso , Thomas M. Green, James E. Guffey & James G. Larson, Unlawful Activities Prevention Act-UAPA (India) & U.S.-Patriot Act (USA): A Comparative Analysis, 5 HOMELAND Security REV. 121 (2011).
[33] D. Dyzenhaus, 'The State of Emergency in Legal Theory' in V.V. Ramraj, M. Hor and K. Roach (eds.), Global Anti-Terrorism Law and Policy (Cambridge: Cambridge University Press, 2005), p. 65.

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X. EXTENSION FOR THE PERIOD OF INVESTIGATION BEYOND 90 DAYS

Ordinarily, a maximum of 90 days is allotted for the investigation's completion in situations where it cannot be finished in 24 hours. The accused cannot be held in custody any longer and has an unjustifiable right to default bail if the investigation and submission of the charge sheet are not finished within that time frame.[34]

However, Section 43D(2) of the UAPA extends the "extended time" under the regular legislation by another 180 days, making the accused's detention mandatory.[35] This is carried out to provide the investigating agency more time to carry out the inquiry consistently.[36] However, due to lengthy delays in the filing of charge sheets, this provision has frequently been abused to keep the accused behind bars and deny them the right to bail. Numerous routine extensions for straightforward investigative procedures have been requested, and the investigative agencies have repeatedly attempted to defend their own delays by citing rights under legal exclusions. This indicates a clear non-adherence to procedural fairness and utter disregard for a citizen's liberty which is constitutionally protected under Article 21.

XI. EXTRA LEGAL MODEL BY OREN GROSS

The business-as-Usual approach is predicated on ideas of absolute constitutional perfection. In accordance with this paradigm, even during emergencies and crises, regular legal standards and norms are nonetheless scrupulously adhered to without significant modification. The law is the same in times of conflict as it is in times of peace. Other emergency power models can be categorized as "models of accommodation" insofar as they try to take security demands and considerations into account within the normative framework already in place. While the regular procedure is maintained as much as feasible, some extraordinary adaptations are made to meet demands.

According to the "model of accommodation", the constitution itself is making space for emergencies. there will be cases where we will have to depart from standard rules and laws. Short-term measures, are made, to deal with emergencies, but the problem is that their effects

[34] Maeen Mavara Mahmood, The Conundrum of the Unlawful Activities (Prevention) Act, 1967: A Comparative Analysis with Analogous Legislations, 26 Supremo Amicus [214] (2021).
[35] Tanishk Gautam & Josheca Mukerji, Critical Analysis of Unlawful Activities Prevention Act, 1967, 26 Supremo Amicus [524] (2021).
[36] South Asia Human RIghts Documentation Centre and Ravi Nair, The Unlawful Activities (Prevention) Amendment Act 2008: Repeating Past Mistakes, Economic and Political Weekly, Jan. 24 - 30, 2009, Vol. 44, No. 4 (Jan. 24 - 30, 2009), pp. 10-14.

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remain long after it, and their powers or imposition becomes indefinite. So a law with a sunset clause, becomes extended. No longer remains a temporary measure.[37]

The Extra-Legal Measures model teaches public authorities that they are permitted to take extralegal acts when they believe that doing so is important to defend the country and the public in the face of tragedy, provided that they do so openly and publicly. The public will then have to determine how to react to such activities, either directly or indirectly (for example, through their elected legislators). The populace may opt to hold the performer accountable for her improper behaviour, displaying a dedication to the breached ideals and standards. The acting official may be asked to give a defence and offer political and legal restitution for her acts. Alternatively, the populace may decide to approve the extralegal activity ex-post of public officials.

By drawing upon both the business-as-usual model and model of accommodation, Oren Gross argues for an Extra-legal order. According to this, under this model, the state is travelling beyond ordinary legal order, so the state is not bending the law and there is no change in laws. There exists no special accommodation, and no flexibility, but at the same time, in times of emergency, this model allows us to go beyond the legal. Therefore, in certain circumstances, the State travels beyond the legal order. In the present case, dealing with terrorists and a situation where there can be a grave public disorder situation, it is a situation that calls for the state going beyond the legal order. But when the state tries to adopt the extra-legal model in its dealing with day-to-day public disorder circumstances and dissent, that is when the State threatens the balance that is the essence of the Extra-Legal Model.

As in practice, once the government and its agencies become used to operating beyond the purview of legality, it becomes a plea of convenience. Inconvenient to give up the new powers. As the use of anti-terrorism legislation has a creeping quality, envelopes everything. Any group/any individual can then be brought into the purview of these terrorism laws. The emergency creates these structuralist changes, that remain long after. For example, National Investigation Agency (NIA) was created to look at terrorism crime, but now this agency is involved in every other case. Thud leads to excessive concentration of power within these

[37]Oren Gross, Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?, The Yale Law Journal , Mar., 2003, Vol. 112, No. 5 (Mar., 2003), pp. 1011-1134.

