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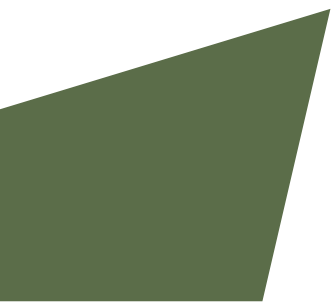
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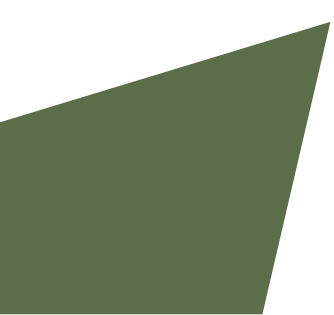
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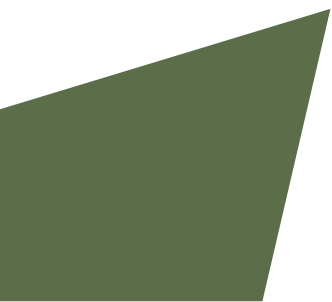
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**Security of Indian State Vis a Vis Lacunas in Bail Provisions Under  
Unlawful Activities (Prevention) Act: Study in Times of Increasing Cases of  
Terrorism and Disruption of National Integrity'**

**Chakshu Purohit & Rishabh Kumar**

## ABSTRACT

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*The basic principle which every legal scholar in making hears is that law changes as per the need of the society. Law devolves itself as is the requirement for being in tune with the nature of crimes surrounding it and the severity with which they have to be dealt with or leniency as the case may be. This is a general principle and very much applicable to almost all the situations except a few. To carve out that kind of exceptional crimes where in a sort of proactive insightful approach is required is very important. National security laws are one such sort of legislation. The recent case of JNU research scholar Safoora Zargar is one such eye opener that compels people to open the detailed books of law and find out where things are yet uncertain.*

*The researchers aim to draw genesis of the Unlawful Activities (Prevention) Act, 1967 and clearly draw the difference in the bail provisions relating to the two divisions in the UAPA, namely-*

- i. Terrorist Acts*
- ii. Unlawful Activities*

*Not dwelling on the merits of the Court's decision of granting bail to Safoora Zargar, the researchers aim to in detail analyze the lacunas, if any, in the bail provisions relating to the offences related to the Terrorist act and Unlawful activities.*

*In the end, researchers would like to submit their suggestions and recommendations which they believe are of prime importance seeing the time of the world wherein crimes are moving faster than forming of required legislation to combat them.*

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**Key words:** UAPA, bail, lacunas, Unlawful Activities, Safoora Zargar

## INTRODUCCION

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History is the biggest teacher of the fact that the first thing every nation has to ensure is the safety and security of its citizens. There can be no nation-state on whom this duty cannot be owed. Be it from the Social Contract Theory or from the current understanding of the times, one can see that in the times of changing world and changed times, National security concerns are at its peak. Be it an episode of everyday horror of cross border firing in the Kashmir valley or the rising cases of anti-national entities in the name of free speech, the surge of such cases is remarkably high and higher than never before. There are innumerable such incidents who draw everyday daggers against the National integrity of India.

Apart from other laws, National Security laws are deemed to be and are necessary to be stricter in comparison to other criminal laws of the country. The essence of the basic criminal laws is disrespected if the National security laws above them are not tight in their approach.

In no situation, an innocent should be hampered within enjoying his/her fundamental rights but situations. But when the concern is owing to the National security of the land, risking the lives of millions of Indians and foreigners who have under different situations accepted India to be the land of their living is not at all acceptable. If any set of representatives are chosen by the people for the people, then they have to be protected.

Bail laws are one such segment of law which if not applied properly, lets the accused roam scot-free. Bail laws have to be applied judiciously.

Now, bail provisions under UAPA ought to be stricter than in most of the other criminal laws. The article aims to understand the genesis behind the introduction of UAPA which will further help the researchers inlining the article to the bail provisions of UAPA and helping the reader understand the lacuna therein.

The researchers might only be able to help see through a peephole whereas the problem might be woven from the gigantic cloth of uncertainty in laws.

A collective attempt by everyone to find will lead to a wholesome detection of lacunas and uncertainties.



## I. BAIL JURISPRUDENCE IN INDIA

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### a. What is bail?

Black's Law Dictionary defines Bail as "Procuring the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court."<sup>1</sup>

The idea and use of bail can be gone back to up to 339 BC. During Medieval times, in Britain bail was instituted with the practice of a concept known as Circuit courts. Bail is derived from the old French word *baillier*, means to give or deliver, and the Latin word *bajulare*, means to bear a burden.

