
A DOCTRINAL, COMPARATIVE, AND CONSTITUTIONAL ANALYSIS OF BAIL UNDER SECTION 43D(5) OF THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967

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ABSTRACT

India's constitutional order guarantees personal liberty as an inviolable baseline; Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 systematically displaces that baseline for persons accused of terrorism-related offences. This article examines how that displacement, in its judicial application, has transformed pre-trial detention from a regrettable necessity into an institutional default—a punishment effectively imposed before any finding of guilt.

The article employs sustained doctrinal analysis of Section 43D(5)'s text and legislative genealogy, a structured survey of Supreme Court jurisprudence from *Watali* (2019) through *Vernon Gonsalves* (2023), a comparative examination of counter-terrorism bail regimes in the United Kingdom, United States, and Canada, and a constitutional mapping across Articles 14, 21, 22, and India's obligations under the International Covenant on Civil and Political Rights.

While Section 43D(5) survives facial constitutional scrutiny, its judicial application—particularly as shaped by the Supreme Court's near-total prosecutorial deference in *Watali*—has produced a structural pathology: bail hearings function as verdict-like proceedings triggered by the prosecutor's narrative, with the defence largely excluded from meaningful participation. Four interlocking causes sustain this pathology: an inflated *prima facie* standard that accepts prosecution material at face value; the absence of individualised risk assessment; endemic investigative and trial delay facilitated by the 180-day charge-sheet window; and appellate entrenchment of *Watali* without adequate reconciliation with the corrective jurisprudence of *Najeeb*, *Thwaha Fasal*, and *Vernon Gonsalves*.

The article proposes a framework of rights-consistent rigour: authoritative Supreme Court guidelines reconciling the oscillating precedent; legislative amendment introducing a multi-factor bail assessment in place of the blunt *prima facie* bar; mandatory periodic custody reviews; and a statutory cap beyond which bail becomes available as of right. The argument has

implications beyond the UAPA for every special statute that deploys the architecture of criminal procedure to achieve the practical result of preventive detention, without the constitutional safeguards that the latter expressly attracts.

Keywords: UAPA, Section 43D(5), bail jurisprudence, Watali, K.A. Najeeb, Vernon Gonsalves, Thwaha Fasal, Article 21, proportionality, counter-terrorism detention, preventive detention, undertrial incarceration, ICCPR, comparative constitutionalism.

I. INTRODUCTION

"The test of a democracy is the extent to which it protects the rights of those who threaten its peace." Justice V.R. Krishna Iyer

The tension between state security and individual liberty is among the oldest and most consequential in constitutional law. It does not disappear in times of genuine threat; it intensifies. And it is precisely in that intensification that the constitutional character of a democratic state is most severely tested. India's engagement with this tension, through the Unlawful Activities (Prevention) Act, 1967 (UAPA), and specifically its bail provisions under Section 43D(5), represents one of the most consequential and least settled chapters in contemporary Indian constitutional jurisprudence.

Section 43D(5)¹ provides that for offences under Chapters IV and VI of the UAPA, bail shall not be granted if the court, on a perusal of the case diary or the charge-sheet filed under Section 173 of the Code of Criminal Procedure, 1973 (CrPC), is of the opinion that there are reasonable grounds for believing that the accusation against the accused is *prima facie* true. The provision thus inverts the foundational presumption of criminal procedure. Where Article 21 of the Constitution² interpreted expansively since *Maneka Gandhi v. Union of India* to encompass the right to live with dignity, fairness, and substantive due process establishes liberty as the rule and its curtailment the exception, Section 43D(5) makes detention the default and bail the prize of a quasi-merits contest the accused is structurally ill-equipped to win.

The UAPA did not emerge in a vacuum. It succeeded TADA and POTA,³ two extraordinary

¹Unlawful Activities (Prevention) Act, 1967 [hereinafter UAPA], § 43D(5), inserted by the Unlawful Activities (Prevention) Amendment Act, 2008.

²Constitution of India, Art. 21. See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, where the Supreme Court held that any deprivation of life or personal liberty must be just, fair, and reasonable.

³Terrorist and Disruptive Activities (Prevention) Act, 1987 (lapsed 1995) [hereinafter TADA]; Prevention of

counter-terror statutes that were allowed to lapse or were repealed partly in response to documented abuses and chronically low conviction rates. The legislative promise implicit in that repeal that the ordinary criminal process, suitably adapted, could address terrorism without the excesses of exceptionalism has been imperfectly kept. Section 43D(5), as interpreted by the Supreme Court in *Zahoor Ahmad Shah Watali v. NIA*,⁴ reproduces the functional result of those earlier regimes: prolonged pre-trial incarceration, minimal adversarial engagement at the bail stage, and a structural convergence between criminal procedure and preventive detention.

