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Why The Uapa And Other Draconian Laws Should Be Opposed?

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Abstract

Bail considerations are not only contained to those offences which come under the Indian Penal Code but also under the special statutes. In these special statutes the offences are cognizable offences and in respect of those offences the officer-in-charge of the police station can arrest any accused, and if the offence is non-bailable then the question of the custody of the accused in police custody or in jail or the production before the magistrate as provided under the Cr.P.C generally arises. The question often arises as to whether the bail provision as contained in Chapter XXXIII of Cr.P.C would be attracted to such offences. As to whether the provisions of bail as contained in this Chapter are wholly attracted or attracted with certain limitations as specially provided in the statute have to be decided on considering the provisions of the various statutes like Prevention of Terrorism Act (POTA), FERA Act, Defense and Internal Security of India Act 1971, 18 Official Secrets Act 1923, 19 The Extradition Act 1962, Prevention of Corruption Act 1988 and Explosive Substance Act 1908. Similarly, the economic offences bring about a total imbalance in the economy of the country which has the effect of making the lives of the majority of people economically weaker and miserable; such economic offences are even treated worse than murders being committed in the country. UAPA is India's foremost anti-terrorism legislation, which has been amended thrice in 2004, 2008 and 2012; the law has become increasingly repressive, regressive and draconian. UAPA violates the norms of natural justice as it puts the onus of proof on the accused and not on the prosecution. The draconian act was also being used to detain poor tribals in West Bengal and Chhattisgarh, who were trying to stop the seizure of their precious farm land by mining companies.

Keywords: Bail, charas, draconian laws, explosives, Ganja. The narcotic drug, psychotropic substance, sentence.

1. Introduction

The theory of bail is changing gradually and in the nineteenth century it had substantially changed and it came to be defined as 'a delivery of a person to his sureties on the basis of giving, sufficient securities for his appearance, and thus he is supposed to continue in their friendly custody instead of going to prison.[1] Jowett's Dictionary of English Law refers the term bail as:
"To set at liberty a person arrested or imprisoned on security being taken for his appearance on a day and at a place certain which security is called bail."[2]

[1] *Chitty's Treatise on the Criminal Law* (1826) p.3
[2] Jowitts Dictionary of English Law 2nd Edn: by John Barke Vol-I at p.172.

The moment when a person's movement is checked by way of arrest, he hankers for freedom. Bail is the only process through which the freedom of arrested person could be restored. In our country, the subject and system of bail namely, the released of an accused person on furnishing surety or security is a very old one and was prevalent even in ancient India. To avoid pre-trial detention Kautilya's 'Arthasastra' advocated speedy trial of the accused. The bail system was also prevalent in the form of muchlaka i.e. personal bond and 'jam Nat' i.e. bail on furnishing surety during Mughal period.[3]

Bail considerations are not only contained to those offences which come under the Indian Penal Code but also under the special statutes. In these special statutes, the offences are cognizable offences and in respect of those offences the officer-in-charge of the police station can arrest any accused, and if the offence is non-bailable then the question of the custody of the accused in police custody or in jail or the production before the magistrate as provided under the Cr.P.C generally arises.

The question often arises as to whether the bail provision as contained in Chapter XXXIII of Cr.P.C would be attracted to such offences. As to whether the provisions of bail as contained in this Chapter are wholly attracted or attracted with certain limitations as specially provided in the statute have to be decided on considering the provisions of the various statutes. So, the question of the applicability of Chapter XXXIII of Cr.P.C in respect of particular statutes is dealt with separately with special reference to Narcotic Drugs and Psychotropic substances Act 1985.

2. Bail under the Narcotic Drugs and Psychotropic Substances Act 1985

2.1 Object of the Act

The Narcotic Drugs and Psychotropic Substances Act 1985(NDPS Act 1985) is enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and to provide for the forfeiture of property derived from or used in illicit traffic in narcotic drugs and psychotropic substances. Sections 15 to 30 contains the provision for various offences and its punishment. Under Section 36 Special Courts are competent to try the offences which are punishable for a term of imprisonment for more than 3 years.