Supreme Court defines bail in *Sunil Fulchand Shah v. Union of India*<sup>2</sup> in which it was held that "Bail is security obtained from a person arrested regarding an offence for the purpose of securing his presence during the course of trial."

The Supreme Court in the case of *Kamlapati v. State of West Bengal*<sup>3</sup>, defines bail as "a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., **the right of an accused to enjoy his personal freedom and the public's interest on which a person's release is conditioned on the surety to produce the accused person in the Court to stand the trial.**"

In the case of *Superintendent Re Membrancers of Legal Affairs vs. Amiya Kumar Roy Chowdary*<sup>4</sup>, the Court held that the law of bails, "has to be dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence viz., the presumption of innocence of an accused till he is found guilty."

Section 436 to 450 of the Code of Criminal Procedure, 1973 governs the provision of bail in India.

Seriousness and intensity of the offence specify the gravity for which bail can be granted or dismissed. Bail is the discretionary power of the court, the bail amount is decided on the gravity

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<sup>1</sup> *Bail*, Black's Law Dictionary. (10<sup>th</sup> ed. 2014).

<sup>2</sup> MANU /SC /0109 /2000

<sup>3</sup> 1979 AIR 777

<sup>4</sup> MANU/WB/0318/1973

of the crime and the economic situation of the person. In India, there are three types of bail, namely, Regular Bail, Interim Bail, and Anticipatory Bail.

**b. Grounds on which bail can be denied-**

In many cases, Courts interpreted the rationale and grounds for granting and refusal of bail. The Hon<sup>ble</sup> Supreme Court in the matter of *State of Maharashtra vs. Sitaram Popat Veta*<sup>5</sup> has stated few **factors to be taken into consideration, before granting bail**, namely:

1. The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence;
2. Reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
3. Prima facie satisfaction of the Court in support of the charge.

Courts must **deny bail** in certain cases only under these three given conditions-

1. One, the person charged with the crime is likely to flee.
2. Two, the accused is likely to tamper with evidence or influence witnesses.
3. Three, the person is likely to repeat the same crime if granted bail.<sup>6</sup>

These grounds should be considered by courts by evaluating the factors as provided in the S.P Vital case. Not to mention that the severity of the crime, the nature of the offence and the effect on the society as a whole is the bottom line of the reasoning while granting bail in particular cases at hand.

In *Gudikanti Narasimhulu vs. Public Prosecutor of Andhra Pradesh*<sup>7</sup> some other **considerations are taken while granting bail**. They are:

**(a)** The nature of the charge is the vital factor and the nature of the evidence also is pertinent. The punishment to which the party may be liable if convicted or conviction is confirmed also bears upon the issue.

**(b)** As to whether the course of justice would be thwarted by him who seeks the benignant jurisdiction of the Court to be freed for the time being. Thus, the legal principle and practice

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<sup>5</sup> MANU/SC/0660/2004

<sup>6</sup> Supra.

<sup>7</sup> MANU/SC/0089/1977

validate the Court considering the likelihood of the applicant interfering with witnesses for the prosecution or otherwise polluting the process of justice.

(c) That deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice -to the individual involved and society affected.

(d) It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted mechanical detention should be demoted.

(e) Bad records and Police prediction of criminal prospects to invalidate the bail plea are admissible in principle, but shall not stampede the Court into a complacent refusal.

(f) The period in prison already spent and the prospect of the appeal being delayed for hearing.

(g) The delicate light of the law favors release unless countered by the negative criteria necessitating that course. The corrective instinct of the law plays upon release orders by strapping on to them protective and curative conditions.

(h) Heavy bail from poor men is obviously wrong.<sup>8</sup>

## **II. BAIL UNDER THE UNLAWFUL ACTIVITIES (PREVENTION) ACT**

### **a. Backdrop of the introduction of UAPA**

A committee was formed in 1963, recommending amendment on National Integration and Regionalism of the Constitution and to put reasonable restrictions on the law of freedom of speech and expression; right to assemble peaceably and without arms; and right to form associations or unions, in the interests of the sovereignty and integrity of India.<sup>9</sup>

An ideological rift between the Soviet Union and China resulted in the separation of more extensive communist Party of India in 1964. That year, at that point, the peculiar Tashkent situation led to the death of the then Prime Minister Lal Bahadur Shastri. Maoist movement establishment stone was led down in Naxalbari village of West Bengal due to uprising, in 1967. PM Indira Gandhi was failed to control the flood of motivation is created by trying to overpower it with military force.

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<sup>8</sup> Supra.

<sup>9</sup> Art. 19 (1) (a), The Constitution of India, 1950.

It was in this wide socio-political setting that Congress sanctioned the UAPA in 1967, which was to a great extent limited to secessionist organizations.

