
NATIONAL SECURITY AS CENSORSHIP: TESTING INDIA'S UNLAWFUL ACTIVITIES (PREVENTION) ACT AGAINST THE JOHANNESBURG PRINCIPLES ON NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

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ABSTRACT

This essay examines the Unlawful Activities (Prevention) Act, 1967 (UAPA), as amended in 2019, against the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, a 1995 framework endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression. It argues that three features of the UAPA: the open-textured definition of “unlawful activity,” the executive's unilateral power to designate individuals as terrorists, and the near-total bar on bail under Section 43D (5) that fail the principle’s tests of legality, necessity, and proportionality. Drawing on the prosecutions of activists, students, and journalists under the Act, including the ongoing case of Umar Khalid, the essay contends that the UAPA operates less as a counter-terrorism statute than as a mechanism of pre-trial punishment for dissent, and that Indian constitutional courts have only partially and inconsistently checked this drift, a fact underscored by the Supreme Court's own May 2026 reference of the applicable bail standard to a larger bench. It concludes with recommendations drawn directly from the Johannesburg framework.

In doing so, the essay situates India's experience within a broader global pattern in which antiterrorism legislation, though facially neutral, is disproportionately deployed against dissenting voices rather than genuine security threats. The unresolved conflict within the Supreme Court itself over the correct bail standard under the Act underscores that the tension between the UAPA and India's free-expression guarantees is not merely academic, but an active and unsettled question of constitutional law.

Keywords: National Security; Freedom of Expression; Unlawful Activities (Prevention) Act; Johannesburg Principles; Pre-Trial Detention; Censorship.

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1. INTRODUCTION

Every state claims a sovereign right to protect itself. The difficulty, as the drafters of the Johannesburg Principles recognised three decades ago, is that “national security” is also the single most convenient justification governments reach for when they wish to silence critics.² The Principles were assembled precisely to distinguish the two, to separate restrictions that genuinely protect a state from restrictions that merely protect a government from embarrassment or opposition. Applied to India's Unlawful Activities (Prevention) Act, 1967, that distinction becomes difficult to sustain. The UAPA, originally a narrow statute aimed at banning secessionist associations, has since 2004 been transformed by successive amendments into India's principal anti-terrorism law and, its critics argue, into a tool for detaining journalists, students, and activists without meaningful prospect of bail or trial.³ This essay tests the UAPA's core mechanisms against the Johannesburg Principles and asks whether a statute framed in the language of national security can survive scrutiny as a matter of international free-expression standards.

2. THE JOHANNESBURG PRINCIPLES: A FRAMEWORK FOR TESTING NATIONAL SECURITY RESTRICTIONS

The Johannesburg Principles were adopted in October 1995 by a group of international law and human rights experts convened by ARTICLE 19, and have since been repeatedly endorsed in UN human rights reporting.⁴ Their central contribution is a three-part test for any restriction on expression justified by national security: the restriction must be prescribed by law, in the sense of being accessible, unambiguous, and narrow enough that a person can foresee whether conduct is unlawful; it must protect a legitimate national security interest, narrowly defined to exclude the mere embarrassment or exposure of wrongdoing by government; and it must be *necessary in a democratic society*, meaning the government bears the burden of showing a genuine risk of harm and that no less restrictive means would serve the same end.⁵ Principle 2 goes further, specifying that a restriction is illegitimate if its genuine purpose or demonstrable

² The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (Nov. 22, 1996), Introduction.

³ Unlawful Activities (Prevention) Act, No. 37 of 1967, India Code (1967), *as amended by* Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004; Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008; Unlawful Activities (Prevention) Amendment Act, No. 3 of 2013; Unlawful Activities (Prevention) Amendment Act, No. 28 of 2019.

⁴ *Supra* note 1; see U.N. Comm'n on Human Rights, Reports of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression (1996, 1998, 1999 & 2001 Sess.).

⁵ *Supra* note 1, Principles 1.1–1.3.

effect is to protect interests unrelated to national security, including shielding a government from criticism or entrenching a particular ideology. Principle 6 holds that expression may be punished as a threat to national security only where it is intended to incite imminent violence, is likely to incite such violence, and there is a direct and immediate connection between the expression and that likelihood. Principles 23 and 24 separately condemn prior censorship and disproportionate punishment including, implicitly, punishment inflicted through prolonged pre-trial detention rather than through a proven conviction.

