
BAIL AS THE EXCEPTION, PRISON AS THE RULE: THE UAPA'S SUBVERSION OF CONSTITUTIONAL LIBERTY AND THE SUPREME COURT'S AMBIVALENT RESPONSE

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ABSTRACT

This article critically examines Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 through a constitutional lens as the said section imposes stringent condition on the grant of bail upon the persons accused under the country's primary counter-terrorism statute. It argues that the provision of the code under question departs from the core idea of right to personal liberty guaranteed under Article 21 of the Constitution of India, Right to Speedy Trial as recognised in the case of *Hussainara Khatoon v Home Secretary, State of Bihar* as well as a settled principles of criminal justice system of 'Innocent Until Proven Guilty' by producing a structurally unconstitutional regime of prolonged pretrial incarceration as has been interpreted by the Hon'ble Supreme Court in *National Investigation Agency v Zahoor Ahmed Shah Watali*. The article further examines the doctrinal corrective principles as introduced by the Hon'ble Supreme Court in *Union of India v KA Najeeb* and *Prabir Purkayastha v State (NCT of Delhi)*, wherein, while the court identified the contributions of the procedural aspect of legislation in question as necessary however, constitutionally incomplete.

Relying upon the data pertaining to national incarceration as published by the National Crime Records Bureau & the principles of international human rights law, the article demonstrates how the operational consequences of the UAPA's bail framework stand in inherent contravention of Preamble's foundational commitment to justice & liberty. In conclusion, the article proposes various legislative & judicial reforms which could help in restoring the constitutional proportionality to the legislation without compromising upon its object of ensuring national security.

Keywords: UAPA, bail jurisprudence, Article 21, pretrial detention, constitutional liberty, counter-terrorism statute, judicial reforms

INTRODUCTION

The constitutional bench of the Supreme Court in 1978, speaking through Justice P.N. Bhagwati in the case of *Maneka Gandhi v Union of India* declared the idea of right to life & personal liberty as guaranteed under Article 21 as not merely a procedural guarantee but also one that ought to be “just, fair, & reasonable” in both, substance & procedure.¹ The declaration helped in shaping the constitutional jurisprudence of the country for almost five decades. However, today, thousands of individuals accused under the stringent legislation of Unlawful Activities Prevention Act, 1967 find their personal liberty extinguished by the questionable procedural lapses ignored by the legislature at the time of passing the said legislation leading them to languish in custody over years, often decades, not owing to the conviction but rather, due to the statutory bail clause interpreted by the Hon’ble Supreme Court in such way leading to some sort of an absolute prohibition leading the incarcerated individuals with no remedy except to await trial.

That declaration has shaped Indian constitutional jurisprudence for nearly five decades. Yet today, thousands of individuals accused under the Unlawful Activities (Prevention) Act, 1967 ("UAPA") languish in custody for years, often decades, awaiting trial, with their liberty extinguished not by conviction but by a statutory bail clause that has been interpreted by the Supreme Court itself into something approaching an absolute prohibition.

This article puts forth an argument that Section 43D(5) of UAPA², as interpreted in *National Investigation Agency v Zahoor Ahmed Shah Watali*³ has led to a creation of structurally unconstitutional regime of pre-trial incarceration, one which the Hon’ble Supreme Court had tried to partially correct in *Union of India v KA Najeeb*⁴ and *Prabir Purkayastha v State (NCT of Delhi)*.⁵ However, the correction seems to be rather in-amicable owing to the lack of doctrinal clarity of institutional commitment that are demanded by the constitutional principles.

METHODOLOGY

The article adopts a layered doctrinal-cum-empirical methodology in order to examine the

¹ *Maneka Gandhi v Union of India* (1978) 1 SCC 248.

² Unlawful Activities (Prevention) Act 1967, s 43D(5).

³ *National Investigation Agency v Zahoor Ahmad Shah Watali* (2019) 5 SCC 1.