The bail provisions of CrPC applied to UAPA as well. In 1973, the new CrPC was brought in, until then the bail provisions applied to UAPA was of the Code of Criminal Procedure, 1898.

### **b. Aims and Preamble to UAPA**

Unlawful Activities (Prevention) Act is aimed at unlawful activities associations in India and its effective prevention. Its fundamental target was to make powers accessible for managing with activities coordinated against the sovereignty and integrity of India.

The aim and the objective of the said act are put forth in its Preamble-

*“An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations<sup>10</sup> [, and for dealing with terrorist activities,] and for matters connected therewith.”*

### **c. Amendments to UAPA**

**1985-** The Terrorist and Disruptive Activities (Prevention) Act [TADA] was instituted in 1985, because of the result of Indira Gandhi's death in 1984, after Operation Bluestar and the following savagery. TADA had exceptionally inflexible provisions for award of bail in Section 20(8). The Supreme Court in *Kartar Singh v. State of Punjab*<sup>11</sup> recognized the harshness of this act and uphold the constitutional validity of this provision.

**2002-** Rising of Terrorist activities in the aftermath of the 9/11 attack in America and also the attack on the Indian Parliament. This led to the enactment of *Prevention of Terrorism Act (POTA)* in 2002.

It was slowly coming into notice that on one hand, the proviso of TADA and POTA were way to severe and on the other hand, UAPA did not cover acts of terrorism.

**2004-** To tackle the possible threats and to maintain balance, TADA and POTA were repealed in 2004. The statutes like offences related to terrorist activities were inserted in UAPA.

<sup>10</sup> Ins. by Act 29 of 2004, s. 2 (w.e.f. 21-9-2004).

<sup>11</sup> 1994 SCC (3) 569.

Although POTA was revoked, its rigid and strict proviso were held to a great extent by UAPA. Now terrorism has been alluded to UAPA as a crime and by which it gives power to the government to ban terrorist organizations.

**This led to the expansion of UAPA scope and now it deals with unlawful activities as well as terrorist acts.**

From **2004-2008** the excursion of UAPA is intriguing. In 2004, the formation of the Communist Party of India (Maoist). This organization remained immensely operative in various areas coursing through around 7 states and as a matter of fact caused numerous cases of brutality.

During 2004-2008, a progression of bomb blasts occurred at the same time in different places in India. For example - Ajmer Sharif *dargah* bomb blast, Malegaon Bomb blasts, Mumbai suburban train blast, Samjhauta Express Bomb Blast, Mecca Masjid bomb blast, and the 26/11 Mumbai Taj terrorist attack.

A National Investigation Agency (NIA) was enacted through the NIA Act, 2008. By the amendment in 2008, UAPA has become the primary legislature for 'terrorist activities.'

**2008-** By the amendment of 2008, the provision dealt with bail for terrorist acts was included in section 43D (5) – (7) of the UAPA amendment act, 2008.

Amendments were made in the year **2012** and **2019** as well.

**2019-** By this amendment, government can label any person as terrorists if they participate or commit an act of terrorism, promote it, prepare for it, or are otherwise involved in it. Previously, the government has just engaged to assign associations and organizations as terrorists, and not an individual

#### **d. Two sets of Criminal acts dealt with under UAPA**

Unlawful Activities Prevention Act deals with two types of crimes-

1. Relating to **terrorist** acts
2. Relating to **unlawful** activities

Bail provision for granting bail in both of these is dealt with differently under the law. Additional provision exists for the former i.e. Terrorist acts in the Act under section 43D(5) which makes

getting bail more difficult than before. The latter i.e. Relating to Unlawful Activities are still dealt with by the provisions of the Code of Civil Procedure.

Next will be a study of both types of bail provisions which is based on the severity of the crime.

## 1. Terrorist Acts

### i. Preamble of the act-

“...AND WHEREAS it is considered necessary to give effect to the said Resolutions and the Order and to make special provisions for the prevention of, and for coping with, terrorist activities and for matters connected therewith or incidental thereto.”<sup>12</sup> The preamble is in consonance to what India has agreed with the United Nations in the fight against terrorism.

### ii. Relevant definitions-

#### Sec 2 UAPA-

(k) “**terrorist act**” has the meaning assigned to it in section 15, and the expressions “terrorism” and “terrorist” shall be construed accordingly;<sup>13</sup>

(l) “**terrorist gang**” means any association, other than a terrorist organization, whether systematic or otherwise, which is concerned with, or involved in, a terrorist act;<sup>14</sup>

(m) “**terrorist organisation**” means an organisation listed in the Schedule or an organisation operating under the same name as an organisation so listed<sup>15</sup>

Part IV, V and VI of the UAPA deals specifically with terrorists and everything pertaining thereto.