Subsequent decisions *Union of India v. K.A. Najeed*,⁵ *Thwaha Fasal v. Union of India*,⁶ and *Vernon Gonsalves v. State of Maharashtra*,⁷ have introduced constitutional correctives: recognising prolonged detention as independently violative of Article 21 and insisting on substantive engagement with the statutory elements of offences at the bail stage. Yet these decisions have not squarely overruled *Watali*, and the resulting doctrinal oscillation has produced a landscape of geographical inconsistency and individual arbitrariness that Article 14 cannot countenance.

This article subjects UAPA bail jurisprudence to sustained doctrinal and constitutional scrutiny. It proceeds as follows: Part II traces the legislative genealogy of the UAPA's bail regime. Part III analyses the text and operation of Section 43D(5). Part IV examines the Supreme Court's landmark decisions in sequence. Part V surveys High Court fragmentation. Part VI offers a structural critique. Part VII situates the regime within a comparative constitutional matrix. Part VIII maps the constitutional interface with Articles 14, 21, 22, and India's ICCPR obligations. Part IX sets out a reform framework. Part X concludes.

Terrorism Act, 2002 (repealed 2004) [hereinafter POTA].

⁴*Zahoor Ahmad Shah Watali v. National Investigation Agency*, (2019) 5 SCC 1 [hereinafter *Watali*]. The Court held that at the bail stage under § 43D(5), the court must confine itself to a broad prima facie assessment of the prosecution's case diary and charge-sheet, without evaluating the defence case or engaging in a detailed weighing of evidence.

⁵*Union of India v. K.A. Najeed*, (2021) 3 SCC 713 [hereinafter *Najeed*]. The Court held that constitutional courts retain their jurisdiction to grant bail on grounds of prolonged pre-trial detention even where statutory conditions remain unsatisfied, as indefinite incarceration may itself violate Art. 21.

⁶*Thwaha Fasal v. Union of India*, 2021 SCC OnLine SC 1000 [hereinafter *Thwaha Fasal*]. The Court held that mere possession of literature sympathetic to extremist ideology, or ideological association, without active participation or concrete acts, does not satisfy the statutory threshold of a 'terrorist act' under § 15 UAPA.

⁷*Vernon Gonsalves v. State of Maharashtra*, 2023 SCC OnLine SC 1151 [hereinafter *Vernon Gonsalves*]. The Court, citing *Najeed*, held that prolonged pre-trial incarceration without prospect of early trial completion constitutes an independent constitutional ground for bail.

II. GENEALOGY OF INDIA'S SPECIAL ANTI-TERROR LAWS: FROM TADA TO POTA TO UAPA

A. The Emergency-Era Legacy and the Culture of Exceptionalism

India's tradition of managing internal security threats through extraordinary criminal law predates the UAPA in its current form by decades. TADA, enacted in 1987 against the backdrop of Punjab insurgency and secessionist violence, introduced reverse burdens of proof, admissibility of statements recorded before police officers, extended investigative custody, and stringent bail conditions that anticipated Section 43D(5). The official record of low conviction rates, documented misuse against political opponents and marginalised communities, and prolonged undertrial detention built the evidentiary case for TADA's non-renewal in 1995.

POTA, enacted in 2002 in the aftermath of the attack on Parliament, reproduced TADA's essential architecture while adding procedural refinements that, in practice, did little to address the underlying structural defects. Its repeal in 2004 was accompanied by the incorporation of its substantive terrorism provisions into UAPA through simultaneous amendment – a legislative sleight of hand that preserved the functional content of exceptionalism while shedding its formal label.

B. The Transformation of the UAPA

The original UAPA of 1967 was a modest statute addressed to unlawful associations and secessionist movements. Its transformation into India's principal counter-terrorism legislation was accomplished through three waves of amendment: the 2004 amendments introducing terrorism offences; the 2008 amendments enacted within weeks of the Mumbai attacks inserting enhanced investigation powers, 180-day charge-sheet extensions, and the bail embargo now codified in Section 43D(5);⁸ and the 2019 amendments extending the designation power to individuals, not merely organisations.

This legislative trajectory parallels a global pattern in which post-attack emergency powers are progressively normalised into the permanent architecture of counter-terrorism law. What distinguishes the Indian experience is the pace of that normalisation, the breadth of the offences

⁸UAPA, § 43D(2) (permitting investigative custody for up to 180 days before filing of charge-sheet, extendable on application). This extended investigation period, combined with § 43D(5)'s bail embargo, creates the conditions for prolonged pre-trial incarceration.

to which it applies, and critically the limited parliamentary scrutiny of the procedural implications of each successive expansion.⁹

C. Bail as the Central Site of Contestation

Of all the UAPA's provisions, Section 43D(5) has become the primary terrain on which the constitutional contest between security and liberty is fought. This is not accidental. The decision on bail is the decision that determines, for most accused persons, the practical reality of their engagement with the criminal process. An accused who obtains bail can participate in their own defence, maintain their livelihood and family relationships, and withstand the reputational consequences of a long trial. An accused who does not remain in custody for the duration which, in complex UAPA cases involving digital evidence, intercept material, and allegations of wide-ranging conspiracy, routinely extends to years.¹⁰