⁴ *Union of India v KA Najeeb* (2021) 3 SCC 713.

⁵ *Prabir Purkayastha v State (NCT of Delhi)* 2024 SCC OnLine SC 934.

constitutional validity & operational consequences of Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967. At its foundational level, the research remains doctrinal in character, drawing primarily upon statutory interpretation, constitutional analysis, & judicial precedent as the principle sources of legal inquiry. The legislative framework has been examined through a close textual & contextual reading of the Unlawful Activities (Prevention) Act, 1967, with particular emphasis upon the legislative evolution, statutory architecture, & parliamentary rationale underlying the incorporation & subsequent amendment expanding the ambit of Section 43D(5)⁶. The constitutional analysis under this article is within the ambit to the broader interpretive jurisprudence evolved by the Hon'ble Supreme Court under Articles 14, 21, & 22 of the Constitution of India, particularly in relation to the concepts of procedural fairness, substantive due process, & protection of personal liberty against arbitrary state action.⁷

At the secondary level, the article uses a precedent-tracing methodology in order to doctrinally trace the judicial evolution of bail jurisprudence pertaining to the UAPA. In doing so, the article traces the trajectory of constitutional interpretation beginning from *National Investigation Agency v Zahoor Ahmed Shah Watali*⁸, & moving towards subsequent decisions of *Union of India v KA Najeeb*, *Thwaha Fasal v Union of India*⁹, *Vernon Gonsalves v State of Maharashtra*¹⁰, & *Prabir Purkayastha v State (NCT of Delhi)*¹¹. Through this practice, this article identifies the emerging tensions, doctrinal inconsistencies, & constitutional deviations that have come to characterise the judicial application of Section 43D(5). All judicial authorities relied upon for the purposes of this research have been accessed through Supreme Court Cases ("SCC") & subsequently cross-referenced through Manupatra so as to ensure doctrinal accuracy & institutional reliability.

Furthermore, the article incorporates an empirical legal dimension by engaging with quantitative data concerning the undertrial prison population of the country as published in Prison Statistics India Reports of National Crime Records Bureau.¹² The incorporation of such quantitative data helps serve the purpose of ensuring critical analytical scrutiny of the data & its incorporation to the primary line of argument of this article.

⁶ Unlawful Activities (Prevention) Act 1967, s 43D(5).

⁷ Constitution of India, arts 14, 21 and 22.

⁸ *Watali* (n 3)

⁹ *Thwaha Fasal v Union of India* 2021 SCC OnLine SC 1000.

¹⁰ *Vernon Gonsalves v State of Maharashtra* 2023 SCC OnLine SC 885.

¹¹ *Prabir Purkayastha* (n 5).

¹² National Crime Records Bureau, *Prison Statistics India 2022* (Ministry of Home Affairs 2023).

THE ARCHITECTURE OF REPRESSION: SECTION 43D(5) OF THE UAPA

The Unlawful Activities Prevention Act, 1967, particularly after the amendments introduced in 2008 & 201, functions as India's principal legislation dealing with terrorism & unlawful activities. Among its most controversial provisions is Section 43D(5), which lays down a substantially stricter framework for the grant of bail as compared to the ordinary principles of governing bail under the Bhartiya Nyaya Suraksha Sanhita, 2023. The provision mandates that a court shall refuse bail where, upon the examination of the case diary or the police report submitted under Section 193 of BNSS, it finds "reasonable grounds for believing" that the allegations under the accused are prima facie true.¹³

In its practical operation, the provision creates an exceptionally restrictive barrier against personal liberty. On one hand, the threshold prescribed for denial of bail is considerable lower than the standard of proof required for securing a conviction during trial. On the other hand, judicial interpretation of the provisions has considerably narrowed the scope of scrutiny available to courts at the stage of bail, often limiting them to a prima facie assessment based predominantly upon the material produced by the prosecution itself. Consequently, the statutory framework effectively enables untested allegations & prosecutorial assertions to become sufficient grounds for prolonged pretrial incarceration, thereby transforming the process of investigation itself into a mechanism of continued detention.