The offences punishable under Sections 20 and 25 read with section 29 of the Narcotic Drugs and Psychotropic Substances Act 1985 (hereinafter referred to as 'the NDPS Act 1985') are also offences under a special statute. So far as offences under the above Act are concerned even though it is a special Act, provisions of Chapter XXXIII have not been specifically excluded. Moreover, the trial is to be held under the Act not by the Special Judge but by the Sessions Judge. Therefore, the provisions of Chapter XXXIII of Cr.P.C are very much applicable to such offences.

The provisions relating to grant of bail to a person accused on an offence under the NDPS Act 1985 are contained in Section 37 of the Act. Before being amended in 1989, this section read as follows: "Notwithstanding anything contained in the code of Criminal Procedure, 1973 (2 of 1974), every offence under this Act shall be cognizable". Although all the major offences under the Act were non-bailable by virtue of the provisions of the Cr.P.C, yet the offenders were often granted bail by the courts on technical grounds as a matter of routine.[4] In view of this state of affairs, the said section was amended by the Narcotic Drugs and Psychotropic Substances

[3] *Bail law and practice by M.R. Mallick. Third Edition* p.3, *para 1*.

[4] Statement of objects of the NDPS (Amendment) Bill, 1988, acknowledges that: "Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail".

(Amendment) Act, 1988 (2 of 1989) so as to put fetters on the powers of court to grant bail to a drug offender.

2.2 History of the Act

The NDPS Act, 1985 is one of the harshest laws in the country. It prohibits cultivation, production, possession, sale, purchase, trade, use and consumption of narcotic drugs and psychotropic substances except for medical and scientific purposes under license.

The Act has been amended twice; in 1989 and 2001.Following the amendments, persons caught with small amounts of drugs faced long prison sentences, without the possibility of release on bail. Courts criticized the harsh and disproportionate sentencing structure, which led to a fresh set of reforms in 2001 to rationalize punishment on the basis of whether the quantity of drugs involved is "small", "commercial" or "intermediate" and provide some leniency towards drug offenders who also use drugs.

3. Stringent provisions under the NDPS Act 1985

- Mandatory minimum sentence of 10 years imprisonment for certain offences
- Presumption of guilt and reversal of burden of proof
- Severe restrictions on grant of bail
- Pre-trial detention of up to 1 year
- No suspension, remission and commutation of sentences
- No release on probation for offenders
- Enhanced punishment (up to 30 years imprisonment) for repeat offenders
- Compulsory death sentence for subsequent conviction for specific offences

3.1 Offences under the Act

The peculiarity of NDPS Act is not only the possession and sale but the consumption is also made liable. Thus, consumption of drugs is illegal and results in a jail term of up to 6 months or 1 year and/or a fine, depending on the substance consumed. Penalties for drug offences, including possession, are determined by the quantity of drugs involved Intention, i.e., whether the drug is meant for sale, distribution or personal use is irrelevant for the purpose of punishment. Thus, selling 5 grams of cocaine attracts the same punishment as possessing the same amount for personal use. Criminalisation of drug use and possession has disproportionately affected the health and lives of millions of people who use drugs. In particular, poor drug users are trapped in the revolving door between prison and the street, devoid of medical, social or legal assistance.[5]

3.2 Right to Bail under the Act

With regard to bail stringent provisions are there in the Act and the discretion of the court is also limited thus the NDPS Act denies safeguards on civil liberties that are ordinarily available within the criminal justice system.

The tart terms of Lord Camden in this regard are that:

[5] Drug Quantity and Punishment: Heroin: Small Quantity (5gms)- Punishment Maximum of 6 months' rigorous imprisonment or a fine up to Rs. 10,000 or both, Commercial Quantity (250gms)- Rigorous imprisonment from 10years' (min.) to 20 years (max.) & a fine from Rs 1 lakh to 2 lakhs; Opium (25gms-2.5kgs), Morphine (5gms-250gms), Ganja (1000gms-20kgs), Charas (100gms-1kg), Cocaine (2gms-100gms), Methadone (2gms-50gms), Amphetamine (2gms-50gms), LSD (0.002gm-0.1gm)

"The discretion of a judge is the law of tyrants. It is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion in the best, it is oftentimes caprice, in the worst, it is every vice, folly and passion to which human nature is liable."[6]

The Criminal Procedure Code allows pretrial detention for 60 or 90 days (for serious crimes), after which the accused can seek and be released on bail. Persons accused of certain NDPS offences are, however, liable to detention for 180 days, which may go up to 1 year, if the investigation is not complete.

