



The Indian Journal for Research in Law and Management

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INVERTED JUSTICE: HOW PMLA AND UAPA TURNED

“BAIL AS A RULE TO JAIL AS THE RULE”

HIBA HAYAT

Abstract

Inverted Justice: How the PMLA and UAPA have turned bail into a rule of imprisonment¹. A fundamental principle of Anglo-Saxon criminal law—widely adopted in Indian constitutional law by Justice V.R. Krishna Iyer—states that "bail is the rule and jail is the exception". This principle, stemming from the presumption of innocence guaranteed by Article 21 of the Indian Constitution, requires that a person's personal liberty should not be restricted before being convicted unless it is absolutely necessary to ensure the accused appears in court or to protect the integrity of the judicial process².

However, specific laws such as Section 45 of the Prevention of Money Laundering Act, 2002 (PMLA), and Section 43D (5) of the Unlawful Activities (Prevention) Act, 1967 (UAPA), have systematically reversed this principle³. By setting up strict legal conditions and limiting the courts' discretion, these provisions place the burden of proof on the accused at an early stage, making it practically impossible to obtain pre-trial release. This in-depth legal analysis examines the workings of these statutes, the constitutional conflicts they trigger, and the key judicial decisions concerning bail under the PMLA and UAPA⁴. It outlines the historical shift from a liberal, liberty-based approach to a strict system of preventive legislation. It argues that in practice, the operation of these laws turns pre-trial detention into a form of summary, unjudged punishment. Finally, the article suggests concrete reforms to restore procedural

¹ Unlawful Activities Prevention Act, No. 37 of 1967

² India Const. art. 14, 21.

³ Prevention of money Laundering Act, No. 15 of 2003, Unlawful activities prevention act, No. 37 of 1967

⁴ Unlawful Activities Prevention Act No. 37 of 1967



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fairness while taking into account both the state's security interests and the constitutional rights of individuals.

Introduction

In the case of *State of Rajasthan v. Balchand* (1977), the Supreme Court of India clearly stated the central idea of procedural fairness: any deprivation of personal liberty before a conviction must be treated as an exceptional measure. This judicial principle is based on Article 21 of the Constitution, which protects life and personal liberty against arbitrary actions by the executive, and Article 14, which ensures equal protection under the law⁵. The right to bail represents a careful balance between an individual's autonomy and society's legitimate interest in ensuring that an accused person does not flee, tamper with evidence, or intimidate witnesses.

Over the past twenty years, India's legislative framework has seen a rapid increase in special laws aimed at dealing with complex socio-economic crimes, white-collar offences, organized crime, and threats to national security. The main of these laws are the Prevention of Money Laundering Act (PMLA) and the Unlawful Activities (Prevention) Act (UAPA)⁶. Although the original purpose of these laws—combating international financial fraud, money laundering, and terrorist activities—is certainly legitimate, the procedures established to enforce them seriously undermine fundamental rights. The inclusion of heavy and non-standard bail conditions in these special statutes has resulted in a fundamental reversal of the criminal justice system. In reality, the long-standing presumption of innocence until proven guilty is replaced by a statutory presumption of guilt when bail is being considered. When lower courts are procedurally barred from granting bail, prolonged pre-trial detention becomes the norm. As a result, the trial process itself becomes the main form of punishment long before guilt has been established beyond a reasonable doubt.

⁵ Indian Const. art. 14, 21.

⁶ Unlawful Activities Prevention Act, No. 37 of 1967, India Code 43D (5) (1967)



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The Statutory Reversal: How the Special Provisions Work

The change from "bail as the rule" to "jail as the rule" is caused by specific legal thresholds that greatly restrict the discretion of criminal courts when considering bail applications. These statutory measures set an extremely high barrier for an accused person to meet.

