

---

# STRINGENCY VERSUS LIBERTY: SPECIAL STATUTES, THE TWIN CONDITIONS, AND THE LIMITS OF PRE-TRIAL DETENTION IN INDIA

---

Srijan Puri, NMIMS, Kirit P. Mehta School of Law

## I. The Basic Conflict

The basic tenet underlying the doctrine of criminal jurisprudence in India is very simple: “bail is the rule and jail is an exception.” This is because of the fact that Article 21<sup>1</sup> of the Constitution of India ensures that no one can be deprived of life or personal liberty without due process of law. The Supreme Court, ever since *Maneka Gandhi v. Union of India*,<sup>2</sup> has consistently held that this procedure must itself be fair, just, and reasonable — not merely technically legal.

Nevertheless, Parliament has intentionally established a separate regime of criminal law for offenses, which Parliament deems serious enough to merit a special treatment. The provisions of NDPS Act, 1985;<sup>3</sup> Prevention of Money Laundering Act, 2002;<sup>4</sup> and the Unlawful Activities (Prevention) Act, 1967<sup>5</sup> impose the so-called twin condition for bail. This requirement reverses the presumption of innocence by making the accused establish his or her innocence prima facie and show that he or she shall not commit an offense upon release from custody. In other words, the accused is required to prove his or her innocence before being charged with an offense.

According to this paper, such rigidity in the law is neither random nor whimsical, but rather a carefully crafted legal requirement that has been generally upheld by the Supreme Court. However, it must also be said that such rigidity is not an absolute; rather, it is limited by the constitutional ceiling imposed by Article 21.

---

<sup>1</sup>Constitution of India, art. 21.

<sup>2</sup>*Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>3</sup>Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985).

<sup>4</sup>Prevention of Money Laundering Act, 2002 (Act 15 of 2003).

<sup>5</sup>Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

## II. Why Parliament Chose Stringency

These two conditions have not been drawn up without proper consideration. The NDPS Act of 1985 was passed to fulfil India's international commitment to drug treaties and also because professionals engaged in drug trafficking cannot be handled using the regular criteria for grant of bail, since they have the means to abscond. Under Section 37<sup>6</sup> of this Act, bail can be given if the court is satisfied that there exist reasonable grounds to believe that the person concerned is not guilty and that he shall not commit any offense on being released. The Supreme Court in *Toofan Singh v. State of Tamil Nadu*<sup>7</sup> reaffirmed that this stringent regime must be applied strictly, while simultaneously holding that investigating officers under the NDPS Act are police officers for the purposes of the Indian Evidence Act — meaning confessions recorded by them are inadmissible. Even within a stringent statute, procedural safeguards survive.

The enactment of the PMLA was prompted by the UN's appeal to its members to deal with the menace of money laundering in order to prevent it from becoming a global financial problem. The crime of money laundering does not constitute any regular crime, since it includes complex financial deals, dummy firms, foreign bank accounts, and the concealment of illegal gains. Therefore, the enactment of the twin conditions under Section 45<sup>8</sup> of the PMLA demonstrates the realization that a person who can launder millions of rupees can also circumvent the bail terms. In *Vijay Madanlal Choudhary v. Union of India*,<sup>9</sup> the Supreme Court upheld the constitutional validity of these conditions in their entirety, overruling its earlier decision in *Nikesh Tarachand Shah v. Union of India*<sup>10</sup> and accepting that economic offences of this magnitude warrant a stricter bail regime.

In addition to that, Section 43D(5)<sup>11</sup> of the UAPA provides for a condition under which granting of bail will not be considered appropriate when, upon reviewing the case diary or charge sheet, the court believes that there exist reasonable grounds to establish the truth of the allegation. This measure seeks to ensure that persons engaged in acts of terrorism or offenses

---

<sup>6</sup>Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985), s. 37.

<sup>7</sup>*Toofan Singh v. State of Tamil Nadu*, (2021) 4 SCC 1.

<sup>8</sup>Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s. 45.

<sup>9</sup>*Vijay Madanlal Choudhary v. Union of India*, 2022 SCC OnLine SC 929.