III. STATUTORY FRAMEWORK: SECTION 43D(5) TEXT, STRUCTURE, AND OPERATION

A. General Bail Principles and Their Displacement

The general framework governing bail under the CrPC¹¹ is animated by a foundational presumption of innocence and a set of consequentialist factors—risk of absconding, tampering with evidence, and likelihood of conviction—that are calibrated to the individual circumstances of each accused. The Supreme Court has, in an unbroken line of authority from *Hussainara Khatoon* onwards,¹² situated this framework within Article 21, holding that pre-trial detention is permissible only for compelling state reasons and that the criminal process must not be used as an instrument of pre-conviction punishment. Section 43D(5) displaces this framework not

⁹Law Commission of India, 'Two Hundred and Seventy-Third Report on Implementation of United Nations Convention Against Torture' (2017); Law Commission of India, 'Two Hundred and Sixty-Eighth Report on Amendments to Criminal Laws' (2017). Both flagged the structural risk of UAPA's bail provisions functioning as instruments of preventive detention without the procedural safeguards that expressly preventive detention statutes attract under Art. 22.

¹⁰National Crime Records Bureau, Prison Statistics India 2022 (Ministry of Home Affairs, 2023). As of 2022, undertrial prisoners constituted approximately 75.8 per cent of the total prison population. Satender Kumar Antil v. CBI, (2021) 10 SCC 773, described this as 'alarming' and issued comprehensive bail guidelines.

¹¹Code of Criminal Procedure, 1973 [hereinafter CrPC], § 437–439 (general bail provisions); § 167(2) (default bail on failure to file charge-sheet within prescribed period). The Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 479–482 re-enacts these provisions without modifying the UAPA's special bail embargo, confirming its continued operation under the new procedural code.

¹²*Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 93. The Court declared the right to speedy trial to be an integral and inalienable component of Art. 21.

entirely, but decisively at the point of most consequence.

B. The Text and Operation of Section 43D(5)

Section 43D(5) operates through a two-stage mechanism.¹³ In the first stage, bail cannot be granted unless the Public Prosecutor has been afforded an opportunity to be heard. In the second and constitutionally critical stage, if the Public Prosecutor opposes bail, the court must peruse the case diary or the charge-sheet and form an opinion on whether there are reasonable grounds for believing that the accusation is *prima facie* true. If the court is of that opinion, bail is prohibited. The provision thus converts what, under the CrPC, is the beginning of a judicial inquiry into a near-conclusory finding: the court's role at the bail stage is reduced, in substance, to asking whether the prosecution's documentary record is internally coherent and not manifestly implausible.

Two structural features of this mechanism merit immediate emphasis. First, unlike the twin-condition regimes under Section 37 of the NDPS Act or Section 21 of MCOCA which require the court to be affirmatively satisfied of the accused's probable non-guilt Section 43D(5) is phrased as a prohibition: bail is forbidden if the accusation appears *prima facie* true. The negative phrasing matters: it tilts the cognitive frame of the inquiry toward sustaining detention rather than interrogating it. Second, the provision makes no provision for individual risk assessment the accused's personal antecedents, flight risk, community ties, or role in the alleged offence are legally irrelevant once the *prima facie* threshold is crossed.

C. The Extended Detention Window

The bail embargo operates alongside UAPA's 180-day charge-sheet extension provision. In practice, this means that an accused person may remain in custody for six months before the charge-sheet is even filed, and thereafter for years while trial proceeds in a Special Court.¹⁴ The combined effect of the bail embargo, extended investigation period, and trial delay is that the bail decision effectively determines the accused's reality for the duration of the criminal

¹³UAPA, § 43D(5) proviso: 'provided that such accused person shall not be granted bail by any court if it, after perusing the case diary or the report made under section 173 of the Code, is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.' Note that the proviso is triggered only where the Public Prosecutor opposes bail absence of opposition removes the statutory embargo: Watali, *supra* note 4.

¹⁴National Investigation Agency Act, 2008 [hereinafter NIA Act], § 13 (exclusive jurisdiction of Special Courts); UAPA, § 43E (presumption as to commission of terrorist act in certain circumstances, placing evidential burden on accused).

process often several years. This is not incidental; it is structurally produced by the interaction of UAPA's provisions, and it is the source of the constitutional anxiety that runs through the Supreme Court's recent jurisprudence.

IV. JUDICIAL INTERPRETATION: SUPREME COURT JURISPRUDENCE ON SECTION 43D(5)

The Supreme Court's engagement with Section 43D(5) has produced a jurisprudence that is simultaneously powerful in its individual decisions and unstable in its cumulative architecture. The four decisions examined below – *Watali*, *Najeeb*, *Thwaha Fasal*, and *Vernon Gonsalves* represent successive attempts to locate the provision within a constitutional framework, each responding to the perceived excesses of what preceded it, none yet achieving doctrinal resolution.

