

REHEARSED TRUTHS

Eight successive bans on SIMI by UAPA Tribunals

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Casting the net wider: the ever-expanding reach of UAPA

Two kinds of activities are criminalized under UAPA - unlawful and terrorist. Neither of the activities necessarily mandate the commission of a violent act to be counted as a crime under UAPA.

Unlawful Activity defined under s. 2(o) includes commission of acts either through words, signs, visible representation or otherwise, intended to, or supporting claims for cession or secession in the country or inciting any individuals/groups to bring about such cession or secession; or disclaiming, questioning, disrupting or intending to disrupt the sovereignty and territorial integrity of India; or intending to cause disaffection against India.

Terrorist activity defined under s.15 includes acts intending to threaten the unity, integrity, security (including economic security) or sovereignty of India or intending to strike terror in the people/any section of the people in India or in any foreign country, either through use of instruments/weapons/arms etc. that result in death or otherwise or through destruction of property which was to be used for any purpose by the government of India; or through show of criminal force; detention, kidnapping, or threat to kill and injure any person to compel the government to do anything.

Banning of Organizations: The UAPA allows the Central Government to ban an organization as an 'unlawful' one under s 3 (3) and several organizations have been banned via this section and individuals have been arrested via their association with the 'banned' organization. However, unlike this 'unlawful' ban provision which requires the approval of a Tribunal—the thrust of the present report—the UAPA also allows for the banning of organizations as 'terrorist' without the requirement of such sanctions. S. 35 empowers the Government to "add an organization to the Schedule", if "it believes that it is involved in terrorism". The targeted organization may appeal to the Government against the ban, under s. 36, and the Government may "prescribe procedure for admission or disposal" of the application. If the application is rejected, the targeted organization can appeal for a review to the Review Committee, under s. 37 of the Act. The Chairperson of the Review Committee, who can be a Judge of the High Court, has to be appointed by the Government. Needless to say, in the last two decades, no Review Committees have been set up to consider the terrorist ban on any organization. Currently, 42 organizations have been banned as 'terrorist' by the Central Government (For details of 'terrorist' organizations, see <https://mha.gov.in/node/91173>)

Commonly invoked sections of UAPA

Section	Crimes they create	Activities they criminalize	Maximum Penalty
10 (a)	Membership of an unlawful association	Taking part in meetings, any form of assistance, contributing to or receiving contributions for the association	Imprisonment for 2 years with fine
10 (b)	Membership of an unlawful association	Possession of weapons/ammunitions etc. to aid the association and commission of any act which results in the death of a person	Death penalty with fine
13	Unlawful activities	Taking part in, advocating, advising, inciting any unlawful activity	Imprisonment for 7 years with fine
16	Punishment for terrorist acts	A terrorist act which results in death of a person	Death penalty with fine
		A terrorist act which does result in death	Life imprisonment with fine
17	Raising funds for terrorist acts	Raising/providing/collecting funds from legitimate/illegitimate source, or intending to do so, or participating in such acts of fund raising	Life imprisonment with fine
18	Conspiracy	Committing, abetting, advocating, advising either a terrorist act or preparatory acts to a terrorist act	Life imprisonment with fine
18 (A)	Organizing terrorist camps	Organizing camps imparting training in terrorism	Life imprisonment with fine
18 (B)	Recruiting persons for terrorist acts	Recruiting persons for commission of terrorist acts	Life imprisonment with fine
20	membership of terrorist gang or organisation	Being a member of a terrorist gang or organization involved in terrorist act	Life imprisonment with fine
38	Offence relating to membership of a terrorist organisation	Associating oneself or professing oneself to be associated with a terrorist organization intending to further its activities	Imprisonment for 10 years to which fine maybe added
39	Giving support to a terrorist organisation	Inviting support for terrorist organization- monetary or otherwise; arranging meetings either held to invite support or is addressed by any person associated with a terrorist organization; or addressing any such support meeting	Imprisonment for 10 years to which fine maybe added
40	Raising fund for a terrorist organisation	Inviting persons for monetary or property related support, receiving such support or providing such support either with knowledge of or with reasonable suspicion that the fund may be used for terrorism	Imprisonment for 14 years to which fine maybe added

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I. Introduction

On August 27, 2019, a Tribunal headed by a sitting High Court judge confirmed a five-year ban on Jamaat-e-Islami (Jammu and Kashmir) [JeI (J&K)], imposed under the Unlawful Activities Prevention Act (UAPA) by the Central Government on February 28, 2019. Joining the ever-growing list of 'banned' organizations, the JeI (J&K), formed in 1953, was declared an "unlawful association" by the Tribunal.

The judicial process by which the ban was confirmed offers a window into understanding why bans are routinely upheld. Before the UAPA Tribunal, the Central Government besides referring to the registration of a flurry of FIRs and seven cases registered by the NIA, produced ten witnesses, of which two were "protected" and cross-examined in camera, and four produced evidence in 'sealed covers' which were not disclosed even to JeI (J&K) during the proceedings. The JeI (J&K) counsel protested the presence of sealed documents, lack of certified copies of FIRs, absence of grounds in the notification and allegations made by the Central Government in the absence of credible information produced by the Central Government. The Tribunal, nevertheless, exclusively reposed faith in what the Government's witnesses said and confirmed the Government's decision to ban the JeI (J&K). On September 20, 2019, the UAPA Tribunal following a similar pattern of adjudication confirmed the ban on the Jammu and Kashmir Liberation Front-Mohd. Yasin Malik faction (JKLF-Y) on September 20, 2019. How did these sleights of hand happen? Or rather, why do they happen?

On July 29, 2019, the UAPA Tribunal confirmed the declaration of the Students Islamic Movement of India (SIMI) as an 'unlawful association' by the Government's notification dated January 31, 2019. Since 2001, when SIMI was first banned, the government has banned SIMI eight consecutive times. In all but one of these instances the Tribunal has confirmed the ban. It bears noting that even when the Government decides to ban an organization, the ban must be confirmed by a Tribunal, headed by a sitting High Court Judge, to remain in force. The Tribunal conducts hearings and the banned organization has the right to defend itself through counsel. Hence, the UAPA Tribunal is meant to be a necessary check on the government's decree. Significantly, while at various points the UAPA Tribunals have faithfully recorded the ever-growing menace of SIMI despite its nearly continuous ban, it has also unwittingly produced a counter-documentation of the smoke-and-mirrors by which the government's fiat has been lent legal authority.

PUDR has documented SIMI's saga with the Tribunal in *Banned and Damned* (2015) by examining the workings of the UAPA Tribunal in 2010, 2012 and 2014. However, the report did not offer a long sweep of the counter-history that is critical to understanding how the UAPA Tribunal, a supposed inbuilt check, has aided the Government's proscription of organizations in at least three ways. One, the dubiousness of decreeing bans is legitimated through an adjudication in the Tribunal in which the principle of equality between both sides is wholly subverted. Two, given the substantially lower evidentiary threshold adopted by the Tribunal, the mere submission of the government that a ban is necessary is accepted at face value: Three, the communal fallout of the ban is such that a wide section of people is stereotyped as terrorist.

With the end of the present ban period in 2024, the time span of SIMI's ban will measure nearly a quarter of century under the UAPA, about the same length of time that the organization legally existed, from April 1977 till September 2001. This report offers a critique of the August 2019 judgment upholding the ban on SIMI. It examines how and why all the seven preceding Tribunals arrived at the same conclusions—the rehearsed truths—including the sole one of 2008 that struck the ban down.

To understand why we describe the Tribunals' conclusions as 'rehearsed truths', it bears noting that after the demolition of the Babri Masjid on December 6, 1992, SIMI was one of the few associations that organised demonstrations on every December 6. Through the late 1990s stray cases were registered against SIMI members under IPC Sections 153A and 153B for dissemination of material critical of the demolition. However, it was not until September 27, September 2001, nearly two weeks after 9/11, that a notification came to be issued under Section 3 (1) of the UAPA declaring SIMI an 'unlawful association'.

No sooner than the issuance of the declaration, Dr. Shahid Badr Falahi, the erstwhile President of SIMI, and several other members of SIMI were arrested from the SIMI office in Zakir Nagar, Delhi. Within 24 hours of the ban, close to 240 SIMI activists were arrested in several states, including in Kerala, Maharashtra, Rajasthan, Tamil Nadu and West Bengal.

In the aftermath of the declaration, numerous cases were registered against members of SIMI. The mere fact of the registration of a number of cases after the confirmation of the ban in 2001 served as the basis for the Tribunal to confirm the declaration of the association as 'unlawful' for a second time in March 2004. The Tribunal's confirmation in 2004 of the Government's notification laid the basis for 5 new cases to be registered. These cases along with the earlier ones, in turn, became the basis for the Tribunal's confirmation of the declaration of the association as unlawful for a third time in 2006. The Tribunal's adjudication of subsequent notifications [see box below] is identically patterned: an exclusive reliance on the sheer number of earlier cases alongside those registered in the aftermath of the immediately preceding confirmation of SIMI's ban.

It is in thus adjudicating each subsequent notification based on recycled allegations, that the Tribunal has arrived at 'rehearsed truths' and has rendered irrelevant the requirement carved out in the UAPA that each notification declaring an association as 'unlawful' be adjudicated afresh for the existence of a 'sufficient cause'.