3. THE UAPA'S ARCHITECTURE OF CONTROL

Three structural features of the UAPA are relevant here. First, the definition of “unlawful activity” in Section 2(o) is broad enough to capture speech that merely questions or disclaims India's territorial integrity, sovereignty, or the disintegration of any part of its territory, critics have long compared to the sedition offence under Section 124A of the Indian Penal Code.⁶ Second, the Unlawful Activities (Prevention) Amendment Act, 2019, inserted Sections 35 and 36, empowering the Central Government to designate an individual, not merely an organisation, as under the pre-2019 law as a “terrorist” by executive notification, without a prior conviction and without disclosed criteria for the designation.⁷ Third, Section 43D(5), inserted in 2008, requires a court to deny bail wherever it finds “reasonable grounds for believing” that the accusation is *prima facie* true, based solely on the case diary and chargesheet prepared by the investigating agency, with no opportunity for the accused to lead rebuttal evidence at the bail stage.⁸ In *National Investigation Agency v. Zahoor Ahmad Shah Watali* (2019), the Supreme Court held that this threshold is deliberately lighter than the ordinary “*prima facie*” standard, and that a bail court may not weigh the merits of the prosecution's evidence.⁹ The practical result, documented across multiple government responses to Parliament, is a conviction rate under the Act estimated at 2–3 percent against tens of thousands of arrests between 2016 and 2020 : a gap that, on its face, suggests the Act's primary operative function is prolonged custody rather than eventual punishment following trial.¹⁰

⁶ Unlawful Activities (Prevention) Act, No. 37 of 1967, § 2(o), India Code (1967); Indian Penal Code, No. 45 of 1860, § 124A, India Code (1860).

⁷ Unlawful Activities (Prevention) Amendment Act, No. 28 of 2019, §§ 35–36, India Code (2019).

⁸ Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D (5), India Code (1967).

⁹ *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 S.C.C. 1 (India).

¹⁰ Gov't of India, Ministry of Home Affairs, Response to Parliamentary Question on UAPA Arrests and Convictions, 2016–2020 (Lok Sabha).

4. TESTING THE UAPA AGAINST THE PRINCIPLES

Legality : Principle 1.1 requires that a restriction be drawn with enough precision that an individual can foresee whether a given act is unlawful. Section 2(o)'s reference to activity intended to cause “disaffection” against India, and Section 15's definition of a “terrorist act” as one intended to threaten the “unity, integrity, security... or sovereignty of India,” import into a penal statute exactly the kind of open texture the Principles were designed to exclude. The absence of any published criteria accompanying Sections 35–36 compounds the problem: an individual has no way of knowing, prior to executive notification, what conduct exposes them to designation as a terrorist.¹¹ A constitutional challenge to these provisions, filed by Sajal Awasthi and separately by the Association for Protection of Civil Rights, characterised the discretion conferred on the executive as “unfettered” and inconsistent with Article 14 of the Constitution, an objection the Supreme Court has not itself resolved on the merits, instead directing that the question be taken up by the High Courts.¹²

Necessity and proportionality : Principle 6's requirement of a direct and immediate connection between expression and incitement to violence is difficult to reconcile with several prosecutions under the Act. In the case against student activists arising from protests against the Citizenship Amendment Act, the Delhi High Court in 2021 granted bail to Devangana Kalita, Natasha Narwal, and Asif Iqbal Tanha, holding that participation in protest activity including calls for a *chakka jam* (road blockade) did not, without more, satisfy the statutory definition of a terrorist act.¹³ Yet the same reasoning has not been applied consistently to all co-accused arising from the same events. Umar Khalid, arrested in September 2020, has been treated very differently: the Delhi High Court denied him bail in September 2025, and the Supreme Court itself denied him bail on 5 January 2026, finding a *prima facie* case against him while granting bail to five co-accused on the basis that they occupied a lesser position within the alleged conspiracy.¹⁴ The prosecution's characterisation of Khalid as an “ideological driver” of a plan to convert protest into disruption, reading a coordinated *chakka jam* into Section 15's residual clause covering a terrorist act by “any other means” illustrates precisely the risk the Johannesburg Principles anticipate: without a narrowly and consistently applied incitement standard, the line between

¹¹ *Supra* note 6.

¹² Sajal Awasthi v. Union of India, W.P. (Crl.) (Sup. Ct. India) (pending); Ass'n for Prot. of Civ. Rights v. Union of India, W.P. (Crl.) (Sup. Ct. India) (pending).

¹³ State v. Devangana Kalita, Bail Appl. (Delhi H.C. June 15, 2021).

¹⁴ Umar Khalid v. State (NCT of Delhi), Bail Appl. (Delhi H.C. Sept. 2, 2025); Umar Khalid v. State (NCT of Delhi), (2026) Crim. App. (Sup. Ct. India Jan. 5, 2026) (Kumar, J.).

protest and terrorism becomes a matter of prosecutorial framing and judicial discretion rather than law.

Burden of proof : Principle 1.1(d) places the burden of justifying a restriction squarely on the government. Section 43D(5), as interpreted in *Watali*, effectively inverts this at the bail stage: the accused must displace a *prima facie* case built entirely on the prosecution's own chargesheet, without being permitted to introduce contrary evidence. The Supreme Court's decision in *Union of India v. K.A. Najeeb* (2021) offered a partial corrective, holding that Section 43D(5) does not oust a constitutional court's power to grant bail where prolonged incarceration itself violates Article 21.¹⁵ This is a narrow exception grounded in delay, however, not a restoration of the ordinary burden of proof and, as discussed below, even this narrow exception is currently the subject of unresolved disagreement within the Supreme Court itself.

