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EDITORIAL ANALYSIS

Bail Under UAPA — When the Supreme Court Speaks with Many Voices

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INTERVIEW ANGLE

"How should the Supreme Court reconcile contradictory bail jurisprudence under UAPA Section 43D(5) to protect Article 21 guarantees for undertrial prisoners without compromising the legitimate security objectives of anti-terror legislation?"

EDITORIAL SUMMARY:

The Indian Express argues that contradictory Supreme Court bail orders under UAPA Section 43D(5) — where different benches grant bail in some cases and deny it in factually similar ones — create a systemic unpredictability that functions as a de facto tool of incarceration, keeping undertrial prisoners confined for years without trial conclusions. The editorial contends that this jurisprudential inconsistency is not merely an administrative inconvenience but a structural violation of Article 21 guarantees, and calls for a larger constitutional bench to settle UAPA bail jurisprudence once and for all, establishing clear standards that protect individual liberty while preserving legitimate security interests.

THE STATUTE THAT REVERSED A PRESUMPTION

Criminal law in India — as in most constitutional democracies — is premised on the presumption of innocence until proven guilty. The right to bail, derived from Articles 21 (right to life and personal liberty) and 22 (protection against arbitrary arrest and detention) of the Constitution, is not a concession — it is the default position. Pre-trial detention is the exception, justified only by compelling necessity: risk of flight, tampering with evidence, or danger to the public.

The **Unlawful Activities (Prevention) Act, 1967**, as amended in 2004, 2008, and 2019, creates a different regime. Section **43D(5)** of the UAPA provides:

> *Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release: Provided that such accused person shall not be released on bail if the Court, on a perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, 1973 is of opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true.*

The critical phrase is **"prima facie true"** — a standard that inverts the normal bail presumption. Under ordinary criminal procedure, the prosecution must show why a person should be held; under UAPA 43D(5), the accused must overcome a judicial finding that the accusation against them appears, even at this early stage, credible. Since the bar is set at the initial case diary (which contains only the prosecution's version), and since UAPA charges are by their nature serious, dramatic, and documented through intelligence reports, the practical effect of Section 43D(5) is to make bail in UAPA cases extraordinarily difficult.

THE WATALI CASE: HOW BAIL BECAME NEAR-IMPOSSIBLE

The Supreme Court's 2019 judgment in **NIA v. Zahoor Ahmad Shah Watali** crystallised the most restrictive interpretation of UAPA bail jurisprudence. The bench held that under Section 43D(5), courts are not permitted to undertake a minute examination of evidence at the bail stage — they must look only at whether, on the face of it, the accusation appears prima facie true, and if it does, bail must be denied.

The Watali judgment created a near-unscalable wall for UAPA undertrial prisoners. Since the case diary almost always contains material that supports the prosecution's theory — that is its purpose — and since the Supreme Court had now instructed courts not to scrutinise this material critically at the bail stage, the practical outcome was that UAPA bail applications became pro forma exercises in denial. Defence counsel could argue, courts could listen, but the Watali standard made meaningful judicial engagement with the merits of custody almost impossible.

The downstream consequences were immediate and severe. Hundreds of undertrial prisoners — some of them academics, activists, and journalists charged under UAPA in high-profile cases — remained in custody for years. Their trials had not begun. The evidence against them had not been tested. They had simply been accused, and the accusation — by the logic of Watali — was sufficient to justify continued incarceration.

NAJEEB: A BREATH OF AIR, BUT NOT A SOLUTION

Two years after Watali, the Supreme Court attempted a partial correction in **Union of India v. K.A. Najeeb (2021)**. The bench held that while Section 43D(5) creates a stringent bail standard, it does not — and constitutionally **cannot** — entirely extinguish the power of constitutional courts (the High Courts and the Supreme Court itself) to grant bail in cases of **prolonged, unjustified incarceration**.

The Najeeb judgment drew on the constitutional guarantee of Article 21 and the principle established in **Hussainara Khatoon v. State of Bihar (1979)** — that the right to a speedy trial is an explicit fundamental right under Article 21, as a component of the right to life and personal liberty. When an undertrial prisoner has spent years in custody without a trial reaching any meaningful stage, the constitutional courts retain their inherent power under Articles 32 and 226 to grant bail, notwithstanding Section 43D(5).

