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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

BAIL NOT JAIL: REVISITING THE RIGHT TO LIBERTY IN THE SHADOW OF SPECIAL LAWS

AUTHORED BY - KRITI TRIVEDI*¹ & MR. KAMLESH BISEN**

Abstract

This paper critically examines the evolving jurisprudence surrounding the right to bail in India, especially under stringent legislations like the Unlawful Activities (Prevention) Act (UAPA) and the Prevention of Money Laundering Act (PMLA). It explores the tension between national security and individual liberty, highlighting how the denial of bail in special law cases often leads to prolonged pre-trial incarceration, violating the fundamental right to life and personal liberty under Article 21 of the Constitution. Through case studies including that of Father Stan Swamy and G.N. Saibaba, the paper underscores the urgent need for a liberal and humane approach to bail. The introduction of Section 479 of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 replacing Section 436A of the CrPC and its retrospective application by the Supreme Court is analyzed as a progressive step toward decongesting prisons and upholding constitutional values. The paper concludes with recommendations to strengthen undertrial review mechanisms, ensure timely bail hearings, and reinforce the principle that "bail is the rule, jail is the exception," even under special laws.

INTRODUCTION

I know not whether laws be right or whether laws be wrong all that we know who be in jail is that the jail wall is strong. And that each day is like a year, a year whose days are long.

- Oscar Wild

On October 8, 2020, the National Investigation Agency arrested an 83 years old Jesuit priest and tribal rights activist known for working to protect the rights of Adivasi peoples and Dalits (who became oldest person to be arrested for terrorism), on some grave charges under various sections of the Penal Code and Unlawful Activities (Prevention) Act (UAPA). The person was father Stan Swamy.

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He suffered from Parkinson's Disease and was reportedly unable to perform basic tasks like feeding and bathing himself. Prison officials allegedly denied him essential aids, such as a straw and a sipper, that could have helped him manage his condition.

His bail was denied on multiple occasions even after his deteriorating health condition which required medical attention, he died as an undertrial prisoner, having suffered 270 days of incarceration awaiting medical bail, in May, 2021. This is an apt circumstance to depict the need to revisit the already established principle of “*bail is rule, jail is exception*”², even in special laws. Bail aims to ensure the attendance of the accused at trial and should not be used as a punitive measure as it is intended to facilitate the presence of the accused at trial rather than as punishment.³

As it has already been established by the Apex Court that, right to life includes life with dignity⁴.

*“Fundamental rights do not flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration.”*⁵

It means that the right of a person to live with dignity guaranteed under Article 21 cannot be deprived merely because he was convicted⁶.

A bench of Justice Hrishikesh Roy and Justice SVN Bhatti was considering a writ petition regarding overcrowding in the prisons across India.⁷ The ‘Prison Statistics India 2022’ report from the National Crime Records Bureau reveals that, out of 5,73,220 people in Indian prisons, 4,34,302 (75.8%) are undertrials, awaiting trial for pending cases.⁸

Such reports showcase the sorry state of affairs as it is against the cardinal principle of criminal justice system that there is “*presumption of innocence until found guilty*”. But delay in completion of investigation, trials leave such arrested persons languishing in jail for a long amount of time as if undergoing punishment without trial, it directly affects the fundamental right to life and liberty under Article 21, guaranteed to every person in India.

² State Of Rajasthan vs Balchand @ Baliay, 1977 AIR 2447.

³ Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1.

⁴ Francis vs. Union Territory (AIR 1981 SC 746).

⁵ Sunil Batra II v. Delhi Administration (1983).

⁶ Mahuya Chakraborty v. The State of West Bengal, W.P.A 22366 of 2023.

⁷ In Re-Inhuman Conditions in Prisons, WP 406/2013.

⁸ Ajoy Sinha Karpuram, *State of India's undertrial prisoners, plans to ease sentencing*, Indian express (November 22, 2024).

Article 21 holds a central and revered place within the chapter on Fundamental Rights in the Indian Constitution. It guarantees the essential rights to life and personal liberty, which remain protected even during a state of emergency, as specified in Article 359(1). Since the landmark *Maneka Gandhi v. Union of India*⁹ case, this Article has been interpreted to include a wide range of both substantive and procedural rights. One such important right that has emerged is the right to a speedy trial.¹⁰

This Court in *Inder Mohan Goswami v. State of Uttaranchal*¹¹, has held that:

Civilized nations have acknowledged that liberty is the most fundamental of all human rights. Documents such as the American Declaration of Independence (1776), the French Declaration of the Rights of Man and of the Citizen (1789), the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights (1966) all affirm, in unison, that liberty is a natural and inalienable right for every human being. Similarly, Article 21 of our Constitution proclaims that.