SIMI Notifications

The notifications banning SIMI as "unlawful" are all remarkably similar, raising grave concerns over the government's non-application of mind in repeatedly renewing the ban. Such bans under the UAPA are time-bound to ensure that the government uses updated information and decides afresh whether the organisation is still active and still indulging in unlawful activities. Yet, these notifications seem to recycle the same stock sentences¹ composed over 18 years ago. Their near-identical nature is immediately visually apparent on perusing the table available [this link](#), which juxtaposes the text of all the notifications next to each other, in the exact order as it appears in the notification.

Apart from the striking similarity, we notice one major change 2010 onwards, since the 2008 notification had been struck down by the Tribunal for not specifying the grounds for the ban, contravening S. 3 (2) of the Act. The lifting of the ban in 2008, the only time this has been done, gave little relief to SIMI, since the Tribunal order was promptly stayed the very next day by the Supreme Court, without so much as giving notice to SIMI's lawyers, and the matter remains pending there till this day. The striking down of the ban in 2008 did, however, force the government to make its notifications more elaborate. Till 2008, the government never produced any 'grounds' and got away with only a 'background' note to support its ban notification. After 2008, the government was forced to provide details of cases in the notification itself, based on which it was deciding to renew the ban. In 2010, its notification was supported with 13 fresh cases, and in 2012, 26 new cases were added to justify the ban notification. In 2014, the UAPA was amended to extend the two-year ban period to five years, and 10 recent instances were shown as proof for the ban notification in 2014.

The recent arrest of Dr. Shahid Badr Falahi in a case registered in 2001, presents yet another instance of the kind of stale material that the Tribunal's conclusions have been predicated on. On September 5, 2019, Dr. Badr was arrested from his home in Azamgarh in connection with a case lodged against him in Bhuj by the Gujarat Police in 2001 for allegedly having delivered an 'inflammatory speech' in the wake of the Gujarat earthquake of January 2001. The case was registered under Sections 143 (unlawful assembly), 147 (rioting) and 353 (assault or criminal force to deter a public servant from discharging his/her duties) of the Indian Penal Code. Apparently, an arrest warrant was issued against Dr. Badr in 2002, but it took the Gujarat police seven years to arrest him. On September 6, 2019, Dr. Badr was produced before a Court in Azamgarh, which granted him interim bail and directed him to appear before the local court in Kutch.

The case's questionable history not only pertains to the nature of the case, which as Dr. Badr said to the media, he was not even aware of, but also to the fact that he was arrested nearly 18 years after the case was registered. The explanation that the police gave to Dr. Badr for the delay in arrest equally defies reason: Since 2003, Dr. Badr has been a visible practitioner of Unani medicine and has been running a clinic in Azamgarh. More importantly, ever since the first Tribunal was constituted in 2002 to adjudicate the ban declared in September 2001, SIMI entered the proceedings through Dr. Badr as he was the President of the organization till the time of its ban. As Dr. Badr stated to a weekly, "From the High Court to the Supreme Court, I have represented SIMI on every date. My address is publicly available in court records. How could the police have never known?" (*The Week*, September 7, 2019). Since 2001, Dr. Badr has been charged in seven cases and has been acquitted in four. However, with this newest one, Dr. Badr will have to continue to spend substantial time, energy and money in defending himself against the charges made. The case is an example of the stale material that the Tribunal adverts to in arriving at its 'rehearsed truths': his arrest in 2019 in connection with a 2001 case, which if marshalled by the Government, would be one in a number of other similar cases that for the Tribunal demonstrate the continued threat posed by SIMI.

An examination of the August, 2019 decision of the UAPA Tribunal reveals that the Tribunal's approach to adjudicating the legality of the Government's 8th successive notification declaring SIMI to be an 'unlawful' association under Section 3 of the UAPA is no different from that adopted in previous iterations. The notification dated January 31, 2019 lists the necessary 'grounds' for the ban which are then deliberated and decided upon by a Tribunal. These grounds must be new—the government must present evidence for fresh events occurring after the last ban, to support its claims that the organization continues to exist and indulge in unlawful activities. This latest notification, the longest so far, lists a total of 58 cases as grounds for the ban, organized in terms of 34 'fresh' cases—new cases since the last ban of 2014—and 24 convictions awarded in past and recent cases.

Significantly, out of the 34 'fresh' cases, 15 (nos. 41-55) arise out of one incident: the blast at Bijnor in 2014, and out of the total number of 24 conviction cases, 16 such convictions (case nos. 11, 12, 13, 14, 15, 16, 17, 18, 23, 24, 25, 26, 28, 40, 56, and 57) are drawn from the period 2003-2010. Of the total 58 cases, 23 cases (case nos. 3, 6, 7, 14, 15, 16, 17, 18, 20, 21, 22, 29, 30, 32, 33, 34, 35, 36, 41, 42, 43, 44, 45) are based on the activities of 6 men who were killed in three incidents of 'encounter' killings, two in Telangana (2015) and one in Madhya Pradesh, Bhopal (2016). Together, the information in the notification is seemingly skewed as the figures for the 'fresh' cases suggest the preponderance of either one incident in Bijnor [see box below] or activities done by six deceased, whilst the conviction data shows an overreliance on past incidents.

This report in closely analyzing the Tribunal's decision confirming the Central Government's declaration of 31st January, 2019 SIMI as an 'unlawful association' and in tracing Tribunals' patterns

of adjudication since the issuance of the first notification in September, 2001 declaring SIMI as such, offers an account of how these ‘rehearsed truths’ are constructed

Bijnor, a small town on north east of Meerut in Uttar Pradesh, came into the news after a non-descript blast occurred in a small rented accommodation in the Kotwali area of the town, in September 2014. The blast did not cause much damage, but one person was injured. Initial investigations showed the presence of explosives, half assembled bombs, a .32 bore pistol, a laptop, 3 voter cards and a few books in Urdu in the premises. The UP ATS (Anti-Terror Squad) picked up details from the female owner who told the police that in May 2014, a saffron tika man had convinced her to rent her premise to him and his two friends from Moradabad as he had got a job at a paper mill in Bijnor.

Camera footage near a clinic showed one person taking a badly burnt person to the doctor’s clinic. The UP ATS along with MP ATS maintained that the injured man was the one who had posed as the saffron tika tenant was Sheikh Mehboob, alias, Guddu. Along with him, five other wanted men—Mohd Ejazuddin, Mohd. Aslam, Zakir Hussain, Mohd. Salik and Amjad—had escaped from Bijnor town after the blasts.

According to the police, the six men had rented two separate premises in Bijnor town since May 2014 and the police recovered 6.5 lakhs from one of the places after the six had escaped. The police claimed that the money was the same which had been allegedly robbed from the SBI Karimnagar branch in February 2014. Importantly, the MP ATS had stated that out of the six involved, five—Sheikh Mehboob, Mohd. Ejazuddin, Mohd. Aslam, Zakir Hussain and Amjad—had escaped from Tanteeya Bheel Jail, Khandwa, in October 2013. The sixth man, Mohd. Salik, was an aide from Khandwa. The successful escape from Bijnor town was the second slip that the five jailbirds gave the police.

The police first nabbed Mohammad Furqan who had helped Sheikh Mehboob to the clinic and had aided the escape of the six men. Subsequently, the police arrested Husna Bi, who had helped the men in securing fake identity cards and in helping them stay in the area. The police recovered 9 lakhs from Furqan’s residence. Within a year, a total of five persons were arrested: Husna, her brother Nadeem, Furqan, Raees and Abdullah for helping the six men in lieu of money.

In April 2015, the NIA took over the case. However, by October 2016, it filed a closure report into the Bijnor blasts as the six wanted men had been killed in two separate encounter killings in 2015. Importantly, at the time of filing the closure report, the NIA had not ascertained whether the six men killed in the two separate encounters were indeed the same who were involved in the Bijnor blasts as identified by the MP ATS. The case against the five others continues.

II. The 2019 Tribunal’s Findings

As required by law, the Home Ministry set up a judicial Tribunal on February 22, 2019 to decide whether the 2019 ban was justified or not. Headed by Justice Mukta Gupta of the Delhi High Court, the Tribunal conducted its hearings for six months and submitted its report/ decision on July 29, 2019 upholding the ban, which was published in the gazette on August 27, 2019. In the course of its hearings across states, the Tribunal examined the ‘grounds’ presented by the Central Government which find a place in two parts of the judgment, “Summary of Evidence by States/ Union Territory & Union of India” (pp. 16-37) and “Analysis of the Evidence” (pp. 59-68). Based on these, the judgment reiterates that since the last ban of 2014, “a large number of new cases have been registered against members of SIMI as well as convictions have been pronounced in many cases in various parts of the country” (para 4.16, p. 16).