A. *Watali* (2019): The Apex of Statutory Deference

The Supreme Court's decision in *Zahoor Ahmad Shah Watali v. NIA* established the operative framework for UAPA bail adjudication and has since functioned as the gravitational centre of the entire field. The case arose from the NIA's challenge to a High Court bail order in a matter involving alleged terrorist financing in Jammu and Kashmir. The High Court had examined the prosecution evidence and found it insufficient to establish a *prima facie* case. The Supreme Court reversed.

The Court held that the bail stage under Section 43D(5) requires only a broad overview of the prosecution's case diary and charge-sheet, taken at their highest. Defence evidence, alternative explanations, and contested inferences are not to be weighed at this stage. The court is not to conduct a mini-trial; it is merely to satisfy itself that the prosecution's account, if accepted, constitutes a plausible basis for the accusation. The practical effect of this formulation was to restructure the bail hearing: the prosecution presents its documents; the court asks whether they tell a coherent story; if the answer is yes, bail is refused.

Watali has been criticised on several grounds. At the level of constitutional doctrine, it fails to engage with the proportionality standard articulated in *K.S. Puttaswamy*¹⁵ and the Article 21

¹⁵*K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (nine-judge bench recognising proportionality as a constitutional standard against which restrictions on fundamental rights must be tested – incorporating the fourfold test of legitimate aim, suitability, necessity, and fair balance).

requirement that any deprivation of liberty be individually justified. At the level of adversarial principle, it eliminates the accused's opportunity to contest the prosecution's narrative at the only stage where such contestation has immediate liberty consequences. At the level of systemic effect, it has entrenched prosecutorial advantage in a manner that lower courts have treated as effectively irreversible.

B. Najeeb (2021): Constitutional Supremacy and the Liberty Corrective

The Supreme Court's decision in *Union of India v. K.A. Najeeb* introduced the first significant constitutional corrective to Watali's deference. The accused had been in custody for years, with no prospect of early trial completion. The Court held that constitutional courts exercising their jurisdiction under Articles 32 and 226 retain the power to grant bail even where Section 43D(5)'s statutory threshold has not been satisfied, where prolonged detention has become disproportionate and the right to speedy trial under Article 21 has been violated.

Najeeb's significance lies in what it implies rather than what it holds. By grounding bail jurisdiction in constitutional rather than statutory authority, the Court signalled that Section 43D(5) does not and cannot suspend the operation of Article 21. Detention that begins as lawful pre-trial custody can, through the passage of time and the absence of trial progress, become constitutionally impermissible. The statutory bar does not immunise indefinite detention from constitutional review.

The decision did not, however, overrule or substantially qualify Watali. The two decisions coexist in an uneasy relationship: Watali governs the ordinary bail inquiry; Najeeb provides an exceptional constitutional exit from that inquiry in cases of extreme delay. The line between ordinary and exceptional, in practice, has proven difficult to draw with consistency.

C. Thwaha Fasal (2021): Substantive Scrutiny Through the Back Door

In *Thwaha Fasal v. Union of India*, the Supreme Court introduced a form of substantive review at the bail stage, albeit through the mechanism of construing the scope of the offence rather than directly examining the prosecution's evidence. The Court held that mere ideological sympathy for banned organisations, or possession of literature associated with extremist movements, does not constitute 'terrorist activity' within the meaning of Section 15 UAPA. Active participation or concrete acts are required.

The significance of this reasoning for bail is indirect but real: if the alleged conduct does not, even on the prosecution's own account, satisfy the statutory definition of the relevant offence, then the statutory prima facie threshold cannot be met not because the prosecution's evidence is disbelieved, but because it does not legally suffice. This approach allows courts to engage in limited substantive review at the bail stage without directly challenging Watali's evidentiary deference, by relocating the inquiry from 'is the prosecution's account plausible?' to 'does the prosecution's account, if accepted, constitute the offence charged?'

D. Vernon Gonsalves (2023): Reaffirming Judicial Oversight

The Supreme Court's decision in *Vernon Gonsalves v. State of Maharashtra*, arose from the Bhima Koregaon prosecutions one of the most politically contested UAPA matters in recent memory. The accused had spent years in pre-trial custody. The Court, citing Najeeb, reaffirmed that prolonged incarceration without prospect of early trial constitutes an independent constitutional ground for bail, and additionally examined whether the prosecution's case met the legal standards of the offences charged.