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agencies. UAPA is being used as one solution fits all and its scope has been extended today to put the anarchists and the dissenters in the same category.[38]

Thus when the State goes beyond the legal order, it has to without failing to acknowledge its actions. Some argue that this is a flawed model because of its inherent problems, but the extra-legal model also acts as an attempt to understand the existence of transgressions from the legal order.

XII. SUSPECT COMMUNITIES AND SPECTRAL TERRORISM

Spectral terrorism refers to a general situation of threat resulting from de-individualized and diffuse Islamic terror, which operates under the presumption that the enemy "could be everywhere and everyone - nearly." It is a new type of threat that cannot be controlled by conventional law and order policing. This premise lays the foundation for a "universal campaign of investigation, interrogation, confiscation, detention, surveillance, torture and punishment on, for the first time, a truly global scale, not only where terrorism does manifest itself, but where it might manifest itself, which, of course, could be anywhere"[39]

According to Alain Supiot, the anthropological aim of law is to "institute us as rational creatures" by turning "each of us into a homo juridicus." Supiot claims that if one remembers one of the lessons from the experience of totalitarianism, where the first crucial step "on the road to ultimate dominance was to kill the legal person, this shift is of particular significance.

In fact, the implementation of anti-terror laws in India has demonstrated that the destruction of the juridical person through the legal system is conceivable by designating them as potential, probable, or real perpetrators of "crimes of terror." Indian anti-terror legal systems distinguish between those for whom such rights may be waived and the moral community that makes up "us," who are the repository of freedom and security. The security laws show the state's unrestricted capacity to produce gendered citizens whose bodies serve as evidence of the state's truth and for whom the presumption of innocence is flipped.

This is being witnessed in the Delhi Riots case in the manner in which UAPA produced gendered bodies of subordinate citizens located within communities rendered suspect because of their religion. Under the UAPA regime, the suspected communities range from Muslim

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[38] A. G. Noorani, India: A Security State, Economic and Political Weekly, Apr. 4 - 10, 2009, Vol. 44, No. 14 (Apr. 4 - 10, 2009), pp. 13-15

[39] Paddy Hillyard, Suspect Community: People's Experience of the Prevention of Terrorism Acts in Britain, Pluto Press in association with NCCL/Liberty, London, 1993, pp.300.

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dissenters to journalists and political dissenters.[40] This comes from the political reality, where the dominant groups conceive of themselves as having the ability to speak for everyone and claim to represent everyone.[41] The scope of the criminality under the UAPA is expanded, and without any offence committed by that person, he is arrested for having "political ideas". When certain communities are treated as suspect communities, the law itself allows a class of people to be treated differently, it becomes a means of institutionalised discrimination or racism. Here the communities are criminalised, that is just by virtue of being members of that community, those people are held to have or treated similarly to someone who has committed a criminal offence. Here not despite of law, but because of the law, people become suspected as a community. It leads to the creation of a "culture of fear", that is carefully created by the media in the public eye. Sub-groups are singled out for special measures, as by the state these groups are seen as "troublesome", just by being part of the community.

XIII. CONCLUSION

The ideological foundation for the security state is provided by a state narrative that justifies the suspension of customary legal processes and the normative standards of the rule of law. The executive's powers also grow exponentially and cumulatively as a result. The government not only asserts the right to declare the existence of an extraordinary necessity that renders the suspension of regular operations necessary, but it also reserves the right to determine what types of laws would best fill the void left by this suspension.

The succession of extraordinary legislation has so continued the network of anti-terror laws and the security regimes that give rise to them. These have multiplied through decentralized anti-terrorist regimes, become increasingly entwined and interlaced with regular laws, and, most importantly, have made temporary measures permanent through the syphoning of temporary/extraordinary measures into permanent legislation like the UAPA.

The various frameworks applied in this appear to analyze the reality of UAPA laws embody the reality of terrorism trials, from the courtroom politics that impedes substantive justice to the normalization of the exceptional laws. Terrorism laws are today used to stifle dissent and break down the very legal system they were brought in to protect. There is a dire need to re-

[40]Ujjwal Kumar Singh Repeal of POTA: What about Other Draconian Acts, Economic and Political Weekly , Aug. 14-20, 2004, Vol. 39, No. 33 (Aug. 14-20, 2004), pp. 3677-3680.

[41]Anushka Singh, Criminalising Dissent: Consequences of UAPA, Economic and Political Weekly , SEPTEMBER 22, 2012, Vol. 47, No. 38 (SEPTEMBER 22, 2012), pp. 14-18.

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examine the ways in which terrorism laws are framed by removing the safeguards and leaving the horizon of the suspect communities to expand.

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