A. The evidence presented in the judgment

An analysis of the evidence proffered shows the following list of the “large number of new cases” attributed to SIMI:

(i) New Cases

1. Bank robbery at State Bank of India, Choppadandi Branch, Karimnagar District (Telangana) on February 1, 2014. The bank was robbed of 46 lakh rupees. Two motorcycles were stolen for the purpose.
2. Twin low-intensity bomb blasts in Kaziranga Express on May 1, 2014 at Chennai Railway Station which caused injuries to fifteen people and the death of a woman passenger.
3. A low-intensity bomb blast in Budhwar Peth, Pune (Maharashtra) on July 10, 2014 for which a motorbike was stolen from the Satara Court premises and was used for detonating the IED.
4. Death of one home guard and one police constable of Suryapet Police Station (Telangana) during vehicle checks in the intervening night of April 1-2, 2015. Two policemen and a driver of a car were severely injured, and the two assailants fled after snatching a 9 mm carbine from the police party.
5. Death of one sub-inspector and injuries to two policemen during the encounter on April 5, 2015 at Jankipuram, Nalgonda District. Two alleged SIMI suspects, involved in the above incident, Mohd. Aijazuddin and Mohd. Aslam, died.
6. Eighteen SIMI prisoners in Bhopal Jail raised slogans while being taken back to the jail van from the court premises.
7. Two SIMI prisoners in Bhopal Jail, Abu Faizal and Sharafat, tried to push jail staff and run away while being taken for video conferencing in May 2015.
8. Death of a constable in Bhopal Jail when eight prisoners escaped from prison in October 31, 2016.
9. Additionally, the government presented/or the tribunal record reflects some significant arrests:

(ii) Arrests

1. Arrest of Abdul Subhan Qureshi @ Tauqeer in New Delhi on July 9, 2018
2. Arrest of Abdul Rahman @ Umari from Coimbatore (Tamil Nadu) for clandestinely heading a banned front, *Wahadath-e-Islam*, which facilitated the recruitment of youth and for conspiring with 9 others for the murder of Hindu Munnani functionary, T. Suresh in June 2014. Rahmani was always on the police’s radar, as his name first cropped up in a FIR listed in the 2002 notification as a SIMI leader in Tamil Nadu.
3. Arrests of Shah Mudassir and Shoaib Akhtar Khan in Gopalapuram (Telangana) for possession of banned literature and materials which linked them to Safdar Nagori, the imprisoned SIMI leader, and with other members of other proscribed organizations. They reportedly confessed that at the behest of Mohtasim Billa, the duo was planning to go to Afghanistan for militant training purposes. The Tribunal failed to consider that in October 2014, Motasim Billah held a press conference and denied all links with the confessional statements extracted from Mudassir and Khan in police custody. Billah, the Secunderabad-based son of a cleric, is no stranger to the police as his brother was shot dead by the Gujarat Police in 2004 and he had been accused and acquitted in the Gujarat blasts case (See PUDR report, *Banned and Damned*, p. 14).

Tauqeer: From quiet schoolkid to alleged mastermind

Tauqeer is supposedly a 'big catch': the co-conspirator of SIMI/IM in recent years; who allegedly visited Raipur in 2004 for purposes of recruitment; was part of the Wagamon conspiracy of 2007; and who played a significant role in the Ahmedabad blasts of 2008. After fleeing India, he purportedly set up his base in Nepal and was the *amir* of Black Beauty @ Haidar, the trained bomb-maker and the key accused in the Patna blast of 2013. From Nepal, Tauqeer apparently contacted Alamzeb Afridi in 2014 and had a preliminary meeting with one Afifi in Riyadh in 2016 about reviving SIMI/IM. Later that year, through Afifi, he reportedly renewed contact with Riyaz Bhatkal, Ariz Khan and others in Riyadh. Along with Bhatkal and others, Tauqeer allegedly decided to take revenge for the killings of eight SIMI accused in Bhopal Jail and he had visited UP and Bihar several times. At the time of his arrest, his entry into India in 2018 was allegedly prompted by the same plan.

To elaborate on Tauqeer's role, the Tribunal relies on confessional statements made by Azaruddin Qureshi and Umair Sidiqqi, recorded in 2013 in connection with their role in the Bodh Gaya blast of 2013; by Ariz Khan arrested in February 2018, who admitted to being in touch with Tauqeer in Nepal; and by Ehetesham Qutubuddin Siddique who was convicted in 2015 for his alleged role in the Mumbai blasts of 2006. The Tribunal also accepts the submissions made by three witnesses, PW 41, 44 and 45—policemen with the Special Cell, Delhi—who, through their investigations, especially the ones related to the Bijnor blasts of 2014, provide links in the story of Tauqeer. Most importantly, the Tribunal upholds Tauqeer's confessional statement in which he admitted to the above charges made against him. For a further elaboration of Tauqeer's role in the ever-broadening activities of SIMI, the Tribunal refers to two NIA special court judgments of 2018: the Bodhgaya blasts of 2013 in which all five accused were convicted and the Wagamon conspiracy and arms camp case of 2007 in which 18 accused were convicted.

Tauqeer's metamorphosis from being the quiet Mira Road schoolkid into an elusive Phantom or even Osama Bin Laden like character, has always attracted media coverage. Since 2006 he was projected as the glib talker who could give the police a slip; a smooth techie who knew the art of sending confusing emails to the media before blasts took place; an explosives expert who succeeded Nagori after the latter was arrested in 2008. But some media reports were skeptical about such theories. Josy Joseph had queried that "the entire theory around Tauqeer is based on interrogation reports, which have not much credibility in a court of law and even among many investigators" ("Is Tauqeer the sole mastermind?", *DNA*, September 15, 2008). The then Joint Commissioner of Mumbai Police, Rakesh Maria, in 2008 had dismissed Tauqeer as a "media creation" and he was never shown as a wanted accused in the 2006 blasts in Mumbai ("Tauqeer a Media Creation, *Times of India*, October 7, 2008). After the 2008 Ahmedabad blasts, the ATS had taken away Tauqeer's siblings' computers. Clearly nothing incriminating was found. Following Tauqeer's trajectory in the media from 2006 when he was first mentioned till his arrest in 2018, Jyoti Punwani has one question to ask: "why does the press swallow the police's story when it comes to terrorist crimes, even after the police have been found to have framed innocents?" ("Déjà vu: 'Mastermind' Tauqeer resurfaces", *The Hoot*, January 25, 2018).

It is also interesting that the prosecution relied on the disclosures made by Ehetesham Qutubuddin Siddique regarding Tauqeer's involvement in SIMI activities. Interesting, because Siddique has challenged his conviction for capital punishment on the grounds that he had been falsely implicated in the Mumbai blasts case and he sought the 2006 IB report purportedly filed by Inspector Raja Mangde, the then investigating officer, before the President's Secretariat.

According to a news report filed in July 2019, in *The Week*, Siddiqui had stated that *Mandge*, through the letter to the President sometime in October or November 2006, had informed that innocent people were falsely implicated in the case (PTI news report, *The Week*, July 19, 2019). Siddiqui first petitioned the President's Secretariat for the missing report, and on not getting a satisfactory response, approached the CIC (Central Information Commissioner), which rejected his plea on the grounds that it did not constitute a human rights violation. Siddiqui next approached the Delhi High Court and sought information regarding the report which was purportedly tabled before the Ministry of Home Affairs in 2009. While the IB opposed the plea, Justice Vibhu Bakhru of the Delhi High Court asked the CIC to reconsider the request as it insisted that the CIC had erroneously concluded that the matter did not pertain to a violation of human rights (See [https://dtf.in/wp-content/files/Delhi_HC_Judgment_dated_16.01.2019 - Ehtisham Outubuddin Siddique v. CPIO Intelligence Bureau.pdf](https://dtf.in/wp-content/files/Delhi_HC_Judgment_dated_16.01.2019_-_Ehtisham_Outubuddin_Siddique_v._CPIO_Intelligence_Bureau.pdf)). After this, the CIC asked for the records from the President's Secretariat which informed the Commission that the said letter was not traceable! In an article published in *The Indian Express* (February 25, 2017), journalist Praveen Swamy maintained "according to a classified dossier prepared in March 2009 by the Andhra Pradesh Police's OCTOPUS counter-terrorism cell and circulated to sister organisations nationwide, both forensic data and the testimony of suspects under interrogation contain evidence that these three attacks were, in fact, carried out by the Indian Mujahideen – and not the individuals charged". (*The Indian Express*, "Lost Life in Jail", February 25, 2017).

4. Six unnamed alleged SIMI activists were arrested for their involvement in the 2008 Ahmedabad and Surat blasts and "their confessional statements were also recorded subsequently in which they have stated that activities of SIMI are still continuing" (2019 Tribunal, p. 31).
5. Arrest of 13 accused following raids of premises in Jaipur and Jodhpur in 2014 where jihadi literature and explosive materials were found. A combined chargesheet was filed against the accused on April 3, 2016.
6. Arrest of 5 persons in Bijnor (Uttar Pradesh) for "providing logistical support and shelter to the accused persons in their house" (Tribunal, p. 33). The accused persons refer to the six SIMI accused, five of whom were fugitives, who had escaped from Khandwa jail in 2013 and had taken shelter in Bijnor. All six were killed in two separate encounters.
7. Arrest of 4 accused (Sheikh Mehboob, Zakir Hussain, Mohd. Saliq and Amjad Khan) and 1 woman (Nazma Bee, mother of Zakir Hussain) in Rourkela (Odisha) in February 2016. All 4 had escaped from Khandwa Jail (2013) and were subsequently involved in the Bijnor blasts and had escaped from there. All 4 confessed to the crimes listed against them by the prosecution. Importantly, all 4 died in October 2016 in the alleged Bhopal Jail encounter.
8. Arrests of Pathan Tausif Khan and Sanna Khan, on September 13, 2017 in Gaya (Bihar). An absconder in the Gujarat blasts case, the raid in Pathan Khan's premises revealed banned literature and materials. In their police confessions, both reportedly admitted to their involvement in SIMI-related terror offences.
9. Arrest of Alamzeb Afridi in Bangalore (Karnataka), in January 2016. A much-wanted man because of his alleged involvement in the Gujarat blasts and for being a member in the Wagamon conspiracy camp case of 2007, Afridi was arrested by the NIA in Bangalore where he had been living and working as a mechanic for the past five years. During his interrogation, he confessed to the above incidents and admitted to his involvement in the Church Street blast in Bangalore in December 2014 and the two cases of arson in the Israeli visa office in the city, in August 2014 and November 2015.