Vernon Gonsalves represents the closest the Court has yet come to a doctrinal synthesis: combining the constitutional proportionality principle of Najeeb with the substantive element-scrutiny of Thwaha Fasal. It implicitly and without saying so limits the most expansive reading of Watali by insisting that Section 43D(5) does not create an irrebuttable presumption against bail and that courts retain the capacity for limited but genuine judicial engagement with the prosecution's case at the bail stage.¹⁶

E. Synthesis: Oscillation Without Resolution

Read together, these four decisions reveal a jurisprudence pulled in irreconcilable directions. Watali sets the principle of prosecutorial deference; Najeeb introduces the constitutional corrective of prolonged-detention review; Thwaha Fasal reopens the door to substantive element-scrutiny; Vernon Gonsalves signals a tentative synthesis. Yet the synthesis remains tentative Watali has never been formally overruled, its authority has never been squarely qualified, and lower courts are left to navigate between precedents that point in opposite

¹⁶See *Sudha Bharadwaj v. State of Maharashtra*, Bombay High Court, Criminal Bail Application No. 2902 of 2021 (granting bail after prolonged incarceration in Bhima Koregaon matter, citing Najeeb and Vernon Gonsalves); see also *State through NIA v. Zahoor Ahmad Shah Watali*, Delhi High Court, CRL.A. 118/2016 (illustrating evidentiary deference to prosecution at bail stage prior to Supreme Court's Watali ruling).

directions. This doctrinal irresolution is not a minor technical inconvenience; for the accused persons whose liberty depends on its resolution, it is a constitutional emergency.

V. HIGH COURT JURISPRUDENCE AND DOCTRINAL FRAGMENTATION

The Supreme Court's oscillating jurisprudence has been refracted through the High Courts in ways that have amplified rather than resolved its contradictions. Three principal axes of divergence are identifiable.

A. The Delhi High Court: The 'Terrorist Act' Threshold

The Delhi High Court's engagement with Section 43D(5) has been most consequential in the context of the 2020 North-East Delhi riots prosecutions. Several divisions of the Court held, consistently with *Thwaha Fasal*, that the mens rea required for a 'terrorist act' under Section 15 the intent to threaten the unity, integrity, security, or sovereignty of India imposes a high threshold that mere participation in public disorder, however violent, does not satisfy. On this reasoning, courts granted bail where the prosecution's allegations, taken at their highest, did not legally constitute the offence charged.

This approach substantive element-scrutiny at the bail stage represents the most doctrinally coherent response to Watali's deference because it operates within the formal framework that Watali establishes (the court examines the prosecution's case) while insisting that that examination must assess legal sufficiency, not merely factual plausibility. It is, in effect, a judicial workaround that achieves constitutional sensitivity through statutory construction.

B. The Bombay High Court: Evidentiary Engagement and Delay

The Bombay High Court's UAPA jurisprudence most visible in the Bhima Koregaon prosecutions before Supreme Court intervention reflects an acute tension between Watali's deference and the constitutional imperatives articulated in Najeeb. Several divisions engaged substantively with the prosecution's evidentiary chain examining the reliability of digital evidence, the directness of alleged organisational connections, and the causal relationship between the accused's alleged conduct and the charged offences. Others applied Watali's broad prima facie test more closely, deferring to the prosecution's narrative.

The result, within a single High Court, was inconsistent outcomes across substantially similar factual situations an Article 14 problem of the first order.

C. The Kerala High Court: Ideological Association and Evidentiary Limits

The Kerala High Court has grappled with a recurrent pattern of UAPA cases involving allegations of ideological association with banned organisations, possession of radical literature, and participation in meetings or communications with members of prohibited groups. Several benches have applied *Thwaha Fasal*'s holding that ideological sympathy and academic engagement are insufficient to satisfy Section 15's statutory threshold, and have granted bail accordingly. Others have deferred to investigation-stage assertions, relying on Watali's directive to accept prosecution material without adversarial examination.

D. Structural Consequence: Geographical Lottery

The cumulative effect of these divergent approaches is that the availability of bail under the UAPA depends, to a constitutionally intolerable degree, on the identity of the bench and the geography of the arrest. An accused prosecuted in Delhi, whose alleged conduct falls within the Delhi High Court's 'terrorist act' threshold jurisprudence, may obtain bail that would be denied to an identically situated accused prosecuted in a jurisdiction whose High Court reads Watali more broadly. This is not judicial diversity; it is arbitrary inequality precisely the constitutional vice that Articles 14 and 21 are designed to prevent.

VI. STRUCTURAL CRITIQUE: BAIL AS DE FACTO PREVENTIVE DETENTION

(i) Front-Loading Punishment

The most profound structural critique of the UAPA bail regime is the most direct: it front-loads punishment. The combination of Section 43D(5)'s bail embargo, the 180-day charge-sheet window, and the endemic delays of complex terrorism trials produces a situation in which the pre-trial detention period routinely exceeds the maximum sentence that would be imposed for lesser offences within the same statutory scheme. An accused who is eventually acquitted or convicted of a lesser offence not attracting the maximum sentence will have served, as pre-trial detention, a custodial period that the court had no power to impose by way of punishment.¹⁷

¹⁷Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 (Supreme Court directing magistrates to independently apply their minds to necessity of arrest and detention, rather than mechanically remanding accused persons; recognising that pre-trial detention often functions as de facto punishment).