Disproportionate punishment : Principle 24's concern with disproportionate punishment is engaged most starkly by the Act's use as an instrument of prolonged pre-trial detention. The death in judicial custody of the Jesuit priest and tribal-rights activist Father Stan Swamy in July 2021, after months of pre-trial detention under the UAPA in connection with the Bhima Koregaon case, remains the most-cited illustration of this dynamic.¹⁶ Khalid's own case now supplies a second: nearly six years in custody without a concluded trial, on charges whose evidentiary basis, in the assessment of at least some benches, rests substantially on inference — WhatsApp group memberships, protected-witness statements, and characterisations of protest rhetoric as coded incitement rather than direct evidence of violent intent.¹⁷ Whatever the eventual merits of the underlying charges, a system in which the process of prosecution itself imposes years of incarceration functions as punishment independent of any judicial finding of guilt, which is exactly the disproportion Principle 24 is directed against.

5. JUDICIAL COURSE-CORRECTION AND ITS LIMITS

Indian courts have not been silent. Beyond *Kalita* and *Najeeb*, the Bombay High Court has in several instances insisted on concrete evidentiary specificity even within the constraints of Section 43D(5).¹⁸ The Delhi High Court in 2021 also criticised the state for expanding the

¹⁵ *Union of India v. K.A. Najeeb*, (2021) 3 S.C.C. 713 (India).

¹⁶ *Bhima Koregaon Case: Fr. Stan Swamy Dies in Judicial Custody*, Bhima Koregaon Case Proceedings (July 2021).

¹⁷ *Supra* note 13.

¹⁸ *See, e.g., State of Maharashtra v. Iqbal Ahmed*, Bail Appl. (Bombay H.C.).

practical scope of “terrorist activity” to encompass ordinary penal offences.¹⁹ These interventions confirm that Indian constitutional courts recognise the tension between the UAPA and free expression guarantees under Articles 19(1)(a) and 21. What they have not done is resolve the structural sources of that tension. The Supreme Court disposed of the Awasthi challenge to Sections 35–36 by directing that the question of their constitutional validity be decided by the High Courts, leaving the core due-process objection that individuals are branded “terrorists” by executive notification with no disclosed criteria and no prior hearing unresolved at the apex level.²⁰ The bail question has fared no better. The Supreme Court's 5 January 2026 denial of bail to Khalid and Sharjeel Imam was itself criticised by a differently constituted bench for reading down *K.A. Najeeb* too narrowly; the resulting conflict was significant enough that, on 22 May 2026, a two-judge bench referred the question of how delay-based bail should apply under the UAPA to a larger bench.²¹ Two coordinate benches of India's highest court now disagree on the operative content of Article 21's protection against indefinite pretrial detention under this Act nearly six years into Khalid's custody, with no trial yet concluded. Judicial relief under the current framework is therefore not merely slow; on this evidence, it is internally unsettled. Principle 1.1(b) requires prompt judicial scrutiny as a safeguard against abuse; a legal system that cannot yet agree, after six years, on the correct bail standard for its own signature terrorism statute does not meet that bar.

6. CONCLUSION

Measured against the Johannesburg Principles, the UAPA fails on more than one axis at once: its central definitions lack the precision Principle 1.1 demands; its 2019 amendment confers a designation power without the narrow tailoring Principle 2 requires; its application to protest activity strains past the incitement standard in Principle 6; and its bail architecture produces exactly the kind of punishment-through-process that Principle 24 was drafted to prevent. None of this requires denying that India faces genuine security threats, or that some restriction on expression in that interest can be legitimate — the Johannesburg Principles themselves accept as much. The difficulty is one of design and application: a statute that cannot distinguish, *ex ante*, between an insurgent and a student protestor is not calibrated to a legitimate security

¹⁹ Delhi High Court, Observations on the Scope of “Terrorist Activity” Under the UAPA (June 2021).

²⁰ *Sajal Awasthi v. Union of India*, Order Disposing of Petition and Remitting Constitutional Challenge to Sections 35–36 to the High Courts (Sup. Ct. India).

²¹ *Umar Khalid v. State (NCT of Delhi)*, Reference Order (Sup. Ct. India May 22, 2026) (Kumar & Varale, JJ.) (referring the application of *Union of India v. K.A. Najeeb* in UAPA bail matters to a larger bench).

interest so much as it is calibrated to executive convenience. Bringing the UAPA into alignment with the Johannesburg framework would require, at minimum, a judicially or legislatively narrowed definition of “unlawful activity,” published and reviewable criteria for individual terrorist designation, and a bail standard that restores rather than inverts the ordinary burden of proof. Absent that recalibration, the Act will continue to function, in practice if not in name, as a mechanism of censorship dressed in the vocabulary of national security — a conclusion the Supreme Court's own unresolved internal disagreement over the correct standard for pre-trial liberty, in a case now stretching past six years of detention without a concluded trial, does little to dispel.

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