NATIONAL INVESTIGATION AGENCY V WATALI: WHEN JUDICIAL DEFERENCE BECOMES DOCTRINAL ABDICATION

The decision of the Hon'ble Supreme Court in National Investigation Agency v Zahoor Ahmad Shah Watali marked a significant turning point in the interpretation of Section 43D(5) of the UAPA & effectively institutionalised one of the most restrictive standards governing bail under Indian Criminal Law.¹⁴ In the said judgement, a two-judge bench of the Supreme Court held that while considering an application for bail under the UAPA, courts are not expected to undertake a detailed examination of evidence or assess its evidentiary value in a meticulous manner. Instead, the scope of judicial scrutiny was confined merely to determining whether the material placed on record by the prosecution disclosed the existence of a prima facie case against the accused. The Court further observed that even disputed material produced by the

¹³ Unlawful Activities (Prevention) Act 1967, s 43D(5); Bharatiya Nagarik Suraksha Sanhita 2023, s 193.

¹⁴ *Watali* (n 3).

prosecution could be relied upon at the stage of bail, thereby considerably limiting the scope of judicial intervention in favour of personal liberty.

The practical consequences arising out of the Watali judgement have been both significant & deeply concerning from a constitutional perspective. One of the clearest illustrations of the operational impact of the judgement emerged in the Elgar Parishad-Bhima Koregaon investigation wherein several academics, lawyers, journalists, trade unionists, & human rights activists remained incarcerated for prolonged periods as undertrial prisoners. Among them was Father Stan Swamy, an eighty-four-year old Jesuit priest & tribal rights activist, who passed away in judicial custody in July 2021 while his application for bail continued to remain pending before the courts. In several such prosecutions, material placed before the courts by the investigation agencies, including documents submitted in sealed covers, was largely accepted at face value for the purposes of determining bail. Consequently, the framework evolved in Watali has often been criticised for reducing the judicial process at the stage of bail into a largely deferential exercise, where the prosecution's version attains a presumption of credibility without undergoing substantive judicial scrutiny.

The constitutional implications of such an interpretation extend far beyond the limited question of procedural fairness in bail proceedings. In *Hussainara Khatoon v Home Secretary, State of Bihar*, the Hon'ble Supreme Court unequivocally recognised the right to speedy trial as an essential component of Article 21 & held that prolonged incarceration of undertrial prisoners constitutes a direct infringement of the guarantee of personal liberty.¹⁵ The interpretive approach adopted in Watali appears to stand in considerable tension with these constitutional principles, particularly in cases where trials under the UAPA continue for several years while accused persons remain incarcerated without a determination of guilt. In effect, the restrictive bail framework under Section 43D(5), as judicially interpreted, risks transforming pretrial detention from an exceptional measure into a prolonged punitive mechanism operating prior to conviction itself.

THE CONSTITUTIONAL CORRECTIVE: KA NAJEEB AND THE ARTICLE 21 OVERRIDE

A significant constitutional qualification to the restrictive framework evolved in Watali

¹⁵ *Hussainara Khatoon v Home Secretary, State of Bihar* (1980) 1 SCC 81.

emerged in February 2021 through the decision of the Hon'ble Supreme Court in *Union of India v KA Najeeb*.¹⁶ In the said judgement, a three-judge bench of the Court recognised that the stringent limitations imposed by Section 43D(5) of the UAPA cannot operate so absolutely as to curtail the constitutional powers of the High Courts & the Supreme Court under Articles 226, 32, & 21 of the Constitution, The Court held that where prolonged incarceration & delay in trial result in a violation of the accused's fundamental right to life & liberty, constitutional courts retain the authority to grant bail notwithstanding the statutory embargo contained under the UAPA. In essence, the judgement acknowledged that pretrial detention cannot be permitted to assume the character of punishment in the absence of a completed trial & judicial determination of guilt.