(ii) Information Asymmetry and the Adversarial Deficit

The bail hearing under Section 43D(5), as shaped by Watali, is structurally non-adversarial. The prosecution presents its case diary and charge-sheet; the court examines them; the defence is largely excluded from substantive engagement. In complex UAPA cases, the prosecution's documentary record comprises thousands of pages of intercept material, digital communications, financial transaction records, and intelligence assessments. The accused has, at the bail stage, no right to full disclosure, no opportunity to test the reliability of forensic or technical evidence, and no effective mechanism to challenge the characterisation of conduct as 'terrorist activity.' The asymmetry is not incidental; it is structurally produced by the provision and judicially entrenched by Watali.

(iii) Preventive Detention by Another Name

The functional convergence between UAPA bail denial and preventive detention has been noted by scholars and, obliquely, by courts. The distinction between the two constitutionally significant because preventive detention statutes attract the procedural safeguards of Article 22(4)–(7), including advisory board review and mandatory periodic renewal¹⁸ has been effectively dissolved by the UAPA bail regime. Where detention for years can be secured through a prima facie criminal accusation without the procedural protections that a formally preventive detention order would attract, the constitutional architecture of Article 22 is circumvented rather than engaged. This is a structural vice that no amount of judicial sensitivity at the bail hearing can fully correct.

(iv) Chilling Effects on Dissent

The systemic implications of prolonged UAPA detention extend beyond the individual cases to the ecosystem of political speech, journalism, and civil society engagement. Where the prospect of multi-year pre-trial incarceration attaches to broadly framed terrorism allegations, the rational response of researchers, lawyers, journalists, and activists who engage with politically sensitive subjects is self-censorship. This chilling effect is not a collateral consequence of the UAPA's bail regime; given the breadth of the offences and the looseness of

¹⁸Constitution of India, Art. 22 (procedural safeguards against arbitrary arrest and detention). Unlike express preventive detention statutes (see Art. 22(4)–(7)), the UAPA does not provide for Advisory Board review or periodic judicial oversight a structural lacuna that heightens constitutional concern when the practical effect of §43D(5) is prolonged incarceration.

the statutory definition of 'terrorist act,' it is a structurally predictable result. Courts adjudicating individual bail applications are ill-positioned to correct it; only legislative reform and authoritative doctrinal guidance can address the structural cause.

VII. COMPARATIVE CONSTITUTIONAL PERSPECTIVES

The challenge of calibrating counter-terrorism detention against constitutional guarantees of personal liberty is not uniquely Indian. Three comparator jurisdictions—the United Kingdom, the United States, and Canada—offer both external standards and institutional tools that illuminate the available design space.

A. United Kingdom: Judicial Centralisation and Proportionality

The United Kingdom's counter-terrorism detention regime, anchored in the Terrorism Act 2000 and its successors, operates within the framework of the Human Rights Act 1998, which domesticates the European Convention on Human Rights and, in particular, Article 5's right to liberty and security.¹⁹ All deprivations of liberty—including pre-charge detention of terrorism suspects, which may extend to 14 days on judicial authorisation—must be individually justified by reference to specific, articulated grounds of necessity. The courts, applying a proportionality test that asks not merely whether detention is authorised but whether it is necessary and balanced against the individual's rights, have struck down detention regimes that failed this standard even in high-security contexts.

The lesson of the British experience for India is not that counter-terrorism detention is impermissible—it is that such detention, to survive constitutional scrutiny, must be individually grounded, time-limited, periodically reviewed, and subject to meaningful adversarial challenge. The UAPA regime satisfies none of these requirements consistently.

B. United States: Adversarial Primacy and Constitutional Constraints

The United States Bail Reform Act of 1984 permits preventive detention in federal terrorism

¹⁹Terrorism Act 2000 (UK), Sch. 8 (detention of terrorism suspects); Counter-Terrorism and Security Act 2015 (UK); Human Rights Act 1998 (UK) incorporating European Convention on Human Rights, Art. 5 (right to liberty and security). See *A v. Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 (House of Lords holding indefinite detention of foreign national terrorism suspects incompatible with ECHR Art. 5).

cases where no condition of release will reasonably assure the safety of the community.²⁰ The constitutional validity of this regime was upheld in *United States v. Salerno* on the ground that it was regulatory rather than punitive but the Court's reasoning depended critically on the procedural architecture surrounding the detention power: an adversarial hearing, an individualised finding, a right to present evidence, and a right to legal representation from the outset. Stripped of these safeguards, the regime would be constitutionally infirm.

The contrast with Section 43D(5), as applied in *Watali*, is stark. Where the U.S. system places the burden squarely on the prosecution to justify detention through adversarial proceedings, *Watali* places the burden effectively on the accused to dislodge a *prima facie* case whose contents have been unilaterally compiled by the investigating agency.