### iii. Bail provisions for Terrorist acts-

It is by way of **Section 4(2) CrPC** that power to special laws apart from the Indian Penal Code (IPC) to lay down separate procedures is imparted. Many statutes dealing with a special set of crimes have thus constructed distinct provisions for bail and several of such statutes have made grant of bail more stringent than CrPC. It is an understanding of general prudence that special statutes must have additional restrictions apart from the general laws. The criteria for bail under UAPA therefore differ and is governed by section 43-D (5) of the UAPA.

<sup>12</sup>Preamble to the Unlawful Activities (Prevention) Act.

<sup>13</sup>S. 2(k), Unlawful Activities (Prevention) Act, 1967.

<sup>14</sup>S. 2(l), Unlawful Activities (Prevention) Act, 1967.

<sup>15</sup>S. 2(m), Unlawful Activities (Prevention) Act, 1967.

The bare texts of the provision under **Section 43-D (5)**, UAPA concerns **Chapters 4 and 6** and is not applied in every case brought under UAPA charges. Chapter 4 and 6 deal specifically with **“terrorist acts”** and **“membership with the terrorist organization”**, respectively. Thus there must be prima facie evidence of the accused(s) either to have committed terrorist attack or to have been part of some terrorist organization.

After the 2008 amendment, **Section 43D (5)** of UAPA, dealing with terrorist activities, stands today as –

*Notwithstanding anything contained in the Code, 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 or on his own bond if the Court, on a perusal of 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.”*

Henceforth, the regular bail provision under UAPA is different from other similar provisions. At an instance when other statute books necessitate recording of an opinion by the court that there are reasonable grounds for believing that the accused is “not guilty” of the alleged offence, as per the provision of UAPA, it is required that there must be the recording of an opinion by the court deciding bail that there are reasonable grounds for believing that the accusation against such person is **“prima facie”** true.

The expression “prima facie true” would mean that the materials/evidence collected by the investigating agency in reference to the accusation against the concerned accused in the FIR, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence.<sup>16</sup> It must be enough on its face to establish a given fact or the chain of facts constituting the specified offence, unless rebutted or contradicted.

There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true.<sup>17</sup>

<sup>16</sup> Ghulam Mohd. Bhat vs National Investigating Agency, MANU/DE/2456/2019

<sup>17</sup> Vikash Kumar Sharma vs State, MANU/DE/4028/2019

Therefore, the approach to regular bail under UAPA for terrorist acts is higher than offences under IPC and more than how the same is dealt with for the Unlawful activities.

iv. **Leading case-**

**Sudha Bharadwaj vs The State of Maharashtra<sup>18</sup> (Bhima Koregaon)**

**Excerpts from the judgment-**

The applicant is seeking her release on bail pending trial in connection with C.R. No.4/2018 registered at Vishrambaug Police Station, Pune. The charge-sheet is already filed. The charge- sheet is filed against the applicant for the commission of offences punishable under -

Sections 121, 121A, 124A, 153A, 505(1)(b), 117, 120B read with 34 of the Indian Penal Code, 1872 (hereinafter referred to as 'I.P.C.') and under Sections 13, 16, 17, 18, 18B, 20, 38, 39, 40 of the Unlawful Activities (Prevention) Act, 1967, as amended in 2008 and 2012 (hereinafter referred to as 'UAPA').

Her counsel submitted that she is in custody for more than a year on the basis of inadmissible vague material against her and, therefore, she deserves to be released on bail. She has developed osteoarthritis and she has started getting growths on the bones of her fingers and she can no longer bend her fingers without great pain. She has lost her father while she was in custody and she is the sole guardian of her young daughter.

Mrs. Pai, the opposing counsel opposed this bail application. Mrs. Pai submitted that the applicant was an active member of the banned organization. She was the Vice President of IAPL which was a frontal organization of the banned organization. She was on the Committee of PPSC i.e. Persecuted Prisoners Solidarity Committee. She was instrumental in arranging meetings, recruiting cadres, raising funds, etc.