Section 45 of the PMLA: The Burden of the Two Conditions

Section 45(1) of the PMLA provides that no person accused of an offence under the Act shall be released on bail unless two cumulative "twin conditions" are satisfied: first, the Public Prosecutor must be given a clear opportunity to oppose the bail application; and second, if the Public Prosecutor does oppose it, the court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence and that they are not likely to commit any offence while on bail⁷. This statutory requirement means that the court must come to a preliminary conclusion about the accused's innocence before the full trial has even started. In practice, it forces the defence to disprove the prosecution's case at the initial stage, effectively reversing the traditional burden of proof. Since it is practically impossible to prove one's innocence before cross-examination or the presentation of trial evidence, pre-trial detention becomes an unavoidable outcome.

Section 43D (5) of the UAPA: The Prohibition on Judicial Review

Section 43D (5) of the UAPA introduces a clear legal prohibition on granting bail in cases where the offence is punishable under Chapters IV and VI of the Act⁸. The provision states that an accused person shall not be released on bail if the court, after examining the case diary or the police report submitted under Section 173 of the Code of Criminal Procedure (CrPC), forms

⁷ Code of Criminal Procedure, No. 2 of 1974, India code (1974).

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



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the opinion that there are reasonable grounds for believing that the accusation against the person is prima facie true⁹.

Unlike standard bail hearings under the CrPC, where the court takes into account factors such as the risk of flight, the possibility of evidence tampering, and the seriousness of the offence, Section 43D (5) limits judicial inquiry to the police documents¹⁰. Defence evidence is generally not allowed at the bail stage, meaning the court must assess the case based solely on the prosecution's one-sided account. This greatly reduces the scope for judicial review, creating a statutory situation in which bail is almost always denied once a charge sheet containing terrorism allegations has been filed.

Constitutional and Judicial Analysis

The constitutionality of restrictive bail provisions has led to a great deal of litigation before the Supreme Court of India, resulting in a developing and often fluctuating line of judicial interpretation.

The Shifting Jurisprudence on PMLA Section 45

The Supreme Court's position on Section 45 of the PMLA has changed significantly over the past ten years¹¹:

In *Nikesh Tarachand Shah*¹² v. Union of India (2018), the Supreme Court declared the twin conditions under Section 45(1) to be unconstitutional, stating that they violated Articles 14 and 21¹³. The Court stressed that requiring bail eligibility to be based on non-threshold offences created an arbitrary system that infringed on personal liberty.

⁹ Prevention of Money Laundering Act, No. 15 of 2003, India Code 45(1) (2003).

¹⁰ Unlawful Activities Prevention Act, No.37 of 1967, India Code 43D (5) (1967), Code of Criminal Procedure, No. 2 of 1974, India Code (1974).

¹¹ Prevention of Money Laundering Act, No. 15 of 2003, India code 45(1) (2003).

¹² *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 (India).

¹³ Prevention of Money Laundering Act, No. 15 of 2003, India Code 45(1) (2003).



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Legislative Amendment (2018): Following the Nimesh Tarachand Shah decision, Parliament amended Section 45 by correcting the technical flaw identified by the Court by replacing the phrase "punishable for a term of imprisonment of more than three years" with "offence under this Act", thus restoring the twin conditions¹⁴.

In *Vijay Madanlal Choudhary*¹⁵ v. Union of India (2022), a three-judge bench of the Supreme Court upheld the constitutionality of the amended Section 45¹⁶. The Court held that money laundering is an independent and serious economic offence against the nation's financial system, and therefore stringent bail conditions are justified.

Post-2024 Nuanced Jurisprudence: In light of the consequences of *Vijay Madanlal Choudhary*, the Supreme Court in cases such as *Manish Sisodia*¹⁷ v. Directorate of Enforcement (2024) and *V. Senthil Balaji*¹⁸ v. Directorate of Enforcement (2024) clarified that Section 45 cannot be used as a means of indefinite pre-trial detention¹⁹. The Court stated that long-term imprisonment without a trial violates Article 21 and therefore established a narrow exception allowing bail to be granted even under the PMLA²⁰.