C. Canada: Charter Proportionality and the Presumption of Bail

The Canadian Charter of Rights and Freedoms explicitly guarantees, under Section 11(e), the right not to be denied reasonable bail without just cause.²¹ The Supreme Court of Canada has interpreted this guarantee to require that bail denial be proportionate to the specific risk posed by the individual accused not derived from the nature of the charge, the gravity of the alleged offence, or the strength of the prosecution's case alone. Categorical bail prohibitions, even in terrorism cases, must survive Charter scrutiny; a provision functionally equivalent to Section 43D(5), in the Canadian constitutional context, would face formidable judicial challenge.

D. Comparative Synthesis: Three Non-Negotiables

Across all three comparator systems, three features stand out as non-negotiable components of constitutionally sustainable counter-terrorism bail regimes: judicial centrality (courts, not prosecutors, determine detention); procedural adversarialism (the accused has a meaningful opportunity to contest the prosecution's case); and temporal limits (extended detention requires continuing judicial justification, not merely initial authorisation). The UAPA bail regime, in its current form, fails on all three dimensions. This is not merely a jurisprudential observation it

²⁰Bail Reform Act, 18 U.S.C. § 3142 (1984) (permitting preventive detention where no condition of release will reasonably assure appearance or safety); *United States v. Salerno*, 481 U.S. 739 (1987) (Supreme Court upholding constitutionality of preventive detention under the Act as regulatory, not punitive, subject to robust procedural safeguards including adversarial hearings and individualized findings).

²¹Canadian Charter of Rights and Freedoms, ss. 7 (right to life, liberty, and security of the person) and 11(e) (right not to be denied reasonable bail without just cause); *R v. Hall*, [2002] 3 SCR 309 (Supreme Court of Canada holding that bail denial must be proportionate to the specific risk posed by the individual accused, not derived from the nature of the charge alone).

is a constitutional indictment.

VIII. CONSTITUTIONAL INTERFACE: ARTICLES 14, 21, 22, AND INTERNATIONAL OBLIGATIONS

A. Article 21: Liberty, Speedy Trial, and Proportionality

Article 21's guarantee of personal liberty as developed from *Maneka Gandhi* through *Hussainara Khatoon*, *Najeeb*, and *Vernon Gonsalves* imposes three requirements on the UAPA bail regime: that any deprivation of liberty be procedurally fair; that trial be completed within a reasonable time; and that continued detention remain proportionate to the state's legitimate objective of securing trial and preventing re-offending. The UAPA regime satisfies the first requirement imperfectly (the bail hearing exists, even if its adversarial character is attenuated); fails the second systematically (multi-year pre-trial detention is endemic); and violates the third in prolonged cases (detention that has outlasted any rational relationship to the state's trial-securing interest cannot be justified by reference to the original statutory authorisation).

B. Article 14: Arbitrariness and the Geographic Lottery

Article 14's prohibition of arbitrary state action,²² developed through the *E.P. Royappa* line of cases, operates both at the level of legislative classification and executive application. The High Court divergence documented in Part V in which identically situated accused receive different bail outcomes depending on the geographic accident of their prosecution raises an acute Article 14 issue of the second kind: the absence of authoritative doctrinal guidance enabling consistent application of Section 43D(5) has produced an outcome that, while not discriminatory by design, is arbitrary in effect.

C. Article 22: Preventive Detention by Another Name

Article 22(4)–(7) establishes the constitutional framework for preventive detention, requiring inter alia reference to an Advisory Board, maximum detention periods, and mandatory periodic review. Where the functional result of UAPA bail denial is indistinguishable from preventive

²²*E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3 (establishing that Art. 14 incorporates a guarantee of non-arbitrariness in state action beyond formal equality). See also *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (proportionality as a component of Art. 14 review).

detention as it is, in practice, for accused persons who remain in custody for years without trial progress the constitutional architecture of Article 22 is bypassed. The accused receives neither the procedural protections of the ordinary criminal process (adversarial bail hearing, discovery, speedy trial) nor those of the preventive detention regime (Advisory Board, periodic review, defined maximum period). This structural gap between what the UAPA's bail regime achieves in practice and what the Constitution permits by way of either criminal punishment or preventive detention is the deepest constitutional vulnerability of the current regime.

D. India's ICCPR Obligations

India's accession to the International Covenant on Civil and Political Rights in 1979 imposes obligations under Article 9(3) the right to trial within a reasonable time or release and Article 14(2) the presumption of innocence.²³ While the ICCPR is not directly enforceable as domestic law, the Supreme Court has consistently treated India's international human rights obligations as an interpretive resource for defining the content of fundamental rights. A construction of Section 43D(5) that reconciles it with ICCPR standards by insisting on individualised bail assessment, periodic custody review, and a presumption in favour of liberty after defined periods of pre-trial detention is not merely desirable; it is constitutionally available.

IX. TOWARD A RIGHTS-CONSISTENT FRAMEWORK: REFORM PROPOSALS

The analysis in the preceding Parts establishes that UAPA bail jurisprudence requires recalibration on both judicial and legislative fronts. The following framework is proposed not to weaken counter-terrorism enforcement, but to restore its constitutional legitimacy.