The Hon'ble Supreme Court stated the settled position about the matters to be considered for deciding an application for bail. Those principles provided for deciding whether there was any prima facie or reasonable ground to believe that the accused had committed the offence; nature and gravity of the charge; severity of the possible punishment in the event of conviction; the danger of the accused not being available for trial; character, behavior, means, position, and standing of the accused; likelihood of

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<sup>18</sup>MANU/MH/3756/2019.



repetition of the offence; possibility of tampering with the evidence; and the possibility of justice being thwarted by grant of bail

As a result of the above discussion, I find that there is sufficient material in the charge-sheet against the applicant. There are reasonable grounds for believing that the accusation of commission of the offences punishable under Chapters IV and VI of the UAPA against the applicant is prima facie true. Considering the 67 / 68 68 1-BA-428-19-order express bar imposed by Section 43D(5) of the UAPA, the applicant cannot be released on bail. The other submissions regarding her academic record, achievements, social work, family background, health issues, and her continued detention in jail for a long period cannot be taken into consideration. Criminal Bail Application No.428/2019 is rejected.<sup>19</sup>

v. **Conclusion**

Considering all the nuances as above mentioned, the researchers conclude that the bail provisions pertaining to the Terrorists act are in par with the current required standard. The fact that in today's time, terrorism is rising at its peak, in this situation showing a lenient hand to the offenders is against the policy of public security. Hence, the 2008 Amendment is very much welcomed as seen from the angle of security of the Nation.

**Now, we have to peruse the other facet i.e. the bail provisions governing offence of Unlawful Activities. It is highly doubtful that the said provisions are sufficient for securing the integrity of the Nation.**

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<sup>19</sup> Supra.

## 2. Unlawful Activities

### i. The relevant part of Preamble-

*“An Act to provide for the more effective prevention of certain unlawful activities of individuals and associations<sup>20</sup> [, and for dealing with terrorist activities,] and for matters connected therewith.”*

### ii. Relevant definition from UAPA-

#### Sec 2.

(o) **“Unlawful activity”**, in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written or by signs or by visible representation or otherwise),—

(i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the cession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or

(ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or (iii) which causes or is intended to cause disaffection against India,<sup>21</sup>

(p) **“Unlawful association”** means any association,—

(i) Which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or

(ii) which has for its object any activity which is punishable under section 153A (45 of 1860) or section 153B of the Indian Penal Code, or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity: Provided that nothing contained in sub-clause (ii) shall apply to the State of Jammu and Kashmir,<sup>22</sup>

Part II, and III of the UAPA deals specifically with Unlawful activities and everything pertaining thereto.

<sup>20</sup> Preamble to the Unlawful Activities (Prevention) Act.

<sup>21</sup> S. 2(o), Unlawful Activities (Prevention) Act, 1967.



iii. **Relevant bail provisions-**

Bail provisions for accused booked under the Unlawful activities part of UAPA are governed by Chapter XXXIII of Code of Criminal Procedure, 1973 specifically by Sec. 437 and 439 as they deal with non-bailable offences.

Contrasting a bailable offence where bail is a matter of right under S. 436 Cr. P.C., the grant of bail for a non-bailable offence under **S. 437 Cr. P.C.** (or, for that matter, even under **S. 439 Cr.P.C.**), is a matter of discretion. The grant of bail in non-bailable cases is usually a matter in the discretion of the authorities in question.

The grant of bail in respect of a person accused of or suspected of the commission of any non-bailable offence, is a matter of discretion and under Section 437 of the Code, if there is no prohibition otherwise and if the guidelines for enlarging on bail are satisfied, then, the Magistrate in his discretion may release such person on bail. It thus imparts such jurisdiction that contains a discretion which must be utilized judicially.

Apart from these provisions, there is a ban even on such discretionary power of the Magistrate when there seem reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life in which case, the Magistrate has no jurisdiction and power to release the accused on bail as it is well emphasized by the use of the words “but he shall not so release”.

The exception to this general ban finds a place in the proviso relating to young persons or sick or infirm persons or women.

iv. **The lacuna in Bail provisions regarding the Unlawful Activities (LENIENT and UNCLEAR)**

It is a matter of general prudence that every accused should be dealt with the provisions of law that are as severe as are his acts. The criminal justice system having strong edifice in the punitive theory, one has to be punished as much as he deserves. The proportionality of the criminal act and the resulting punishment must be equal.

Talking sociologically, the criminal justice system is fundamentally an instrument of social control. Talking politically, it is a system that ensures the political safety of the nation-state. A nation-state, in the changing times of today, is not a nation-state until it knows how to guard its

boundaries against the rest of the world. Hence, the need for such laws arises that aim to punish those who try to weaken the integrity and the sovereignty of the nation-state.

'Unlawful activities' is a complete straight jacket fit when looking with the above-mentioned lens. A simple understanding of the term itself makes one interpret the meaning correctly. It is an act relating to the cession of any Indian territory or disrupts territorial integrity and sovereignty of India or tries to incite dissatisfaction towards the government of India.

Observing the seriousness which is coupled with the trial, prosecution, etc. of such crimes, dealing the bail part of it as per the general law of the land is not sufficed. Section 437 and 439 of the Code of Criminal Procedure are too wide to cover many cases of such unlawful activities and let the accused roam scot-free. Laws are unclear as to when and when not to give bail or deny bail when considering crimes under the Unlawful Activities Prevention Act cases.