Bail is one such way of granting liberty and ensuring that such incarceration does not turn into punishment without conclusion of proper trial. Bail is a conditional release on the solemn undertaking by the suspect that he would cooperate both with the investigation and the trial. The word “bail” has been defined in the Black’s Law Dictionary, 9th Edn, pg. 160 as: -

“A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time.”

Section 2(b), BNSS defines bail as- ‘*release of a person accused of or suspected of commission of an offence from the custody of law upon certain condition imposed by an officer or court on execution by such person of a bond or a bail bond.*’

In *Sanjay Chandra v. CBI*¹², the court has observed that,

‘The purpose of bail is not punitive or preventative. Loss of liberty should be viewed as a form of punishment, unless it is necessary to ensure that the accused appears for trial. Courts must genuinely uphold the principle that punishment begins only after conviction, and that every individual is presumed innocent until proven guilty through a proper trial.’

From the earliest days, it has been recognized that keeping someone in custody before their

⁹ 1978 AIR 597.

¹⁰ *Satender Kumar Antil vs Central Bureau Of Investigation* (2022) 10 SCC 51.

¹¹ (2007) 12 SCC 1.

¹² (2012) 1 SCC 40.

trial can lead to serious hardship. While it may occasionally be necessary to detain individuals before trial to ensure they appear in court, such detention should only occur when truly essential necessity must be the guiding principle. In our legal system, which values personal liberty as protected by the Constitution, it would be completely inappropriate to punish someone for an act they have not been convicted of, or to take away their freedom simply based on a suspicion that they might interfere with witnesses except in the most exceptional circumstances.

Moreover, beyond preventing possible interference or flight, we must remember that imprisoning someone before their conviction effectively serves as a form of punishment. Therefore, courts should not deny bail as a way of expressing disapproval of someone's past actions regardless of whether they have been convicted for them or not nor should bail be denied to unconvicted individuals just to subject them to jail as a form of warning or lesson.¹³

It is duty of the court to ensure that more liberal view is adopted with respect to granting of bail and now the benefit of new additions to S.436A as now given in S.479 should be given to person arrested even under special laws such as under PMLA, or UAPA.

PMLA

PMLA, 2002, is an act designed to combat money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected.

In *P. Chidambaram v. Directorate of Enforcement*¹⁴, the Supreme Court held that the economic offences have large societal impact, so it can be classified as grave offences, and when assessing bail applications in such cases, courts must be sensitive to the nature of the allegations. Severity of the sentence prescribed for the alleged crime can be one of the factors to determine gravity of the offense, Section 45 which deals with bail under PMLA sets a higher threshold for bail than regular bail, it provides-

- (1) *'no person accused of an offence under this Act shall be released on bail or on his own bond unless*
- (i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and*

¹³ (2012) 1 SCC 40.

¹⁴ (2020) 13 SCC 791.

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:’

The "twin conditions" for granting bail are two mandatory requirements the court must be satisfied with before granting bail. These conditions are:

- (1) there are reasonable grounds for believing the accused is not guilty of the offense; and
- (2) the accused is not likely to commit any offense while on bail

These conditions make it difficult to obtain bail. It shifts the burden on the alleged accused person, i.e the presumption of innocence is reversed.

However, the Supreme Court in *Manish Sisodia v. Directorate of Enforcement*, stated that ‘although the offense under the Prevention of Money Laundering Act (PMLA) is grave, the right to a speedy trial and the right to liberty cannot be disregarded.’¹⁵

Furthermore, in *Prem Prakash v. Union of India* through the Directorate of Enforcement, the Supreme Court has held that bail is Rule, and jail is an exception even in the Prevention of Money Laundering Act 2002 (PMLA).

Earlier, the Court while hearing a bail application flagged¹⁶ that out of the 5000 cases filed in the past decade, the Enforcement Directorate (ED) secured only 40 convictions and was urged to prioritize quality prosecution.¹⁷

It makes the question of balancing personal liberty with justice or societal interest essential. As such pre-trial incarceration should not turn into punishment.

Hence, the provision relating bail to undertrial prisoners provided under Section 479 of newly enacted Bhartiya Nagrik Suraksha Sanhita, 2023, which was earlier included in Section 436A of Criminal Procedure Code, 1973 becomes important. The provision provides that, Maximum period for which undertrial prisoner can be detained- If a person has during investigation, inquiry or trial undergone one half of the punishment maximum provided for the offence then such person shall be released on bail.

¹⁵ 2024 LiveLaw (SC) 563.