10. Arrest of Ariz Khan from India-Nepal border on January 13, 2018. In 2008 when his flat in Delhi's Batla House was raided, he managed to escape. In Nepal, he allegedly met Tauqeer and helped plan the revival of SIMI/IM. In his confessional statement, Ariz reportedly admitted to his involvement in jihadi politics from 2002-2003 onward.
11. Arrest of Mohammad Faiz on January 27, 2019 from Varanasi airport in connection with a case of 2001. The judgment states, "During the course of investigation, it was revealed that Mohd. Faiz had travelled abroad to promote the ideas and objectives of SIMI and raise funds for the organization." (p. 32).

Beside the significant cases and arrests, two "cross-fires" are also listed:

(iii) "Cross-firing"

1. In a 'cross-fire' on April 4, 2015, Mohamad Aijajudeen @ Ajaj @ Rahul @ Arvind and Aslam Mohammad Aslam Khan @ Soheb @ Bilal @ Santosh were killed. The incident happened under the jurisdiction of P.S. Mothkur in Telangana. The accused were involved in the Chennai train blast, in the theft of motorcycles in Karimnagar, in the heist in SBI Choppadandi and also in killing a home guard and a police constable of Surapet PS on the night of April 1-2, 2015.
2. On October 31, 2016, eight prisoners escaped from Bhopal Jail after killing Head Constable Rama Shankar Yadav and locking-up guard Chandan Singh. The eight were spotted by locals the following morning at Khejada Naala near Malikheda Kot Pathar. When challenged and asked to surrender by the police party, the eight attacked and injured three policemen with knives and daggers. In the 'cross-fire' that followed, all eight died and based on the recoveries made, a case was lodged against the deceased.

It is useful to remember that soon after the incident, the State Home Minister had said that the prisoners were unarmed and the State ATS Chief had also concurred. A day later, the Minister backed the police version: of the prisoners firing at the police and refusing to surrender. The videos mystified the police version as there was no evidence of any gun battle (See report in *India Today*, Nov 1, 2016). Needless to say, no policeman was injured in the encounter; and the doctor who carried out the medical examination of the policemen told the magistrate that the surface injuries that the three suffered were not caused by firearms. All the slain men were shot at close range and in the upper parts of their bodies. While the slain men were described as 'hardened terrorists', they were actually undertrials and only one of them, Aqeel, had been convicted in a 2006 case of rioting (See Ananya Bhardwaj's "One of India's murkiest jailbreaks & killing of 8 Muslim men remains wrapped in mystery, *The Print*, April 9, 2018).

(iv) Convictions

The Tribunal listed only 1 instance in which conviction has been secured in post-2014 cases. The case pertains to the sloganeering by 18 prisoners in Bhopal Jail in 2014. A large number of convictions are shown, but all belong to the pre-2014 ban period.

B. Questionable evidence

In all, the Tribunal has listed 8 incidents including 1 heist of 46 lakhs, 11 arrests and 2 'cross-fires' to show the continuance of SIMI post-2014. The casualty list is remarkably low: 3 policemen and 1 civilian died.

To boost up its case of SIMI's continuing terror financing, the prosecution claimed that during investigation into the Bijnor blasts, some money pertaining to the heist, approximately 2 lakhs, were recovered as the six SIMI suspects had paid that amount to the house owner for helping them flee after the blasts (p. 22).

Among the arrests, the confession of Shah Mudassir and Shoib Akhtar has been challenged by Mothasim Billah. The unusual emphasis placed on Tauqeer has also been questioned in the media and the arrest of Ariz Khan also raises some questions. The police maintain that he was present in the Batla House encounter site and that he allegedly escaped along with another person. However, in their report entitled '*Encounter' at Batla House: Unanswered Questions* (2008), the Jamia Teachers' Solidarity Group had questioned the possibility of escape based on the architecture of the building (see page 16-17)

In the alleged 'cross-fire' in which eight prisoners from Bhopal Jail were gunned down, the police was given a clean chit by the one-man judicial commission a year after, and the report was tabled in June 2018. However, many questions remained unanswered: how did the prisoners procure the sharp-edged weapon inside the jail premises as was shown in two video clips that surfaced soon after? The Commission did not inquire into why only 4 of the 42 CCTVs were functioning, how the prisoners scaled the prison walls, or who gave them food and clothes after they escaped. The Commission ignored the video clips that went viral soon after the incident. In short, notwithstanding the clean chit given by the Commission, questions arising in the Bhopal Jail encounter remain unanswered.

C. Questionable analysis

Section 9 of the decision/report examines the evidence presented and the Tribunal arrives at SIMI's continued terrorist conspiracies, activities and finances based on meagre evidence, an overreliance on confessions and the use of a controversial terrorist past that has been created through successive bans.

- The most important pieces of evidence pertain to two training camps held in Gujarat in 2007 and in Kerala in 2008. For the Gujarat camp, the tribunal relies on the evidence of an accused person procured in 2016 and for the Kerala case, it cites extensively from the NIA judgment of 2018 in which 18 accused were sentenced to seven years of RI. Undoubtedly, the training camps are important, but the rationale of a fair trial should depend upon fresh and new evidence and not simply rely on timeworn and stale material for confirming the given declaration.
- The next important plank for the Tribunal's conclusions is one in which it provides a 'chain of evidence' linking *one* Kerala camp accused along with five fugitives of the 2013 jail escape in Khandwa with the bank robbery followed by a low-intensity train blast. Subsequently, five were allegedly involved in a low-intensity blast in a marketplace and then all fled to Bijnor. While two were killed in an encounter in 2015, four were arrested and their interrogation confirmed the activities of SIMI in 2004 and 2005. All four were gunned down in the Bhopal Jail fake encounter. The chain of evidence linking Khandwa with the bank robbery, blasts and Bhopal jail escape is certainly plausible, but what needs to be factored in is that all the accused have been killed by the police.
- The Tribunal also emphasizes the NIA judgment in the Bodh Gaya case which upheld the confession by two accused who gave information about SIMI's past activities, between 2001 and 2013. The confessions are important as they provide an account of SIMI's funding, arising out of robberies, donations and foreign sources. The arrests, especially those of Tauqeer and Ariz Khan, enable the Tribunal to argue for the continued role of IM via the fugitive Riyaz Bhatkal. But, as is discussed in-depth later in the report, confessions made in police custody are inherently unreliable. Shadowed by the spectre of custodial torture and coercion, these confessions cannot ordinarily be used against accused persons in trials. The Tribunal's overreliance on confessions to prove the deadly nature of SIMI, disregarding all apprehensions that were obtained under duress, is a sign of the poor evidence it has otherwise marshalled.

- It is noteworthy that the Tribunal places an unusual importance on the accidental blast in Bijnor in 2014 as proof of SIMI's continued terrorist activities including its terror finances. As noted in the box, the NIA filed its closure report into the blasts without ascertaining that the six men who were killed in two different encounters were indeed those guilty of the Bijnor blast and the terror trail they supposedly left behind.

The evidence presented before the 2019 Tribunal through the government notification, and the Tribunal's reasoning, are no anomaly. The 2019 notification and judgment are consistent with how both the state and the Tribunal have approached each previous iteration of the ban cycle, together reflecting a vicious loop of reasoning created by the UAPA. The next two sections of the report deal with previous notifications and judgements in turn, revealing a sinister design that ensures that bans tend to be bygone conclusions from the moment of their pronouncement.

III. Past SIMI Tribunals

A. Tribunal as safeguard against executive

When the UAPA was first being drafted, the government would have been conscious of the Supreme Court's decision in *V.G. Row v. State of Madras* (1952 AIR SC 196) in which it has been held that:

*"The right to form associations or unions has such wide and varied scope for its exercise, and its curtailment is fraught with such potential reactions in the religious political and economic fields, that the vesting of authority in the executive government to impose restrictions on such right, without allowing **the grounds** of such imposition, both in their **factual and legal** aspects, to be duly **tested in a judicial inquiry**, is a strong element which, in our opinion, must be taken into account in judging the reasonableness of the restrictions imposed by Section 15(2)(b) on the exercise of the fundamental right under Article 19(1)(c)". (emphasis supplied)*

Clearly, it is in the light of the law laid down by a Constitution Bench of the Supreme Court in *VG Row* that section 4 of the UAPA mandates the government to constitute a Tribunal that must decide whether there is sufficient cause for the ban.

The Supreme Court's decision in *VG Row* was reiterated in *Jamaat-e-Islami Hind v. Union of India v Union of India*, (1995) 1 SCC 428. Every Tribunal has cited *VG Row* and *Jamaat-e-Islami Hind* to acknowledge that its role is to act as a safeguard against arbitrary executive power and yet, as this chapter attempts to illustrate, every Tribunal has failed to do so.

B. Locus to contest the ban

Apart from how Tribunals have worked in practice, certain troubling aspects of the UAPA Tribunals' functioning are traceable to the UAPA itself. This becomes evident on a cursory glance at the UAPA. For instance, Section 4 provides for office-bearers or members (not ex-members) of the banned association to participate in the Tribunal inquiry, but by appearing as members of a banned association, they make themselves vulnerable to being punished under Section 10 with a two-year maximum imprisonment term as well as fine.