This was a meaningful qualification of Watali. But Najeeb created its own problem: it did not define how long was "too long," what constituted meaningful trial progress, or how courts should weigh security concerns against Article 21 guarantees. It gave constitutional courts a tool without a calibration.

VERNON GONSALVES AND THE CONTRADICTION THAT REMAINS

In 2023, the Supreme Court granted bail to **Vernon Gonsalves and Arun Ferreira**, two of the accused in the Elgar Parishad-Bhima Koregaon case, after both had spent over five years in UAPA custody without trial completion. The bench held, following Najeeb, that the prolonged incarceration itself — in the absence of trial progress — constituted a violation of Article 21 that the court was obligated to remedy.

But here is the contradiction that The Indian Express's editorial documents and that makes the current situation so troubling: in **multiple cases before different Supreme Court benches in 2025 and 2026**, bail has been denied in situations that appear factually similar — long incarceration, slow trial progress, and UAPA charges that have not been meaningfully tested. Different benches of the same court, applying the same statutory provision and the same constitutional principles, are reaching opposite conclusions.

This is not merely inconsistency — it is **systemic unpredictability**. For a UAPA accused and their counsel, whether bail is granted or denied has become, in part, a function of which bench they appear before. This is incompatible with the rule of law.

THE UNDERTRIAL CRISIS: NUMBERS THAT SHAME THE SYSTEM

The UAPA bail inconsistency is part of a larger, devastating systemic failure. **NCRB Prison Statistics India (2023 data)** reveals that approximately **73.5–75% of India's prison population** consists of undertrial prisoners — persons awaiting trial who have not been convicted of any offence. India incarcerates more undertrials than many democracies incarcerate total prisoners.

UAPA cases represent an extreme within this crisis:

- Trials in UAPA cases routinely take **5–10 years** from arrest to any verdict, often longer
- Many accused spend the entire trial period in custody; some are acquitted after years of incarceration
- The **NIA (National Investigation Agency)**, which handles most high-profile UAPA cases, has a disposal rate far slower than ordinary criminal courts due to the complexity and sensitivity of cases

- Witnesses are frequently reluctant to testify; documentary evidence requires forensic analysis; electronic records create disclosure complications — all extending pre-trial periods

For these prisoners, the bail question is not abstract. Every year in pre-trial custody is a year of life, family, career, and reputation destroyed before any judicial finding of guilt.

WHY A CONSTITUTIONAL BENCH IS NOW NECESSARY

The Indian Express editorial makes the case that the contradictions in UAPA bail jurisprudence have reached a point where a **larger constitutional bench of the Supreme Court** must comprehensively settle the law. What is needed is not another two-judge or three-judge bench ruling on a specific case, but a five-judge (or larger) constitution bench that:

1. **Re-examines the constitutional validity of Section 43D(5)** in light of Article 21 — specifically, whether the prima facie standard, as interpreted in Watali, violates the right to a fair trial and the presumption of innocence as components of Article 21
2. **Establishes clear temporal standards:** At what point does prolonged incarceration without trial progress trigger the court's obligation to grant bail regardless of 43D(5)?
3. **Defines the evidentiary review standard:** Courts need guidance on how to assess whether an accusation is "prima facie true" without doing what Watali said they could not — engaging in a detailed examination of evidence. These two requirements are in tension, and the tension must be resolved authoritatively.
4. **Addresses bench shopping:** The current regime allows strategic forum selection — prosecution prefers benches likely to deny bail; defence prefers benches likely to grant it. This cannot be the basis on which liberty is determined.

The broader constitutional principle at stake is the one articulated in **Maneka Gandhi v. Union of India (1978)**: that the procedure established by law for depriving a person of liberty must itself be fair, just, and reasonable. A procedure that makes bail effectively unavailable for five to ten years, in the absence of a conviction, and that produces opposite outcomes depending on judicial assignment, fails this standard.