Even under Section 439, the same issue exists. The nature of section 499 bestows unlimited judicial discretion on the High Court (and on the Sessions Court under the new Code) in the matter of granting bail<sup>23</sup>. This will further aid the accused in getting bail.

The Court should consider the nature of the offence charged, its nature, and its seriousness.<sup>24</sup> The seriousness with which offences under UAPA are needed to be dealt with becoming prey to the general act i.e. CRPC by the exceptions and leniency shown in the said act to cover a wide range of situations.

### **III. LENIENCY IN BAIL PROVISIONS (CASE STUDY)**

In this section, the researchers aim to substantiate their opinion with case studies. The recent case of Safoora Zargar is one which brings to light how much uncertain, vague, and lenient our laws are when they are dealing with crimes relating to Unlawful activities under UAPA. Such was the case of JNU research scholar Safoora Zargar and her obtaining bail on the ground of her pregnancy. It incited a huge hue and cry as accusations were that why did she not care about her pregnancy when she was on the stage, during the committing of the particular unlawful activity. This case showed that our legal system lacks proper guidelines, certain laws for governing the unlawful activities under UAPA, and what will be the extent of health grounds on which bail can be granted.

<sup>23</sup> Abdul Karim Khan v. State of M.P, AIR 1960 MP 54.

<sup>24</sup> State v. Capt. Jagjit Singh, AIR 1962 SC 253.

In certain cases, health grounds are allowed to be accepted for granting of bail and in certain cases not. There exists no standard, no guidelines, and no specific bail provisions for Unlawful activities. This in turn grants a huge discretion to the judges without there being any guiding principles on their head. CRPC is competent to cover all kinds of criminal acts but the nature and the amount of leniency to be granted is of a totally different nature when it comes to offences against the state.

### **Leading case-**

#### a. Understanding with the case of Safoora Zargar v. State<sup>25</sup> -

#### **Brief facts**

Safoora Zargar is an Indian student activist leader from Kishtwar, Jammu, and Kashmir, best known for her role in the Citizenship Amendment Act protests. She is an M. Phil student of Jamia Millia Islamia and media coordinator of the Jamia Coordination Committee. Safoora Zargar, 27, was three months pregnant when she was arrested on April 10 on conspiracy charges over the riots that broke out in February during protests against the Citizenship Amendment Act. She had participated in the protests against the new citizenship law.

She was arrested for allegedly obstructing a road near the Jaffrabad metro station but charged later under the National Security law Unlawful Activities (Prevention) Act, 1967.

She has been booked under the Unlawful Activities Prevention Act on the allegation that she hatched the criminal conspiracy behind the riots which happened in North East Delhi during February 23-25. Prima facie evidence of Whatsapp group chats etc. were present against her.

#### **Trial court judgement**

Delhi's Patiala house court denied bail to 27-year-old Safoora Zargar.

*'Prima facie evidence to show there was conspiracy.'*

The judge, while pronouncing his order, also referred to statements made by eyewitnesses and a WhatsApp chat that had been placed on record. The judge held that "there is prima facie evidence to show that there was a conspiracy to at least block the roads (chakka jam)."

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<sup>25</sup> 2020 SCC Online Del 664.

### Delhi police statement

The Delhi Police on Monday opposed in the Delhi high court the bail plea of Jamia Milia Islamia student Safoora Zargar. Police cited the fact that 39 deliveries have taken place in Delhi prisons in the last 10 years as proof that Zargar's pregnancy did not demand that she be given bail. The Delhi Police, in its status report filed through Special Cell DCP P.S. Khushwaha, opposing Zargar's bail plea, said a "clear and cogent case" has been made out against the accused woman and as such she is not entitled to bail for the "grave and serious offences which have been meticulously and surreptitiously planned and executed by her."<sup>26</sup>

In the status report filed through advocates Amit Mahajan and Rajat Nair, the police said Zargar is also being provided with complete care to prevent any COVID-19 infection and she has been lodged in a separate cell and chances of her contracting coronavirus from any other person do not arise.<sup>27</sup>

"There is no exception carved out for pregnant inmate, who is accused of such heinous crime, to be released on bail merely because of pregnancy. On the contrary, the law provides for adequate safeguards and medical attention during their custody in jail," it said, adding that 39 deliveries have taken place in Delhi prisons in the last 10 years.

"...the health status of the accused (both mental and physical) is satisfactory and normal. Further, all medical care and prescribed medication is being provided to her to ensure the well-being of the accused and her fetus, as such on this ground also no case for bail has been made out by her," the police said and prayed for dismissing the bail plea.