(i) Authoritative Reconciliation of Supreme Court Precedent

The Supreme Court should convene a larger bench to authoritatively reconcile *Watali* with *Najeeb*, *Thwaha Fasal*, and *Vernon Gonsalves*. The reconciled standard should affirm that: Section 43D(5) does not create an irrebuttable presumption against bail; courts at the bail stage must assess not merely whether the prosecution's narrative is internally coherent but whether the alleged conduct, taken at its highest, satisfies the statutory elements of the offence charged;

²³International Covenant on Civil and Political Rights, Art. 9(3) ('Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'). India acceded to the ICCPR on 10 April 1979.

prolonged incarceration is a constitutionally weighty factor that courts must address in every bail order where detention has exceeded one year; and reasoned speaking orders engaging individually with each element of the bail inquiry are constitutionally required.²⁴

(ii) Legislative Amendment to Section 43D(5)

Parliament should amend Section 43D(5) to replace the blunt prima facie bar with a multi-factor assessment requiring courts to consider: the gravity of the alleged conduct and the specificity of the accused's alleged role; the strength and reliability of the prosecution's evidence, including forensic and digital evidence; the accused's personal antecedents, community ties, and flight risk; the length of detention already undergone and the realistic prospect of trial completion; and the availability of less restrictive conditions as an alternative to custody. This amendment would bring the provision within the constitutional mainstream without disabling counter-terrorism prosecution.

(iii) Mandatory Periodic Custody Reviews

Legislation or Supreme Court guidelines should mandate automatic periodic bail review hearings at fixed intervals every six months in all UAPA cases where the accused remains in pre-trial custody. Reviews after two years of uninterrupted custody should attract enhanced scrutiny: the prosecution should be required to justify continued detention by reference to specific, current grounds rather than the original prima facie finding. These mechanisms, analogous to those that exist in the United Kingdom and Canada, would prevent the inertia of continued custody from becoming self-justifying.

(iv) Statutory Custody Cap

The most structural reform and the most consequential is the introduction of a statutory custody cap: a provision that bail becomes available as of right, without reference to Section 43D(5)'s prima facie threshold, once pre-trial detention has exceeded a defined period say, three years without a verdict. This proposal, analogous to Section 436A of the CrPC for general offences, acknowledges that there is a point beyond which the state's interest in securing trial cannot justify continued detention, regardless of the gravity of the allegations. Parliament has

²⁴Manish Sisodia v. CBI, (2024) SCC OnLine SC 879 (Supreme Court, in the PMLA context, admonishing courts for treating bail refusal as a 'ritualistic formula' and emphasising the constitutional obligation to pass reasoned, speaking orders individually engaging with each statutory prong).

the competence to enact such a cap; the constitutional impetus is Article 21 and the proportionality requirement of *K.S. Puttaswamy*.

(v) Institutional Reforms: Transparency and Specialisation

The government should publish annual data on UAPA arrests, prosecutions, bail outcomes, conviction rates, and average pre-trial detention periods. This data currently unavailable in systematic form is essential both for evidence-based legislative reform and for the constitutional accountability of a regime whose legitimacy depends, in part, on its proportionality in practice. Specialised judicial training on digital evidence, conspiracy law, and human rights standards for Special Court judges would additionally improve the quality and consistency of bail adjudication.

X. CONCLUSION

This article has traced the evolution of bail jurisprudence under the UAPA from its legislative antecedents in TADA and POTA to the oscillating Supreme Court precedent of the last five years. The analysis reveals a regime characterised less by settled doctrine than by constitutional improvisation: successive courts have attempted to contain the excesses of Watali's deference without confronting its authority, producing a landscape of doctrinal instability and individual arbitrariness that the Constitution cannot sustainably accommodate.

The stakes are not merely jurisprudential. For the individuals whose liberty depends on the resolution of these questions academics, lawyers, journalists, activists, and others caught in the wide net of UAPA allegations the gap between Watali and Najeeb is the gap between years of imprisonment and return to their families. That gap is measured in constitutional terms as the distance between a state that uses criminal procedure to achieve the practical result of preventive detention, and a state that holds itself genuinely accountable to the promise of Article 21.

The challenge for Indian courts and lawmakers is not to choose between security and liberty the comparative evidence is clear that robust counter-terrorism systems and meaningful judicial oversight of detention are not mutually exclusive. The challenge is to build a legal architecture in which each reinforces rather than erodes the other. Bail under the UAPA must remain genuinely difficult to obtain in appropriate cases; but it must not be a mirage formally

available, structurally inaccessible, and constitutionally illusory.

A constitutional democracy that tolerates punishment before verdict, however ingeniously dressed in the procedural clothing of criminal law, has ceased to honour the compact it made with the accused at the founding moment of its constitutional order. The recalibration this article proposes is not lenience; it is constitutionalism.

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