<sup>10</sup>*Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

<sup>11</sup>Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967), s. 43D(5).

against national security are not let out on bail at any stage of the trial process.

### III. Where the Courts Have Drawn the Line

Acknowledging the validity of such strict terms of bail does not mean agreeing to the unrestricted application thereof. The Supreme Court has, through a number of decisions lately rendered, laid out the limitations of the Constitution within which those twin terms cannot apply.

The most significant of these is *Union of India v. K.A. Najeeb*,<sup>12</sup> where the Court ruled that when there is undue delay in the completion of a trial despite continued detention, Article 21 comes into play again, even in UAPA-related matters. When an individual has been detained for several years and there is no real likelihood of the trial coming to an end, he or she is no longer considered to be under pre-trial detention but rather punished without conviction.

On the procedural front, *Pankaj Bansal v. Union of India*<sup>13</sup> has ruled that it was obligatory for the Enforcement Directorate to give in writing to the arrested person under the PMLA the grounds for his arrest. It is not enough to record the grounds internally. This is a straightforward invocation of Article 22(1)<sup>14</sup> that guarantees an arrested person the right to know the grounds of his arrest without delay. Failure to do so would make the arrest unconstitutional, and the arrested person would be entitled to be released, irrespective of whether the twin tests are fulfilled or not. *Prabir Purkayastha v. State (NCT of Delhi)*<sup>15</sup> further elaborated upon this through the distinction drawn between “reasons to believe” (which is an internal necessity) and “grounds for arrest” (which is a constitutional responsibility to the accused). These two are not synonymous.

In the cases of *Umar Khalid* and *Sharjeel Imam*,<sup>16</sup> the court relied upon the twin requirements of UAPA and refused to grant bail because the case made out a prima facie case on the part of the prosecution. Such cases exemplify the daily practice of the twin requirements: when prima facie material is found, then granting bail becomes almost impossible. The issue is that the court needs to be sure that this is indeed a prima facie evaluation, and not merely a

---

<sup>12</sup>*Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.

<sup>13</sup>*Pankaj Bansal v. Union of India*, (2023) 10 SCC 113.

<sup>14</sup>Constitution of India, art. 22(1).

<sup>15</sup>*Prabir Purkayastha v. State (NCT of Delhi)*, 2024 SCC OnLine SC 509.

<sup>16</sup>*Umar Khalid v. State (NCT of Delhi)*, 2022 SCC OnLine Del 2270.

confirmation of the prosecution's claims without any counterarguments from the accused.

#### IV. The Distinction That Matters

The crucial difference that needs to be pointed out is that **stringency in bail conditions does not necessarily mean certainty in detention**. It should be clear from the legislative intent that both the stringent bail conditions and the twin conditions were meant to set a higher bar for bail — not to deprive persons of this fundamental constitutional right. The courts have failed to adhere to the legislative intent in these cases.

There are three situations in which Article 21 acts independently as the legal basis for bail despite the existence of special statutes on the matter: when there is procedural impropriety in the process of making the arrest, including failure to inform about the grounds for arrest under Article 22(1);<sup>17</sup> when the period of detention becomes so protracted and disproportionate to the purpose of pre-trial detention; and when the evidence is not substantial enough to satisfy the prima facie test.

The parliamentarians who made it compulsory for drug traffickers, money launderers, and terrorists to meet stringent conditions for bail were justified. These offenses cannot be committed by anyone and anytime since they require planning, resources, and organization. In other words, these crimes are extremely detrimental.

However, the task of the judiciary cannot be confined merely to upholding the intentions behind the legislation and taking a back seat. The judiciary has to safeguard, on a case-by-case basis, the principle that stringency must never become a tool of indefinite incarceration without any answerability. The two prerequisites are a sieve, not a barricade. In cases where an accused has spent many years in jail in a seemingly endless process of trial, as was held by *K.A. Najeeb*,<sup>18</sup> it would not be permissible to be silent.

The relationship between the stringency of law and the freedoms enshrined in the Constitution cannot be reconciled once and for all time. It is an ongoing process wherein both must be respected and balanced in equal measure.

---

<sup>17</sup>Constitution of India, art. 22(1).

<sup>18</sup>*Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.