In its report, the Delhi Police has said statements of "witnesses and co-accused clearly implicate Zargar as being a leading co-conspirator in commissioning of the serious offence of causing large-scale disruption and riots, not only in the national capital but also in other parts of the country."

"The present case pertains to grave offence against the society and nation. The investigation is at a very crucial juncture, and therefore, considering the sensitivity and the broad nefarious

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<sup>26</sup>The Wire Staff, 22/JUN/2020, 'Pregnancy No Ground for Bail': Delhi Police Cites Jail Statistics, Opposes Safoora Zargar's Plea, <https://thewire.in/rights/delhi-police-safoora-zargar-pregnancy-bail>

<sup>27</sup> Supra.

conspectus of the present case, it would not be in the interest of justice as well as in public interest to grant bail to the accused at the present stage," it said.

She was disposed towards creating turmoil, and that she was part of the conspiracy to "destroy, destabilize and disintegrate the Government of India in order to compel to withdraw the Citizenship Amendment Act (CAA) and the alleged National Register of Citizens

#### **Final Court order-**

Based on the Centre's concession, a bench of Justice Rajiv Shakhder granted regular bail to Safoora on furnishing a personal bond of 10k and on the following conditions:

-She should not indulge in activities she is being investigated for -She should refrain from hampering investigation -She has to take the permission of the concerned court before leaving the territory of Delhi. -She has to get in touch with the Investigating Officer once in every 15 days through a phone call

#### **Conclusion from this case (Lacunas In Bail Provision)**

Given the facts of the case and the resulting decisions and statement by Delhi Police, the researchers without going into the merits of the case, want to submit that there is a serious lacuna in the bail provisions of the Unlawful Activities part of the UAPA.

1. Firstly, the bail under the Unlawful activities part of the act is governed by the Code of Criminal Procedure. The researchers do not intend to state by any means that the bail provisions under the code are ineffective or out-dated. What the researchers intend to put forth is that special bail provisions must be formulated for governing the granting of Interim, anticipatory and regular bail under the UAPA. Code of Criminal Procedure was framed keeping in mind all the types of crime including the non-serious crimes. **National security laws and the termed offences therein are the most serious crimes in any nation, letting the bail be governed by regular bail provisions hurts the stakes which are involved with the topic.**
2. Secondly, when it comes to granting bail to pregnant women or people who are undergoing unfit medical condition, there are no guidelines which should be the model to be followed by the judges of various courts across India. It is understood that deciding everything on the facts and circumstances of the case is the general practice, yet, the fact that this also results in arbitrariness can also not be denied. Running parallel are the menaces like media trials, Judge's own preconceived notions, his background, violent



outbreaks in the garb of peaceful protests, etc. which will undoubtedly affect the decision whether bail should be provided or not. **No common standard practise is followed, no Apex Court guidelines are put in place or no legislation exists that govern bail provisions for the Unlawful activities part of UAPA.**

3. We have in place **National Prison Manual, 2018**, specific jail manuals like that of Tihar jail, Jail and prison manuals of respective states and also **United Nation guidelines** relating to **women in prison**, yet as seen in Safoora Zargar's case, all such pieces of guidelines were brought to that of zero importance when the basic question of granting bail made the current laws shake. **No Supreme Court guidelines or orders are put in place that help decide arrest and bail of pregnant women if they are pregnant at the time of such arrest or bail. Such guidelines have to be in tune with the seriousness of the offence, the duration of the pregnancy, and the quality of prima facie evidence against the accused. Not to mention that no such consideration has been addressed with respect to UAPA. Moreover, even the Court in Safoora's case said that this should not be deemed as a precedent!**

#### IV. RECOMMENDATIONS AND SUGGESTIONS

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When it comes to law and order management of the Nation-state, maximum care has to be taken while formulating the concerned laws. What must be made sure is that whenever any defect or lacuna is detected, researchers should research, legal fraternity should be made aware and the lawmakers should fasten their belts and start working?

The researchers want to humbly submit the following recommendations and suggestions-

1. Despite letting the bail provisions be governed by the regular laws, specific bail provisions should be formulated as soon as possible for dealing with cases of Unlawful activities under the Unlawful Activities (Prevention) Act, 1967.
2. While dealing with cases of mental or physical illness concerns, specific Supreme Court guidelines should be available for the courts to follow. This will also help to ensure that no unnecessary bail applications are submitted faking such medical grounds.
3. Relating to the bail of pregnant women in cases of non-bailable serious offences concerning the safety, security, and integrity of the nation, specific guidelines should be

placed to fore. Such guidelines should be formulated taking expert advice from the best of medical experts of the country.