Thus, those who have contested the SIMI bans over the years always identified themselves as ex-members before the Tribunal, even though the government would then argue that they had no locus to contest the ban. All the Tribunals allowed the ex-SIMI members to participate; powerless to fix the vicious loop created by the Act, the most any Tribunal could do was "hope" and "expect" that the appearance of ex-SIMI cadre before it would not lead to their prosecution, as the 2010 Tribunal did. For a Tribunal comprising a sitting High Court judge to merely be able to "hope" that

the government does not use a legal provision that it very easily can is a clear sign of the Tribunal's baseline ineffectiveness (p. 22 of 2010 order).

Certain other Tribunals regressed much lower, with the 2012 Tribunal ruling that ex-members *could not* participate in the proceedings as ex-cadre in their individual capacities. The 2012 Tribunal allowed their participation only as continuing members of SIMI, holding that from "the tone and the tenor" of their objections, reply and cross-examination, it is clear they are representing the banned organisation. That the ex-members would represent the interests of SIMI is of course painfully obvious from the fact that the entire purpose of their participation was to contest the ban on SIMI. However, both the UAPA and the fact that the Supreme Court has not yet heard any of the appeals against the Tribunal orders enable the 2012 Tribunal to exacerbate this horrifying loop, and use it as further evidence for SIMI's pre-determined guilt (p. 11 of 2012 order).

The 2006 Tribunal order traces an even more terrifying line of reasoning. Being a youth organisation, membership of SIMI is open only to persons below the age of 30; members automatically retire on reaching the age of 30. Dr Shahid Badr Falahi was 30 years old and the President of the organisation when it was first declared unlawful, and contested the declaration before the Tribunal on behalf of the association in his capacity as the last President before it was declared unlawful. Since all subsequent declarations were issued before the expiry of the preceding declaration, there was no occasion for the association to re-establish itself and to hold elections and appoint new office bearers. Dr Badr therefore continued to defend the association on successive declarations until 2008. The 2006 tribunal, however, relied on the fact that Dr Badr continued to defend the association even at the age of 35 to find that membership of the association did not terminate at age 30. It further used this to rely upon acts attributed to persons beyond 30 years of age, who could not therefore have been members of the association, to uphold the declaration. The Tribunal went even further to question why Dr Badr accepted notice of the setting up of the tribunal, asking why he was "taking so much of interest" in an organisation he is no longer a part of (p. 19 of 2006 order).

C. SIMI's existence

The locus to contest the ban is of course tied to the question of SIMI's existence, which reveals yet another dangerous circularity in the Tribunals' reasoning. The 2006 Tribunal's line of reasoning, described above, descends even further into this second loop. The Tribunal uses SIMI's 'terrorist' tag to declare that SIMI's very object is to commit terrorist acts, and hence if anyone is accused of committing an unlawful activity and of being a member of SIMI, it is not even open for SIMI to try and prove anything to the contrary. The mere accusation suffices: if an association is accused of unlawful activity, and another person is accused of unlawful activity, then the two must be linked and the accusation of each proves the guilt of the other (p. 20 of 2006 order). The Tribunal repeats this reasoning with respect to magazines containing allegedly anti-national content, which the government believes are brought out by SIMI. The 2006 Tribunal order admits there is no direct evidence for the government's belief, but asserts that there cannot be, given the ban; hence, the government disapproving of the magazine and the government disapproving of SIMI are enough to link the two and term both unlawful (p. 22 of the 2006 order).

For the 2006 Tribunal, in fact, even accusations were unnecessary. The 2006 ban notification is the only one which does not cite a single new case to justify renewing the ban. But the Tribunal glosses over how after the 2003 ban, "not many cases of criminal activity... were reported or registered," when he should be admitting that none were, and goes on to state "that would not imply that it ceased to operate." On its own, the Tribunal proffers various reasons to explain away the non-registration of cases, from stating that SIMI's activities must have simply slowed down, to

the lack of coordination between intelligence agencies and the police, to the indifference of local police. The Tribunal's reasoning of convenience even leads it to state that the registration of cases between 2001 and 2003 proves SIMI's existence *after* 2003. The few acquittals in 2001-2003 cases can also do nothing to shake this conviction, since most 2001-2003 cases are still pending trial. On the other hand, the mere fact that Dr Badr after his release visited Mumbai and Kerala is enough to show that SIMI continued to indulge in unlawful activities (p. 20 of the 2006 order).

The 2004 Tribunal order as well takes the mere registration of cases against people accused of being SIMI activists as proof that SIMI exists, terming the acquittal of several of these accused "immaterial" because of the "onerous" burden cast by the most basic principle of criminal law, proof beyond reasonable doubt. Perhaps because it regards this basic protection as "onerous," the 2004 order completely reverses it for the purpose of the Tribunal. The Tribunal holds against SIMI the fact that it has never issued a public statement saying that Kashmir is an "integral part of India" and that it does not advocate its secession [sic]. The order points out further that SIMI had neither explicitly declared that it condemns Islamic terrorism nor given a call to its members to promote brotherhood between Hindus and Muslims. Of course, ex-members representing SIMI before the Tribunal had sworn affidavits stating precisely that SIMI did not believe in Islamic terrorism and that SIMI's members had engaged in several relief work activities without discriminating between religions before its ban. But the real issue is not that the 2004 order conveniently ignored these. It is that according to the Tribunal, once the state accuses you of thinking differently from it about, say, Kashmir, you must instantly publicly declare that you in fact agree with the state, and if you don't, the state need not prove anything else to support its accusation (p. 107-8 of 2004 order).

Using similar lines of reasoning—accusations sufficing as proof—all the Tribunals, including the 2008 Tribunal that struck down the ban on other grounds, have concluded that SIMI continues to exist.

D. Procedure

The flawed reasoning of the Tribunals is made possible by how it has interpreted the kind of procedure enabled by the Act. Sections 4 and 9 of the UAPA, read with Rule 3(2) of the 1968 Rules under the Act, permit the Tribunal to regulate its own procedure and follow the Code of Civil Procedure ("CPC") and Indian Evidence Act *as far as may be practicable*. The term 'as far as may be practicable' does not in and of itself permit the Tribunal to altogether dispense with the CPC or the Evidence Act. As the Supreme Court has held in the context of other laws, "It will be for the person asserting that a particular provision... contained in the Code of Civil Procedure will not apply... on the ground that it was not practicable to show as to how and why it was not practicable." (*Maganlal v. Jaiswal Industries*, (1989) 4 SCC 344, para 28). However, in interpreting this phrase, Tribunals have allowed themselves more leeway in ignoring key safeguards enshrined in the CPC and Evidence Act, as detailed below:

(i) Inquiry, not a trial

In its 1994 *Jamaat-e-Islami Hind* judgment, the Supreme Court was faced with a challenge to the constitutionality of the UAPA and it chose to read in the requirements of all the safeguards of a civil trial into the UAPA in order to uphold its constitutionality. Patently contrary to this, however, Tribunals have consistently held that their proceedings are an *inquiry*, not a trial, to permit wholesale violations of principles of fair procedure. For instance, the 2004 Tribunal glossed over SIMI's objection that it was not shown all the evidence and hence could not properly defend itself, by stating that since "this inquiry is not adversarial in nature, and is inquisitorial only... the requirements of natural justice stood met by following this procedure" (p. 82 of 2004 order). The

2012 Tribunal justified admitting non-legal evidence, and lowering the standard of proof, on the same ground (p. 13 of 2012 order).

The devastating absurdity of this position is most clear, ironically, in the 2008 order, which is the only order to have struck down the ban. The bulk of the evidence against SIMI comprised cases registered against its alleged members for committing unlawful activities. The 2008 Tribunal holds that since its proceedings “cannot be equated to a trial in an ordinary civil suit” or in a criminal case, it does not have to “opine as to the falsity or truth” of the cases cited as evidence against SIMI. But, without any certainty as to the truth of the cases, and without any of the adversarial system’s procedures to determine the truth, the Tribunal can still consider these cases to decide on the ban, and go as far as to *presume their genuineness* (pp. 73-4 of 2008 order). These words imply a world where every case cited against SIMI could turn out to be false, and that would make no difference to whether SIMI should be banned or not. This is even more absurd when considered in light of the fact that, as reported by its then lawyers, all that was produced against the association in the great majority of cases was photocopies of documents purporting to be First Information Reports that, the government claimed, implicated the association in unlawful activities. As decisively held by the Supreme Court, information pertaining to a cognizable offence (one where the police can investigate and arrest without a warrant from court) must be registered as an FIR, and the police is forbidden from even conducting a preliminary enquiry to establish whether this information is true or false (*Lalita Kumari vs. Govt. of U.P.*, (2014) 2 SCC 1). FIRs, therefore, are not proof of anything and are absolutely useless to what is at issue before the Tribunal. In the handful of cases before the 2008 Tribunal where the government produced material apart from FIRs, it did not produce the persons who had allegedly prepared these documents. By doing so, as discussed below, the government denied SIMI its right to cross-examine—the only method in law available to SIMI to test the material relied on by the government in order to advance its argument that the government’s documents could not form the basis for any findings against it. The government’s failure in producing such witnesses can thus only indicate that it was seeking to avoid an independent adjudication of its claims.