UPSC MAINS ANALYSIS

GS Paper 2 — Polity and Governance: Fundamental Rights and Judiciary

- **UAPA and its constitutional tension:** The architecture of Section 43D(5) as a departure from the CrPC bail presumption; comparison with POTA (repealed 2004), TADA (lapsed 1995), and AFSPA bail provisions

- **Watali (2019), Najeeb (2021), Gonsalves (2023):** The evolution of UAPA bail jurisprudence — trajectory, contradictions, and what a coherent doctrine would require
- **Article 21 — expanded interpretation:** From Maneka Gandhi (1978) onwards — procedure must be fair, just, reasonable; Hussainara Khatoon (1979) — speedy trial as FR; K.S. Puttaswamy (2017) — privacy as component of Article 21
- **Undertrial crisis in India:** ~73.5–75% undertrial share (NCRB 2023 data; 5,30,333 total prisoners); causes (slow trials, inadequate legal aid, bail affordability); NALSA and undertrial review committees
- **NIA and UAPA enforcement:** National Investigation Agency Act, 2008; NIA's jurisdiction and powers; relationship between investigation quality and prolonged pre-trial detention; the 2019 UAPA amendment also expanded NIA jurisdiction to investigate UAPA cases regardless of which state police registered the FIR — raising federal balance concerns under the Seventh Schedule
- **Judicial inconsistency as a constitutional problem:** The rule of law requires like cases to be treated alike; contradictory bail outcomes in factually similar UAPA cases violate this principle

GS Paper 4 — Ethics: Institutional Ethics and Justice

- **Ethics of preventive incarceration:** The moral burden of holding persons in custody before conviction — balancing security necessity against individual liberty
- **Institutional accountability:** When different judges of the same court reach opposite conclusions on liberty, what accountability mechanisms exist?
- **The human cost of procedural injustice:** Undertrial imprisonment destroys lives — ethical frameworks for evaluating the proportionality of security laws

Keywords: UAPA Section 43D(5), NIA v. Zahoor Ahmad Shah Watali 2019, Union of India v. KA Najeeb 2021, Vernon Gonsalves bail 2023, Elgar Parishad Bhima Koregaon, Article 21 right to life, Maneka Gandhi v. Union of India 1978, Hussainara Khatoon speedy trial, undertrial prisoners India 73-75% NCRB 2023, Prison Statistics India, constitutional bench UAPA, bail jurisprudence inconsistency, NIA National Investigation Agency, anti-terror legislation liberty, prima facie standard bail.

Inserted by the UAPA Amendment Act 2008; applies to offences under Chapters IV (unlawful activities) and VI (terrorist activities) of UAPA; reverses the ordinary bail presumption by requiring courts to deny bail if the accusation appears prima facie true on perusal of the case diary; the Public Prosecutor must be heard before any bail order.

Supreme Court (two-judge bench) held that under 43D(5), bail courts must not undertake minute examination or weighing of evidence — the standard is simply whether, broadly speaking, the accusation is prima facie true; effectively set an extremely high bar for UAPA bail; remains a binding precedent.

Supreme Court (three-judge bench) held that constitutional courts retain inherent power under Articles 32/226 to grant bail in cases of prolonged incarceration even under UAPA, because the right to speedy trial under Article 21 cannot be extinguished by Section 43D(5); did not define how long is "too long."

Both accused in the Elgar Parishad-Bhima Koregaon UAPA case; arrested August 2018; granted bail by Supreme Court in 2023 after over 5 years of incarceration without trial completion; court held prolonged incarceration without trial progress violated Article 21.

Approximately 73.5–75% of India's approximately 5.3 lakh prisoners (5,30,333 total, NCRB 2023) are undertrials; India has one of the highest undertrial proportions globally; causes include slow trials, inadequate bail systems, and legal aid gaps; NALSA (National Legal Services Authority) runs undertrial review committees under Supreme Court direction.

Landmark Supreme Court ruling expanding Article 21 — held that "procedure established by law" must itself be fair, just, and reasonable (not merely any procedure prescribed by statute); overruled the narrower A.K. Gopalan interpretation; foundational for all subsequent Article 21 jurisprudence including bail rights.

Extended UAPA to designate individuals (not just organisations) as terrorists; lowered the bar for property attachment; gave NIA powers to investigate UAPA cases regardless of state jurisdiction; drew criticism from civil liberties groups for expanding the scope of potential incarceration without corresponding procedural safeguards.

The Supreme Court's contradictory voices on UAPA bail are not merely a jurisprudential curiosity — they are a liberty crisis playing out in real time, with real people losing years of their lives to pre-trial detention whose end-date neither they nor their lawyers can predict. A court that reaches opposite conclusions on the same question depending on bench composition is not administering law — it is administering chance. The constitutional bench that settles UAPA bail jurisprudence will not just be deciding a doctrinal question; it will be deciding whether Article 21 means something in the face of security legislation, or whether security legislation means that Article 21 falls silent.

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