The decision in *Najeeb* therefore represented an important reaffirmation of constitutional supremacy over statutory restriction. By recognising that legislative limitations cannot entirely extinguish the constitutional obligation of courts to protect personal liberty, the judgement restored, at least partially, the primacy of Article 21¹⁷ within the framework of anti-terror legislation. The core constitutional principles emerging from the judgement, that statutory restrictions must ultimately remain subordinate to the guarantees of life & liberty under the Constitution, remains one of considerable doctrinal significance.

However, despite its constitutional importance, the judgement stopped short of evolving a comprehensive doctrinal standard governing the exercise of such constitutional discretion. While the Court recognised prolonged incarceration as a valid ground for grant of bail notwithstanding Section 43D(5), it did not clearly defined the threshold at which continued detention would become constitutionally impermissible. The absence of clearly articulated standards concerning duration of custody, stage of trial, nature of evidence, or proportionality of detention has consequently left substantial discretion in the hands of lower courts. This lack of doctrinal clarity has, in practice, resulted in uneven & inconsistent application of the principles laid down in *Najeeb*, thereby limiting the transformative constitutional potential of the judgement itself.

¹⁶ *KA Najeeb* (n 4).

¹⁷ Constitution of India, art 21.

THE INCONSISTENCY PROBLEM: A JURISPRUDENCE IN TENSION WITH ITSELF

The judicial trajectory following the decision in *KA Najeeb*¹⁸ has been marked by considerable doctrinal inconsistency in the interpretation & application of Section 43D(5) of the UAPA. In *Thwaha Fasal v Union of India*, the Hon'ble Supreme Court granted bail to a student accused under the provisions of the UAPA while placing substantial reliance upon the absence of sufficient prima facie material directly connecting the accused to any terrorist activity.¹⁹ In doing so, the court appeared to adopt a relatively broader standard of judicial scrutiny at the stage of bail, thereby indirectly moderating the otherwise restrictive approach evolved in *Watali*. The judgement indicated that constitutional courts could not remain entirely passive spectators to prosecutorial assertions & that some degree of judicial examination of the material on record remained necessary in order to safeguard personal liberty.

A similar constitutional concern became visible in *Vernon Gonsalves v State of Maharashtra*, wherein the Supreme Court granted bail after the accused had undergone more than five years of incarceration as an undertrial prisoner.²⁰ While adjudicating the matter, the court acknowledged the serious constitutional implications arising from prolonged pretrial detention & recognised that continued incarceration without timely completion of trial directly implicates the guarantee of personal liberty under Article 21 of the Constitution. The decision therefore reflected an emerging judicial recognition that anti-terror legislation, irrespective of its object, cannot operate entirely insulated from constitutional scrutiny concerning fairness, proportionality, & liberty.

However, notwithstanding these decisions, several other benches of the Supreme Court as well as various High Courts have continued to apply the restrictive framework laid down in *Watali* with substantive rigidity, often refusing bail solely on the basis of prosecution material that has not yet undergone evidentiary testing during trial. The continuing coexistence of *Watali* & *Najeeb* without any authoritative reconciliation by a larger constitutional bench has resulted in a fragmented & uncertain bail jurisprudence under the UAPA. Consequently, the determination of an accused person's entitlement to liberty frequently appears dependent not upon settled constitutional standard but upon the particular judicial approach adopted by the bench hearing

¹⁸ *KA Najeeb* (n 4).

¹⁹ *Thwaha Fasal* (n 9).

²⁰ *Vernon Gonsalves* (n 10).

the matter. Such a position raises serious constitutional concerns, particularly in light of Article 14's guarantee of equality before law & equal protection of laws. A constitutional framework in which access to personal liberty becomes contingent upon judicial inconsistency rather than principled adjudication risks undermining both the predictability & legitimacy of the criminal justice system itself.