¹⁶ 'ED Conviction Rate Is Poor, How Long Accused Can Be Kept Undertrial?': Supreme Court Asks In Ex-WB Minister Partha Chatterjee's Bail Plea, (27 Nov 2024)

<https://www.livelaw.in/top-stories/ed-conviction-rate-is-poor-how-long-accused-can-be-kept-undertrial-supreme-court-asks-in-ex-wb-minister-partha-chatterjees-bail-plea-276447>

¹⁷ Sunil Kumar Agrawal vs Directorate Of Enforcement, Special Leave to Appeal (Crl.) No(s).5890/2024.

Also, if such person is a first time offender then he shall be released on bond if he has undergone detention for the period up to one-third of the maximum period of imprisonment provided for that offence.

The benefit of prolonged undertrial custody, as provided under Section 436A of the CrPC, was confirmed to be applicable to PMLA cases in the landmark judgment of *Vijay Madanlal Choudhary & Ors. v. Union of India* (2022). The Court reasoned that since Section 436A was enacted after the PMLA, and there was no conflict between Section 436A CrPC and the provisions of the PMLA, the former would apply to PMLA.¹⁸

This interpretation was reaffirmed by the Supreme Court in *Ajay Ajit Peter Kerkar v. Directorate of Enforcement & Anr.* (2024), which extended the benefit of Section 436A to an accused nearing three and a half years in custody, half of the maximum seven-year sentence under Section 4 of the PMLA.¹⁹

Furthermore, the Supreme Court in *Badshah Majid Malik v. Directorate of Enforcement & Ors.* held that corresponding Section of CrPC S.436A as enshrined in 479 BNSS would be applicable in PMLA cases.²⁰

Strict compliance of S.479 is required to uphold the right of personal liberty enshrined under Article 21, as well as to protect the prisoner from undergoing punishment without trial.

UAPA

UAPA is a law which is designed to prevent and deal with unlawful activities, including terrorist acts. It allows the government to designate organizations and individuals as “terrorist organizations” and “terrorists”, respectively.

Section 43D of the Unlawful Activities Prevention Act, 1967 deals with provision of bail, it states-

‘ Section 43D(5) - 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:

¹⁸ 2022 LiveLaw (SC).

¹⁹ 2024 LiveLaw (SC) 400.

²⁰ (Special Leave Petition (Criminal) No. 10846 of 2024)

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.'

The conditions to be fulfilled to obtain bail are stringent and therefore makes it difficult for a person to obtain bail even after long incarceration. Certain developments have been made by the Hon'ble Supreme Court to ensure that the inviolable fundamental rights are not violated such as of right to life and personal liberty, and a balance is established to cater ease of investigation, presence before court as well as personal liberty.

In a significant judgment of *Sheikh Javed Iqbal @ Ashfaq Ansari v. State of Uttar Pradesh*²¹, the Supreme Court granted bail to an undertrial prisoner facing charges under the Unlawful Activities (Prevention) Act, 1967, and held that a constitutional court can grant bail despite statutory restrictions if it finds that the right to speedy trial under Article 21 has been infringed.

Even in interpretation of a penal statute, howsoever stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law of which liberty is an intrinsic part.

The Court referred to its previous rulings, including the cases of *Javed Gulam Nabi Shaikh v. State of Maharashtra*²², underscoring the necessity of balancing the seriousness of the charges with the duration of pre-trial incarceration. The Supreme Court highlighted that prolonged detention without conclusion of the trial violates the fundamental right to a speedy trial.

In *K.A.Najeeb Vs. Union of India*²³, the Hon'ble Supreme Court stated that Courts are expected to appreciate legislative policy against grant of bail but rigour of such provisions will melt down when trials are unlikely to conclude within a reasonable timeframe and period of detention which the alleged accused has already undergone has exceeded a substantial part of prescribed sentence.

Hence, held that prolonged incarceration is a ground for bail under UAPA. The Court further

²¹ Criminal Appeal No. 2790 Of 2024

²² 2024 LiveLaw (SC) 437.

²³ (2021) 3 SCC 713.

stated that presence of statutory restrictions like Section 43D(5) of UAPA per se do not oust ability of Constitutional Courts to grant bail on grounds of violation of Part III of Constitution.

As the PUCL study²⁴ found that 8,371 persons were arrested under the Unlawful Activities Prevention Act between 2015- 2020, while only 235 i.e only 2.8% were convicted under the draconian anti-terror law in the same period.

Such reports show pernicious trend and imposes greater duty on the Supreme Court to balance the rights of individuals as well as the interest of society considering the fact that the accused has been charged under such stringent laws which deals with offences affecting social-economic interests of the nation. Further when the plight of such cases is deplorable.