The Evolution of UAPA Bail Jurisprudence

Judicial interpretation of Section 43D(5) of the UAPA illustrates a continuous tension between national security interests and individual freedoms²¹:

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¹⁵ *Vijay Madanlal Choudhary v. Union of India* 2022 SC929 (India).

¹⁶ Prevention of Money Laundering Act, No. 15 of 2003, India Code 459 (1) (2003), Finance Act, No.13 of 2018, 208 (India).

¹⁷ *Vijay Madanlal Choudhary v. Union of India*, 2022 SSC online SC 929 (India); *Manish Sisodia v. Directorate of Enforcement*, 2024 SSC Online SC 1920 (India).

¹⁸ *V. Senthil Balaji v. Deputy Director, Directorate of Enforcement*, 2024 SCC online SC 2085 (India).

¹⁹ Prevention of Money Laundering Act No. 15 of 2003, India Code 45(1) (2003).

²⁰ INDIA CONST. arts. 14, 21.

²¹ Unlawful Activities Prevention Act, No. 37 of 1967, India code 43D (5) (1967).



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- In the case of *National Investigation Agency v. Zahoor Ahmad Shah Watali* (2019) the Supreme Court held that when deciding a bail application under the UAPA the courts should not assess the evidential value of the prosecution's materials; rather they had to accept the prosecution's documents on their face to decide whether the allegations are prima facie true, thus greatly restricting the judiciary's discretion in granting relief²².
- In the case of *Union of India v. K.A. Najeeb* (2021), the Supreme Court set up an important constitutional safeguard by deciding that statutory provisions contained in special acts such as the UAPA cannot negate the constitutional powers of the High Courts and the Supreme Court to enforce fundamental rights²³. The Court stated that if an individual who has not yet been convicted is held in custody for an extended period and a quick trial seems impossible, then Article 21 takes precedence over Section 43D(5)²⁴.
- In the case of *Gurwinder Singh*²⁵ v. *State of Punjab* (2024) the Supreme Court reaffirmed the strict nature of the UAPA by stating that the provisions under Section 43D(5) are the rule and that bail can only be granted in exceptional circumstances where the allegations are not prima facie true²⁶. Nevertheless, later judgments have still been concerned with whether the K.A. Najeeb principle should be applied broadly in order to avoid indefinite detention.

The practical impact and concerns regarding human rights

Pre-Trial Incarceration as Summary Punishment

Because of the strict standards set out in PMLA and UAPA, an accused person has to show that they are almost innocent when the case first reaches the trial stage²⁷. Together with prolonged

²²Unlawful Activities Prevention Act, No. 37 of 1967, India Code 43D (5) (1967); *National Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 (India)

²³ Unlawful Activities Prevention act, No. 37 of 1967, India Code 43D (5) (1967).

²⁴ INDIA CONST. art. 14,21.

²⁵ *Gurwinder Singh v. State of Punjab*, 2024 SCC Online SC 97 (India).

²⁶ Unlawful Activities Prevention Act, no. 37 of 1967, India code 43D (5) (1967).

²⁷ Unlawful Activities Prevention act, no. 37 of 1967, India Code 43D (5) (1967).



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investigations, huge charge sheets, hundreds of named witnesses, and a backlog of cases in the courts, it often takes years or even decades to complete a trial. As a result, people continue to be held in custody for long periods without being convicted and this means that pre-trial detention effectively serves as a form of punishment.

Subversion of the Presumption of Innocence

The principle of innocence is fundamental to procedural fairness in the area of criminal law. Where special laws such as the PMLA require the person accused to disprove the police allegations at the bail stage or where the courts are prevented from challenging the prosecution's version of events under the UAPA, the basic presumption is changed²⁸. As a result, the legal system operates on the unstated assumption that the accused is guilty and it is up to them to prove their innocence if they are to have their liberty restored.