(ii) Standard of proof

At various points, the Tribunals record that the standard of proof against SIMI is a preponderance of probabilities (i.e. is it more likely than not that there is sufficient cause to ban SIMI?). This standard is commonly used in civil proceedings, as opposed to the reasonable doubt standard used in criminal cases (i.e. is it beyond reasonable doubt that there is sufficient cause to ban SIMI?).

First, using the preponderance standard instead of the reasonable doubt standard must itself be questioned. If it upholds the ban, the Tribunal potentially makes mere membership a criminal offence. Although the Supreme Court has read down the UAPA and analogous statutes to hold that mere membership of even an unlawful association or a terrorist organisation is not an offence, the great majority of the cases produced before the Tribunals bear testimony to the fact that several hundreds of persons have lost many years of liberty because the government claimed in cases against them that they were members of unlawful associations. That declarations of associations as unlawful have wide and serious implications for exercise of several fundamental rights and most importantly for the right to liberty was acknowledged by a Constitution Bench of the Supreme Court as early as 1952 in the *VG Row* case. With such serious consequences for such a wide array of fundamental rights and for such a large number of people, it is arguable that the government must be held to a higher standard than a mere preponderance of probabilities.

Second, before some Tribunals, even the burden of proof has been reversed. It is noteworthy that in 2006, when SIMI argued that the onus is on the government to prove sufficient cause for

banning SIMI, the government had not disputed this, compelling the 2006 Tribunal to at least pay lip-service to SIMI's contention (p. 11 of 2006 order), even if it did not apply it in practice. But in 2012, the Tribunal held that once banned, the onus is on the association to show why it should not be declared unlawful (pp. 11, 46 of 2012 order).

E. Evidence

In practice, the specific kinds of unfairness created by the procedural departures outlined above can be seen in what evidence the Tribunal admits, and what little scrutiny of the evidence is done.

(i) Cases outside the ban period

In the *VG Row* case, the permanent nature of the power to ban an association played a key role in the SC striking down the impugned provisions as unconstitutional. It is likely keeping this in mind that banning provisions under the UAPA were enacted with a two-year time limit, later expanded to five years in 2014. Since these bans are time-bound, it stands to reason that each new ban must be based on fresh material—if the same grounds could be recycled indefinitely to justify successive bans, the power to ban would be akin to a permanent one, defeating the purpose of having a time limit. Contrary to this however, as described earlier, a few Tribunals relied on cases from the previous ban period. The 2006 one in particular exclusively relied on old cases, since it had no new cases before it, and justified this saying SIMI's "historical background... cannot be lost sight of" (p. 19 of 2006 order). In considering this "historical background," the 2006 Tribunal even relied on cases from before the first ban! (p. 17 of 2006 order) The 2008 Tribunal agreed that material from the previous ban period "cannot be held to be stale or irrelevant" (p. 85 of 2008 order); the 2010 Tribunal relied on material printed before the first ban (p. 60 of 2010 order) and the 2012 Tribunal also held that SIMI's "past conduct... [will] need to be looked into" (p. 47 of 2012 order).

As if relying on old cases was not excessive enough, most of the Tribunals also held that they can consider cases filed *after* the government notification banning SIMI. If the Tribunal's mandate is to judge whether the government had sufficient cause to ban SIMI, why would it consider new cases that were not available to the government when it issued the ban on SIMI? The law requires that the government form its "opinion" on banning an association, and that it declare its opinion along with the grounds or the basis for the opinion in the notification. The Tribunal is to then conduct a legal and factual enquiry to determine whether those grounds exist and whether they justify the Central government's opinion. If the Tribunal travels outside of the grounds on the basis of which the government has reached its opinion, it would not be upholding the ban order passed by the government, but making its own order. The Supreme Court has repeatedly said, in similar contexts, that it is not open to a Tribunal to do so (for instance, see [*Harnam Das v. State of U.P.*](#) A.I.R. 1961 S.C. 1662, para 13).

Yet the Tribunals in 2002, 2006, 2010, and 2012 all held that they can rely on material subsequent to the government notification banning SIMI. The 2006 Tribunal, in particular, did this by illogically expanding its mandate under S. 4 (3) of the Act. The said Section empowers the Tribunal to decide whether there is sufficient cause for a ban "after calling for such further information as it may consider necessary" from both parties. Intuitively, it is evident that this clause allows the Tribunal to ask for clarifications when needed, etc. According to the 2006 Tribunal, however, the clause somehow implies that even if there was no sufficient cause at the time the government banned SIMI, if such cause were to appear later, the Tribunal could call for it and retrospectively uphold the ban! (pp. 11-12 of 2006 order).

(ii) Confessions

As discussed above, the bulk of evidence against SIMI comprises cases registered against persons

who are alleged to be members of SIMI. The only “proof” of their membership usually is a confession made in police custody. Such confessions cannot be used in criminal trials against any of the accused as per the Evidence Act, due to fears that they may have been extracted under duress or torture, and hence, are unreliable. But since the Tribunals can modify procedure, they have always chosen to admit confessions as evidence, despite SIMI’s strenuous objections. This leads to a state of affairs where most of the evidence used to hold that SIMI is indulging in unlawful activities could not be used in a criminal trial against anyone accused of indulging in those unlawful activities. Yet, because UAPA Tribunals are not criminal proceedings, that same evidence is allowed.

Even more shockingly, Tribunals have not just allowed confessions, but have also mindlessly believed them, fully discounting evidence to the contrary. The 2014 Tribunal explicitly stated that defects which may prove fatal in trials need not affect the reliability of confessions in UAPA proceedings (p. 47 of 2014 order). The 2006 Tribunal went so far as to rely on a 2001 confession in which the accused stated he was a SIMI member, completely ignoring that SIMI had published a newspaper statement disowning him *months before SIMI had been banned* (p. 17 of 2006 order). The 2008 Tribunal, as stated above, held that it can simply presume that such confessions are genuine (p. 74 of 2008 order), even in the face of SIMI counsel pointing out that whenever produced before court, accused persons had retracted their confessions (pp. 110-1 of the 2008 order). Tribunals have uniformly refused to engage with concerns of false confessions, apart from stray observations that cases should not be registered against Muslim youth on mere suspicion (see, for instance, p. 49 of the 2014 order). Procedural fairness demands that if confessions made by persons who claimed to have been members of the association were to be relied upon, those persons should have testified to the Tribunal and the association should have been given a chance to cross-examine those persons to try and establish whether they had been a part of the association or were testifying falsely for any reason. But persons to whom such confessions were attributed did not testify before the Tribunals, even in cases the Tribunal relied upon.

(iii) MCOCA and confessions made by co-accused

The Maharashtra Control of Organised Crime Act (MCOCA) allows for certain confessions made by co-accused to be used as evidence in criminal trials under the Act. Such confessions must always be scrutinised carefully, because co-accused persons have an obvious interest in pinning the crime on someone else. The 2010 Tribunal, however, gave “more evidentiary value and weight” to confessions made under MCOCA, while admitting that MCOCA is not strictly applicable to Tribunal proceedings (p. 60 of the 2010 order). Apart from before the 2010 Tribunal, SIMI specifically raised objections to relying on such MCOCA confessions before the 2008 Tribunal, which too ignored SIMI’s concerns.

(iv) Secret material

Tribunals have also always allowed the government to use secret material against SIMI, which is not even given to SIMI, completely violating principles of natural justice. In 2006 in fact, the government did not even mention any secret material in its notification banning SIMI or the accompanying background note, and yet introduced secret material during the Tribunal proceedings (p. 7 of 2006 order). In 1993, a UAPA Tribunal examining the ban on the Rashtriya Swayamsevak Sangh (RSS), Vishwa Hindu Parishad (VHP) and Bajrang Dal did *not* allow secret material, on the grounds that this was not shown to the organisations being banned. But in SIMI’s case, Tribunals used the Supreme Court’s 1994 decision in *Jamaat-e-Islami Hind* to overrule SIMI’s objections to such material being read and relied upon each time.

The Supreme Court’s decision in *Jamaat-e-Islami Hind* had permitted a departure to be made from the ordinary rules of evidence and requirement of natural justice “only when the public

interest so requires” and even then found that the Tribunal must “devise a suitable procedure whereby it can itself examine and test the credibility of such material before it decides to accept the same.” Contrary to this, Tribunal orders in SIMI’s case reveal no application of mind to the question of the requirement of public interest while allowing privilege in respect of each document, and also do not reflect that any suitable procedure was devised to test the credibility of material presented to it behind the association’s back.

As with confessions, Tribunals seem to have accepted the truth of such secret material without much scrutiny. For instance, the 2012 order asserted that “any reasonable law-knowing person” who perused the sealed envelopes against SIMI would be convinced of the organisation’s guilt (p. 16 of 2012 order). But how could “any reasonable law-knowing person” be so convinced, if the organisation was not given a chance to contest the secret material? Of course, reasonable law-knowing persons in India are trained under the adversarial legal system, which assumes that a clearer picture of the truth emerges if both sides are allowed to question each other. Since Tribunals have dispensed with adversarial niceties, they can even base their entire judgment exclusively on material that SIMI has no knowledge of!

It is clear that for most Tribunals, secret material played a crucial role in deciding against SIMI, almost as if it were a convenient way of doing so when public evidence against SIMI was inadequate, or even non-existent. The 2004 order decided SIMI was collecting funds from the United States based solely on secret inputs. Similarly, the 2006 order justified holding that Dr. Badr was committing unlawful activities, in the absence of a single case alleging so, based on “intelligence reports” alone (p. 20 of 2006 order).