PROCEDURAL RIGHTS AND PRABIR PURKAYASTHA: A NECESSARY BUT INSUFFICIENT STEP

In May 2024, the Hon'ble Supreme Court in *Prabir Purkayastha v State (NCT of Delhi)* strengthened procedural safeguards available under the UAPA.²¹ The Court held that the grounds of arrest must necessarily be communicated to the accused in writing and that mere oral disclosure would not satisfy the constitutional requirement under Article 22(1).²² Consequently, the arrest of the NewsClick editor without written communication of grounds of arrest was held to be constitutionally invalid, thereby entitling him to bail.

The judgement is significant as it reaffirms that even within the exceptional framework of the UAPA, constitutional protections relating to personal liberty & procedural fairness cannot be displaced entirely. However, its practical scope remains limited since it primarily addresses procedural safeguards at the stage of arrest & does not substantially engage with the larger issue of prolonged pretrial detention under the existing bail framework of the UAPA.

THE UNDERTRIAL CRISIS: DATA AS CONSTITUTIONAL ARGUMENT

The constitutional critique against the UAPA's bail framework finds substantial support in the empirical realities of India's prison system. The Prison Statistics India report published by the National Crime Records Bureau reveals that more than seventy-five percent of India's prison population comprise undertrial prisoners, namely individuals who have not been convicted of any offence.²³ In cases involving the UAPA, the concern becomes even more serious owing to low conviction rates & extra-ordinarily prolonged trial proceedings which often continue for several years or even decades. Consequently, the statute does not merely impose restrictions upon bail; in its practical operation, it risks transforming the process of trial itself into a form

²¹ *Prabir Purkayastha* (n 5).

²² Constitution of India, art 22(1).

²³ National Crime Records Bureau, *Prison Statistics India 2022* (n 12).

of punishment.

The empirical reality is not peripheral to the constitutional analysis but central to it. Where the operation of a statute results in the systematic & prolonged incarceration of persons who enjoy the presumption of innocence, serious constitutional concerns arise regarding its compatibility with the principles of fair trial & personal liberty guaranteed under Article 21. The right to speedy trial & the presumption of innocence constitute foundational principles of criminal jurisprudence, & any statutory framework that disproportionately curtails these guarantees must necessarily be subjected to rigorous constitutional scrutiny.

REFORM IMPERATIVES: TOWARD A CONSTITUTIONALLY COMPLIANT FRAMEWORK

A constitutionally adequate response to the UAPA's liberty deficit requires reform at multiple levels. First, the Supreme Court should constitute a larger bench to reconcile *Watali*²⁴ & *KA Najeeb*²⁵ lay down clear standards for determining when prolonged pretrial detention violates Article 21. Secondly, Parliament should introduce mandatory periodic judicial review of detention under the UAPA so that incarceration does not continue indefinitely merely because a trial remains pending.

Further, the definitions of "terrorist act" & "unlawful activity" under the UAPA which are presently broad in scope, should be narrowly construed to prevent misuse of the statute against legitimate dissent & civil society activism, a concern repeatedly raised by constitutional courts as well as the United Nations Special Rapporteur on Human Rights Defenders

CONCLUSION

The Preamble to the Constitution guarantees justice, social, economic, and political along with liberty to every citizen. These guarantees are not merely aspirational ideals but enforceable constitutional commitments. A penal framework that systematically subjects presumed innocent individuals to prolonged incarceration, relies upon untested prosecutorial allegations to determine liberty, and provides limited doctrinal clarity regarding constitutional safeguards,

²⁴ *Watali* (n 3).

²⁵ *KA Najeeb* (n 4).

inevitably creates tension with the constitutional order it seeks to uphold.

Although recent judgments of the Hon'ble Supreme Court have introduced important constitutional correctives, such interventions have remained limited and incremental in nature. What is presently required is not merely case-specific judicial intervention, but a clear and coherent constitutional framework governing bail under the UAPA, one that meaningfully protects personal liberty while remaining consistent with the constitutional values embodied in the Preamble.