Erosion of Judicial Discretion

The extent to which the judiciary can remain independent relies on its capacity to use equitable discretion in light of the particular facts of each case. When statutes introduced by special legislation take away this discretion, bail hearings are reduced to a simple examination of the allegations made by the executive. This kind of structural limitation hampers the judiciary's ability to function as a constitutional remedy against police overreach or prosecutions which are motivated by political considerations.

A comparison of the standard bail arrangements with the special bail frameworks

Understanding the structural shift caused by special statutes requires analyzing how standard criminal procedure under the CrPC differs from provisions under the PMLA and UAPA:

²⁸ Unlawful Activities Prevention act, no. 37 of 1967, India Code 43D (5) (1967).



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- **Primary legal presumption:** According to the usual provisions of the CrPC, the presumption of innocence is fully applicable at the pre-trial stage and therefore bail is the normal position²⁹. However, under section 45 of the PMLA this presumption is changed so that the accused has to actively prove their innocence. Moreover, under section 43D(5) of the UAPA bail is prevented if the charges brought by the prosecution are deemed to be *prima facie* true³⁰.
- **Regarding the burden and the standard of proof:** In the case of bail proceedings under the CrPC, it is the prosecution which has to show that detention is necessary, taking into account factors such as the risk of flight or the possibility of witness tampering³¹. However, under the PMLA the burden is on the defence to prove to the court that there are broad probabilities of their innocence. Under the UAPA the standard strongly favours the prosecution since the courts are required to accept the state's reports at face value without examining the evidence put forward by the defence³².
- **The extent of the judicial inquiry:** In ordinary bail applications judges weigh an individual's freedom against the need for procedure; but in the case of special acts the judicial inquiry is strictly restricted by statutory prohibitions and this limits the judge's ability to provide equitable relief apart from cases where there have been constitutional violations as a result of excessive trial delays.

The impact on the criminal justice system in institutional terms

The operational inversion of bail rules carries deep institutional consequences for the broader administration of justice in India:

- There is a problem with overcrowding in India's prisons since a large number of people detained there are undertrials—that is, individuals who have not yet been convicted of any

²⁹ Code of criminal procedure No. 2 of 1974, India code (1974).

³⁰ Unlawful activities prevention act No.37 of 1967, India code 43D (5) (1967).

³¹ Code of criminal procedure No. 2 of 1974, India code (1974).

³² Unlawful activities prevention act No.37 of 1967, India code 43D (5) (1967).



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crime. The high bail requirements set out in laws such as the PMLA and UAPA and in similar acts make the situation of overcrowding worse and give rise to serious human rights concerns concerning sanitation, health, and dignity while in custody³³.

- The weaponization of criminal procedure occurs when it becomes very difficult to get bail, so that the act of arresting a person under a special statute acquires excessive influence. Executive agencies gain enormous power to incarcerate people for long periods merely by submitting a charge sheet, which raises worries about the possible abuse of the legal process.
- Negative impact on civil liberties: The regular refusal to grant pre-trial bail under national security and economic laws can have a deterrent effect on political dissent, investigative journalism, and activities carried out by civil society. If the standard for being released before trial is very high, people may end up being detained for a long time even if the charges are later proven wrong in court.

Conclusion

The laws provided for under the PMLA and UAPA have set up a separate system of criminal justice in which the normal constitutional protections are mostly denied³⁴. Although it is necessary for the state to investigate complex financial offences and to deal with threats to national security, it cannot do so by violating the main constitutional rights. It is important to maintain the presumption of innocence if the rule of law is to be preserved, and a constitutional democracy must not permit temporary state objectives to cause fundamental personal freedoms to be permanently weakened.

³³ Unlawful activities prevention act No.37 of 1967, India code 43D (5) (1967).

³⁴ Unlawful activities prevention act No.37 of 1967, India code 43D (5) (1967).