For the 2012 and 2014 Tribunals, secret material played an even larger, clinching role. The 2012 Tribunal explicitly stated that it arrived at its “irresistible conclusion” to uphold the ban, on perusing secret material furnished by the Union of India and 8 states (p. 50 of 2012 order). The 2014 Tribunal, in an eerie echo of its predecessor, also stated that “the intelligence reports and other confidential material submitted by the State Governments and the Central Government... leads to an inescapable conclusion” that SIMI should be banned. Tellingly, the 2014 Tribunal stated that a mere “perusal” of the confidential material, no scrutiny or detailed analysis, was enough (p. 47 of 2014 order).

As argued by SIMI in 2006 (albeit unsuccessfully), this overwhelming reliance on secret material amounts to a ban without hearing, violating natural justice. Since the Tribunals don’t even describe the secret material, we have no way of reassuring ourselves that in “perusing” the government’s secret material, they were still acting as a safeguard and not a rubber stamp.

(v) Cross-examination

The rule against hearsay is an ancient rule that is part of most judicial systems, and certainly has a long history within the common-law system. One of the most important rationales for the rule against hearsay is that it cannot be tested in cross-examination—the person testifying in court claims to have received the information from some other source or person and there is no way for the judge to make an assessment of whether the person who claims firsthand knowledge of the facts should be believed.

Before various Tribunals, SIMI claimed that if the government produced those persons who, as per the government’s own version, had first-hand knowledge of the facts, it would establish through cross-examination that there was no material against it, and it was for this reason that the government was refusing to produce them and instead producing second-third hand sources of information. Tribunals however denied SIMI a fair hearing by frustrating its right to cross-examine. The non-secret evidence against SIMI comprised cases registered against alleged SIMI

members, and in an effective cross-examination, SIMI should have been able to probe these officials about any inconsistencies in their version of the case, pointing out flaws in say, their timeline of investigation or their manner of recording a confession. But for the most part, the government would neither produce the Investigating Officer (IOs) who had personal knowledge of the case, nor the police official who witnessed any confession or recovery in the case.

Instead, the government called on higher-ranking nodal officers who would simply restate what was written in the official case documents. As even the 2014 Tribunal order noted disapprovingly, “senior supervisory officers are normally not very intricately involved” in cases and are thus “unable to answer relevant details... with respect to the investigation of the case” (p. 49 of 2014 order). Hence, SIMI could not effectively cross-examine the vast majority of the witnesses against it; it could not ask them to elaborate on an apparent discrepancy and thus make the official version less believable. The only response the officers *could* give is that they have no personal knowledge of the case and are merely deposing from the official record.

What would have been a basic right in an adversarial trial is dispensed with in the ‘inquiry’ conducted by the UAPA Tribunals. In this process, the mere officialness of case documents lends them the aura of truth, and SIMI has no way to unravel the narrative behind these cases.

SIMI’s evidence

The last remaining option for SIMI was to counter the government’s version by producing witnesses and evidence of its own. But in these attempts too, it seems it was damned regardless.

Before the 2002 Tribunal, SIMI produced 9 witnesses, all former office-bearers, who denied the allegations against SIMI and put forth their account of SIMI’s past activities. On reading the Tribunal’s evaluation of their evidence, their admissions seem insufficient to uphold the ban on SIMI (pp. 9-12 of 2002 order). For instance, the second SIMI witness (RW-2, i.e. Respondent Witness 2) admits that SIMI believes that Muslims in Jammu and Kashmir have a right to a plebiscite for self-determination. He admits the arrest of certain persons in a case but denies that they are SIMI members (p. 10 of 2002 order). RW-3 admits certain accused persons are SIMI members, but does not admit that the accusations against them are true. RW-4 and RW-5 admit merely that certain cases are pending. The order does not even discuss the evidence of RW-6 to RW-9, stating that their evidence “is practically on similar lines” as the previous SIMI witnesses (p. 12 of 2002 order).

None of these admissions disclose any unlawful activity. But, as discussed earlier, the mere registration of cases is taken as proof of guilt. Right after stating merely that RW-4 admitted the pendency of certain cases, the order jumps to the conclusion that perusal of one of the FIRs *prima facie* reveals that SIMI members have been abusing Hindu gods and goddesses. While talking about the next case, the order does not even bother to use the word “allegedly:” the order states as if it were a proven fact that SIMI members instigated certain Muslim youth in Indore in September 2000, though the case is pending trial (p. 12 of 2002 order). In describing the government’s evidence, the order repeats a refrain of police officers “proving” their affidavits (pp. 10-12 of 2002 order). But in describing SIMI’s evidence, it highlights innocuous admissions as if they justify the ban.

The 2004 Tribunal order notes disapprovingly that Dr. Badr did not issue any press release saying that SIMI had ceased to exist, though he stated that his statement was never printed anywhere because he was arrested soon after the first ban (p. 62 of 2004 order). Similar to the 2012 Tribunal’s logic of a reverse burden of proof that was described above, the 2004 order too puts the onus on SIMI to actively declare that Kashmir is a part of India! (p. 62 and p. 108 of 2004 order). It holds against SIMI the fact that it never expressly called its members to promote Hindu-Muslim brotherhood and have faith in the Constitution of

India (p. 108 of 2004 order), as if suspicion against minority communities is justified until they do so. In its reasoning thus, the order also completely disregarded evidence to the contrary that SIMI presented before it, in describing its relief activities in Gujarat and explaining how its charter was consistent with the Indian Constitution. The order explicitly states the base rationale implicit in nearly all Tribunal orders: “why so many cases have been registered all over India if SIMI members are not involved in any unlawful activity” (p. 107 of 2004 order).

SIMI’s damned-if-you-do, damned-if-you-don’t situation is clear on examining its different strategies across time. The 2004 order concluded that since SIMI did not place a list of its members on record, it must be deliberately holding back so its members can continue their unlawful activities undetected, disregarding SIMI’s more obvious answer that since it ceased to exist, it no longer has a list of members (p. 107 of 2004 order). The 2004 order also held against SIMI the fact that it did not move to cancel the notification banning it (p. 62 of 2004 order), and that it did not actively dissociate itself from arrested persons alleged to be SIMI members (p. 108 of 2004 order). The 2006 order makes clear that doing both these things would have made little difference. Before the 2006 Tribunal, SIMI presented a statement that it had issued disassociating itself from persons arrested before its ban (p. 17 of 2006 order) as well as a statement that accused persons has issued disassociating themselves from SIMI (p. 19 of 2006 order). In response to the former, the Tribunal stated that “issuing of a mere denial may not really be enough” (p. 18 of 2006 order). In response to the latter, the Tribunal held that simply because the accused persons mentioned SIMI in their statement distancing themselves from it, SIMI must continue to exist (p. 19 of 2006 order). Dr. Badr also stated that after the last Tribunal, he had asked his counsel to move to cancel the notification banning SIMI but the Tribunal disregarded this as well.

Moreover, as described above, the Tribunal held the mere fact of Dr. Badr approaching the Tribunal against SIMI, punishing an organisation as “unlawful” for pursuing the only legal remedy available to it (pp. 19-20 of 2006 order). It also indulged in strange intellectual contortions to hold that SIMI’s oath of allegiance and aim of jihad were unconstitutional. SIMI’s witnesses had deposed that ‘jihad’ is simply struggling against evil, with greater jihad being against one’s own evils and lesser jihad, against the evils of others. From the text of SIMI’s oath of allegiance which states “I won’t spare my life if need be” while working for SIMI’s cause, the Tribunal somehow concluded that since there would be no occasion to give up one’s life in greater jihad, the oath of allegiance must imply that “lesser jihad permits use of force also,” even though SIMI’s witnesses had explicitly denied this. The Tribunal then assumed that lesser jihad would permit force against non-Muslims and thus be unconstitutional “if anything that is not in conformity with Islam is treated as an evil.” SIMI’s witnesses had never presented such an understanding of ‘evil,’ and the assumption seems based on prejudiced notions of Islam than evidence (p. 21-2 of 2006 order). The 2006 order confirms the impossibility of SIMI being able to counter the narrative against it: regardless of its explanation of jihad and its compatibility with the Constitution, the mere fact that ‘jihad’ features in its objectives seems to have pre-decided the case against it.

While it may seem as if putting SIMI witnesses on the stand in 2006 worked against it, with the Tribunal terming Dr. Badr “evasive” and shifty without adequate reason (p. 19 of 2006 order), *not* taking the stand was held against SIMI in both the 2010 and 2012 orders (p. 61 of 2010 order; p. 50 of 2012 order). The 2012 order in fact held that prima facie, it was satisfied to hold in favour of the government merely because SIMI had produced no witnesses while the government had examined 43! The 2012 Tribunal explicitly stated that SIMI’s applicants did not enter the witness box because they wanted to avoid unsavoury questions, and thus justified drawing such an adverse inference against them (p. 41-2 of 2012 order). But the same Tribunal’s analysis of the one non-government applicant who did take the stand indicates how SIMI’s applicant would have fared if they had done so too.