4. In case any pregnant accused is sent to jail, proper accountability should be made to such officer of the jail that is deemed fit for the purpose. This is to ensure that no human rights of the accused are snatched away until the trial is complete and the conviction is confirmed or denied.
5. The ground zero workers in the prison authorities should be given special training to deal with such cases of physically or mentally sensitive inmates.
6. While dealing with such grave offences, monetary consideration is not much for the accused. The court should look into factors other than monetary consideration as well. Factors like, whether there is a chance of absconding of the accused, presence of family, etc.
7. The court must treat anticipatory bail with caution because this bail is just a 'considerable advantage' for the accused. Since the offences are of severe and extreme, bail must be given in a certain inexorable and supervening circumstance.
8. In cases related to terrorism, the bail granting authority should consider the degree of the offence committed, societal threats, repetition of the offender, and only grant bail if the court is sure after assessing every probable outcome that there will be no possible threats from granting bail to the accused.
9. Authorities are recommended to improve technological aspects for tracking the criminal history of the accused. The technical architecture of the Crime and Criminal Tracking Network and Systems (CCTNS) scheme could be very useful in tracking down the information on the accused as well as his/her existing history in that matter. Technical facilities like intelligent databases, electronic tagging, electronic monitoring, etc.
10. The court must treat anticipatory bail with caution because this bail is just a 'considerable advantage' for the accused. Since the offences are of severe and extreme, bail must be given in a certain inexorable and supervening circumstance.

## CONCLUSION

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Only by following the procedure established by law can the liberty of any individual can be put into shadow. It is the ending four words of Article 21 of the Indian Constitution that makes human rights breathe. The last four lines are- **procedure established by law**.

Bail is a right and committal to jail an exception. Committal to jail is under the circumstances which that the alleged accused would flee from justice or create trouble in the form of repeating offences or intimidating witnesses and the like.<sup>28</sup>

Apart from other laws, National Security laws are deemed to be and are necessary to be stricter in comparison to other criminal laws of the country. The essence of the basic criminal laws is disrespected if the National security laws above them are not tight in their approach.

But when the concern is owing to the National security of the land, risking the lives of millions of Indians and foreigners who have under different situations accepted India to be the land of their living is not at all acceptable. If any set of representatives are chosen by the people for the people, then they have to be protected.

Bail laws are one such segment of law which if not applied properly, lets the accused roam scot-free. Bail laws have to be applied judiciously.

Now, bail provisions under UAPA ought to be stricter than in most of the other criminal laws. The recent case of JNU research scholar Safoora Zargar is one such eye-opener that compels people to open the detailed books of law and find out where things are yet uncertain.

Under UAPA, bail provisions relating to the terrorist acts are still to an extent addressed, but for the other section that is Unlawful activities, there are undoubted lacunas. Bail provisions for accused booked under the Unlawful activities part of UAPA is governed by Chapter XXXIII of Code of Criminal Procedure, 1973 specifically by Sec. 437 and 439 as they deal with non-bailable offences.

In certain cases, health grounds are allowed to be accepted for granting of bail and in certain cases not. There exists no standard, no guidelines, and no specific bail provisions for Unlawful activities. This in turn grants a huge discretion to the judges without there being any guiding principles on their head. CRPC is competent to cover all kinds of criminal acts but the nature

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<sup>28</sup> State of Rajasthan v. Balchand (1977) 4 SCC 308

and the amount of leniency to be granted is of a totally different nature when it comes to offences against the state.

The lacunas pointed out by the researchers-

1. National security laws and the termed offences therein are the most serious crimes in any nation, letting the bail be governed by regular bail provisions hurts the stakes which are involved with the topic.
2. No common standard practice is followed, no Apex Court guidelines are put in place or no legislation exists that govern bail provisions for the Unlawful activities part of UAPA.
3. No Supreme Court guidelines or orders are put in place that help decide arrest and bail of pregnant women if they are pregnant at the time of such arrest or bail. Such guidelines have to be in tune with the seriousness of the offence, the duration of the pregnancy, and the quality of prima facie evidence against the accused. Not to mention that no such consideration has been addressed with respect to UAPA. Moreover, even the Court in Safoora's case said that this should not be deemed as a precedent!

In consonance to the same, respective recommendations are also put forth by the researchers. There can be no nation-state on whom this duty of security of its citizens cannot be owed. Be it from the Social Contract Theory or from the current understanding of the times, one can see that in the times of changing world and changed times, National security concerns are at its peak. Be it an episode of everyday horror of cross border firing in the Kashmir valley or the rising cases of anti-national entities in the name of free speech, the surge of such cases is remarkably high and higher than never before. There are innumerable such incidents who draw everyday daggers against the National integrity of India.

It's time we sharpen our swords and be the nation who does not let intruders affect an inch of the cloth of its integrity!