One such case was of GN Saibaba who was sentenced to life imprisonment under UAPA on charges of affiliation with the Maoist party, his alleged role in terrorist activities, etc. After his arrest in 2014, he remained in jail for about eight years after that the Bombay High Court found that the entire process of recovery of evidence was flawed and no punishment could be given on that basis.²⁵

Finally, on 7 March, 2024 he came out of jail, but till then jail had completely broken him. Saibaba's health has deteriorated greatly while in prison and has been denied adequate medical care. He was 90% physically disabled and was wheelchair-bound since catching polio as a child. He required assistance to do basic tasks such as sitting up, eating, drinking, and going to the bathroom. Saibaba reportedly suffered from several health conditions including, a heart condition, brain cyst, hypertension, breathing difficulties, back pain, and nerve damage.²⁶ After being released from the jail after long incarceration, he died after seven months due to medical conditions.

These instances make it more lucid as to requirement of adopting liberal approach in granting bail.

²⁴ UAPA: CRIMINALISING DISSENT AND STATE TERROR Study of UAPA Abuse in India, 2009 – 2022 V. Suresh, Madhura SB and Lekshmi Sujatha, September 28, 2022.

²⁵ Apoorva Anand, *N. Saibaba: A Life Ended by Systemic Injustice*, Oct 13, 2024.

<<https://frontline.thehindu.com/news/indian-activist-gn-saibaba-death-uapa-controversy-human-rights-political-prisoners-disability-activism/article68748624.ece>>

²⁶ [Gokarakonda Naga Saibaba](#),

<https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/gokarakonda-naga-saibaba>

CONCLUSION

According to the Prison Statistics Report, 2022 released by the National Crime Records Bureau, the total number of undertrials in Indian prisons exceeds the number of convicts by three times. With a mounting count of 4, 34,302, undertrials make up a majority of India's prison population. The Model Prisons and Correctional Services Act, 2023,²⁷ defines an undertrial prisoner as, *a person who has been committed to judicial custody pending investigation or trial and has not yet been convicted.*

India has committed to several international agreements, such as the International Covenant on Civil and Political Rights (ICCPR), which stress the need to treat undertrial prisoners with dignity and fairness, acknowledging their unconvicted status.

As a step in the direction of recognising the rights of under trials, the Apex Court on August 23, 2024 had held that the beneficial provision of Section 479 of BNSS would apply retrospectively to the undertrials across the country, i.e., to all undertrials in cases registered before July 1, 2024, can also benefit from the provision, which allows release on bail after completing a portion of the potential sentence.²⁸

To ensure effective implementation, the Court emphasized that the Undertrial Review Committees (UTRCs) in every district must actively work with Jail Superintendents to identify eligible prisoners. Additionally, District Legal Services Authorities (DLSAs) and State Legal Services Authorities (SLSAs) should engage panel lawyers and para-legal volunteers to keep undertrial records updated. This is essential because an undertrial may become eligible for release soon after a review, and delays could deny them justice.

This is necessary as a particular under trial may cross the threshold bar of one third or 50% of the sentence the very next day after the information is collected or thereafter. Therefore, this has to be an ongoing process, and steps must be taken to ensure the release of deserving under trials under section 479 BNSS in a proactive way.”²⁹

²⁷ Unmasking Hardship Of Women Undertrials In India, 28 Mar 2025

https://www.livelaw.in/articles/unmasking-hardship-women-undertrials-india-287823#_ftn1

²⁸ Take Proactive Steps To Release Deserving Undertrial Prisoners Under S.479 BNSS: Supreme Court To States/UTs.

<https://www.livelaw.in/top-stories/take-proactive-steps-to-release-deserving-undertrial-prisoners-under-s479-bnss-supreme-court-to-statesuts-273246>

²⁹ Ibid.

Such step by the Hon'ble Supreme Court is a welcoming step which will not only assist in de-congestion of jails but also provide legal aid to the persons who are languishing in jail due to various readiness such as lack of knowledge, fund etc.

Earlier also to tackle the problem direction was given by, a three-judge Bench of the Supreme Court which directed the Jurisdictional Magistrates/Sessions Judges to hold one sitting in a week in each jail/prison for two months to identify the under-trial prisoners who had completed half period of the maximum term; or maximum term of imprisonment stipulated for the offence and pass an appropriate order to release them on bail.

This judgment is a strategic move that can help reduce overcrowding in prisons and support individuals who remain in jail due to lack of awareness or financial limitations.

Previously, the Supreme Court had also directed Magistrates and Sessions Judges to hold weekly sessions in jails for two months to identify and grant bail to undertrials who had completed half or the full length of their maximum possible sentence. The Court also instructed all High Courts to ensure these orders were followed and to report back on their implementation.³⁰

Consistent and sincere application of these measures can not only uphold the fundamental rights to life and liberty but also significantly ease the issue of overcrowded prisons in India.

³⁰ Bhim Singh v. Union of India (2015) 13 SCC 605.

<https://www.scconline.com/blog/post/2021/02/06/gamut-of-section-436-a-of-the-code-of-criminal-procedure-an-analysis/>