The Secretary of Khair-e-Unmat Trust, Mr. Mozawala, took the stand to depose that his Trust was not affiliated to SIMI and had been wrongly included by the government in its background note. While describing the activities of the Trust, he deposed that before being given scholarships by the Trust, students were ordinarily required to memorise the Namaz and Daru-e-Sharif, though this was not strictly followed. Yet, from this, the Tribunal concluded that “the trust was breeding fanatics” (p. 49 of 2012 order). The Tribunal also noted several unfounded suspicions about his conduct. It cast doubt over the fact that Mr. Mozawala claimed he had only studied since 9th standard, since he also said he could read and write English! Further, the Tribunal termed him “crafty” for explaining his own understanding of jihad (as a struggle and as including day-to-day activities), while also stating that he could not explain the exact meaning since he was not a scholar, which intuitively of course seems to be a perfectly reasonable answer for any non-scholar to give. Without naming any specific instances, the Tribunal claims that the 72-year-old Mr. Mozawala uses forgetfulness as an excuse whenever he finds a question to be inconvenient, though it is again not unreasonable to expect someone of that age to have defects in memory. The Tribunal further claims that since Mr. Mozawala so frequently volunteers to furnish information to show that the Trust is not a front for SIMI, which of course was his purpose in appearing before the Tribunal, he wants to hide facts and only give answers convenient to him! (p. 43 of 2012 order).

Thus, SIMI’s efforts at countering the government narrative through its own evidence seem doomed, regardless of strategies and across Tribunals.

F. Practicality and state necessity

An important factor underlying the Tribunal’s approach to procedure and evidence overall was its understanding of “practicality.” The Tribunals repeatedly justified doing away with safeguards for SIMI on the grounds of “practicality”, except it is clear that the only practicality and convenience the Tribunal was concerned with was that of the government. The constitutional rights of SIMI, on the other hand, were in effect accorded lower priority.

For instance, S. 4 of the UAPA requires that Tribunals conclude their proceedings within 6 months of being set up. Such a time limit certainly ensures that cases don’t remain pending before the Tribunal for years, denying speedy redressal to organisations banned with immediate effect under S. 3 (3) of the UAPA. But in practice this time limit was used to further disadvantage the banned organisation. Tribunals repeatedly acceded to the government’s request to hold hearings/sittings in different parts of the country. SIMI protested and pleaded that it was impractical and expensive to do so; it was unaffordable for the association to defend itself across cities and there was no requirement in law for the Tribunal to travel to different cities. But the government argued that the Tribunal should travel to different cities so that the authorities in those cities could produce material against the association before the Tribunal. This was an absurd proposition. The UAPA requires the Tribunal to weigh the material that had been in the consideration of the Central government when it decided to declare the association unlawful. If the authorities in the different states had not already presented material to the Central government on the basis of which the Central government had declared the association unlawful, they should not have been allowed to produce material before the Tribunal. And if the material had already been produced by the authorities in different parts of the country to the Central government, it should have been a simple matter for the Central government to organise and sift through the material and ensure that what state-level authorities had submitted to it was presented before the Tribunal at a sitting in one place. However, Tribunal sittings were always held all over the country—eating into the 6 months for the proceedings to be completed—and as reported by lawyers appearing for SIMI before

various Tribunals, they would be given hundreds of pages worth of witness affidavits often only a day before they had to cross-examine those witnesses. Tribunals would satisfy themselves as to the fairness of the hearing, simply by recording the presence of SIMI's lawyers at these hearings, ignoring the inadequate time the lawyers were given to effectively prepare.

The resultant stress on time was then used in Tribunal orders to justify relaxing procedural safeguards in the government's favour. By citing practicality and the state's convenience, the Tribunals used this time limit to justify the fact that investigating officers, witnesses, certified records etc. in cases allegedly registered against SIMI members could not be produced before the Tribunal. The 2008 Tribunal, for instance, focused on how doing so would interfere with several trials occurring in multiple states (p. 63-4 of 2008 order). Here again, thus, the mere fact that a high number of cases are registered against SIMI becomes enough to effectively deny SIMI's right to a fair hearing and to cross-examine the evidence against it.

The 2008 order in fact went even further in stretching the scope of "practicality," to exclude even more safeguards relating to evidence. It stated that the nature of the activities the Act seeks to prevent is such that direct evidence of them is hard to get (p. 75 of 2008 order). Specifically, in SIMI's case, the Tribunal accepted the government's contentions that since the time it was banned, SIMI would have had to operate underground, making it impossible to secure a list of its members, written records of its activities etc. Further, since alleged SIMI members are highly educated technocrats etc. who have been trained abroad, placing any kind of direct evidence would be "impossible" for the government, and following the rules of evidence would be "impracticable" for the Tribunal (p. 251 of 2008 order). As a result, the stipulations of the UAPA, the UAPA rules and the Supreme Court's *Jamaat-e-Islami Hind* judgement that the Tribunals follow the procedures laid down by the CPC for a civil trial appear to have been blithely bypassed. The exception to the rule—that the Tribunal was allowed to depart from the CPC and the Evidence Act only where the government was able to establish that it was not "practicable"—swallowed the rule; and the rule itself was made redundant (p. 77 of 2008 order).

A similar approach pervades the judgments of other Tribunals as well. As described above, the 2006 order bent over backwards to accommodate what was "practical" for the government, justifying and remedying fundamental deficiencies in its evidence. The 2006 Tribunal explained away the lack of any new cases, attributing it to and excusing the lack of coordination between state agencies (p. 20 of 2006 order). It accepted certain magazines as proof of SIMI's guilt without any evidence linking it to SIMI, stating that direct evidence would be impossible for the government to provide anyway (p. 22 of the 2006 order). The 2006 order even glossed over the lack of facts in the notification banning SIMI, holding that the background note retroactively remedied this (p. 10 of 2006 order). The 2004 Tribunal too held that state necessity, to curb unlawful activities and protect India's sovereignty and integrity, justified a ban "without a deep probe into the truth or falsity of such material" (p. 78 of 2004 order).

Despite all these accommodations made by Tribunals on the grounds of practicality, the 2012 Tribunal opined that even the expenditure involved in conducting Tribunals in this compromised manner—without summoning most investigating officers or witnesses etc.—was excessive. It hence recommended prolonging the ban on organisations from two to five years, providing another concrete instance of the state's convenience being valued over the rights of organisations (p. 50 of 2012 order). These multiple accommodations raise serious doubts over the Tribunals' functioning as a safeguard against executive action. In many ways, these indicate that the voice of the Tribunal often echoed the voice of the state. Banning itself seems to have been justified as a practical necessity, and other rights and safeguards dispensed with.

IV. Conclusion

Each mechanism described above thus converges to create a situation where the government's claims about an association become predetermined conclusions. Based on an erroneous understanding of the leeway given to them to depart from ordinary procedural safeguards, Tribunals allow confessions made to the police, which would be inadmissible in a trial, and secret evidence that is not revealed to the banned association. Given their civil nature, Tribunals require a relatively lower standard of proof, which is diluted further, effectively reversing the burden of proof in many cases.

Each mechanism is further justified by Tribunals for the same reasons cited by the government in Parliament when the UAPA was passed in 1967. The government had then asserted that special powers were necessary in the face of "real threats to the integrity and the sovereignty of this country;" using ordinary processes would defeat the Bill's urgent purpose. This rationale is reflected in each Tribunal order. For instance, despite striking down the ban, the 2008 order was receptive to the government's claim that SIMI's highly-educated cadres and sophisticated methods "render it impossible to place hard evidence" before the Tribunal. The 2010 Tribunal too held that an unlawful association would be clandestine, necessitating a "pragmatic" approach to evidence.

To what extent Tribunals can choose not to depart from ordinary procedure is debatable. The 'state' logic is enough to twist measures meant to protect the association into constraints. Even if Tribunals were to function differently, the UAPA allows government many other ways of imposing its bans. SIMI, as mentioned above, has also been declared a terrorist organisation, for which there is no judicial review. Even if the government were to stop renewing its ban on SIMI as "unlawful," it would still be a criminal offence to be a member of SIMI, aid in its activities, deal in its funds etc. under the anti-terror provisions of the UAPA. These anti-terror provisions fall even more clearly within the pale of unconstitutionality since they don't even contain the nominal safeguards of judicial review etc. that the "unlawful association" provisions of the UAPA attempt.

Despite the many routes available to government to exercise unbridled powers under the UAPA, the Tribunal's ineffectiveness as a safeguard is still crucial. This is because the UAPA's grant of sweeping powers as a whole, and its severe restrictions on fundamental rights, were justified by government through the guarantee of the Tribunal. As UAPA supporters in Parliament asserted, "Once you are acting judicially, you cannot act arbitrarily." But if the Tribunal is inadequate at checking arbitrariness, the government's assurances about the Act crumble. Promises that the Act will not be misused, repeated till date in the latest Parliamentary session amending the UAPA, are proven meaningless, and misuse is shown to be woven in.

The 'safeguard' of the Tribunal is thus rendered an elaborate sophistry, a tangle of procedures masking the power of the state instead of ensuring any accountability. SIMI's engagement with Tribunals showcases virtually untrammelled state powers that affect us all: the government can ban associations, repeat those bans, and no legal avenue in the country will provide any effective redress. Why the government even subjects itself to this dance, this periodic laying bare of its impunity-ensuring machinery, is a conundrum. What is clear is that the archive of these judgments, published in the gazette on the mandate of the very law that renders them farcical, reveals the law at one of its most intricately—and therefore totalisingly—repressive moments. A safeguard failing because of human error is a tragedy. A safeguard failing by human design is a rot, one that goes to the core of what one values in a country. For a law like this to exist on the statute books is cause for outrage, and should be stimulus enough for its repeal.

Published by: Secretary, People's Union for Deocratic Rights, Delhi (PUDR)
Website: www.pudr.org Email: pudr@pudr.org