Apart from that the Act imposes severe restraints on bail. Section 37 makes specific offences including those involving commercial quantity, the offence is non-bailable and with regard to bail unless the Court is satisfied that the accused is not guilty the question of bail does not arise. These restrictions were also being applied to drug users upon arrest for consumption or possession of small amounts of drugs but the Courts have now clarified through decisions that persons charged with small quantity drug offences have a right to get bail. In Abdul Aziz v. State of U. P[7],the court held that in offences punishable up to three years of imprisonment the accused has right to get bail. The question whether the provisions of Cr.P.C will override the NDPS Act was discussed in detail in this case. Under section 5 of Cr.P.C , the special provisions to the contrary will override the provisions of the Cr.P.C. Clause (2) of Section 4 and 5, Cr.P.C. It further provides that "all offences under any law shall be investigated, enquired into, tried and otherwise dealt with accordance to the provisions, but subject to the enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

From the analysis of provisions of Section 37 of the N.D.P.S. Act and Sections 4 and 5 of the Cr.P.C. it is clear that except for offences under Sections 19, 24 and 27A of the Act, the provisions for bail as given in the Cr.P.C. will apply. The offences no doubt are also cognizable and the provisions of the Act will prevail over the provisions of the Cr.P.C.

Accordingly, it is decided that the offence committed by the petitioner is bailable offence. The learned Sessions Judge is directed to dispose of the bail application of the petitioner considering the offence committed by the petitioner as bailable in the light of the provisions of Section 436, Cr.P.C.

In Shaji v. State of Kerala[8],three questions discussed, as

1) Is the Magistrate competent to release the accused of any offence under the NDPS Act?
2) Whether offences punishable with not more than three years under the NDPS Act is bailable or not?
3) Is the Magistrate competent to extend the remand beyond 15 days?

The Court while answering the first question observed that in cases punishable with imprisonment for a term exceeding three years triable by a special court the Magistrate is not competent to release such an accused. About the second question the offences punishable with imprisonment up to three years magistrate is competent to release the accused on bail. With regard to the third question court held that if the article seized is beyond small quantity the magistrate is not competent to remand beyond 15 days and hence mandatory to forward with the special court.

[6] 1 Bovu.Law Dict,Rawles III Revision p.885-quoted in Judicial Discretion-National College of the State Judiciary, Reno ,Nevada p.14

[7] 2002 Cri.LJ 2913.

[8] 2004(3) KLT 270.

In Stefan Mueller v. State of Maharashtra[9], the Supreme Court held that the stringent conditions of grant of bail under the NDPS Act prescribed under section 37 (1)(b) are applicable only to offences punishable under sections 19,24 and 27-A and also to the offences involving commercial quantity. The said conditions are not applicable to any other offence. In para 19 Court observed that a person who is alleged to have committed a bailable offence as an unfettered and absolute right to be enlarged on bail and the court or the police officer concerned as the case may be, has no discretion to grant or refuse bail.

As per the three decisions mentioned above a person arrested under the NDPS Act for minor offences like consumption and those involving small quantity of narcotic drugs and psychotropic substances is entitled to get bail.

3.3 Unconstitutional Provision under the Act

Prior to the decision in Harm Reduction Network v. Union of India[10], Section 31A of the NDPS Act imposes mandatory death penalty for certain repeated crimes involving a large quantity of drugs. In June 2010, the Lawyers Collective argued a constitutional challenge to this provision in Indian Harm Reduction Network v. Union of India[11] on grounds of infringing fundamental rights under Articles 21 (protection of life and liberty) and 14 (equal protection of law) of the Constitution of India. It also questioned the appropriateness of a death sentence for drug trafficking, which does not involve killing or taking of human life and is merely an economic offence.

Through this decision the Bombay High Court found Section 31A to be in violative of Article 21 as it divested the Court of its beneficent discretion and scrutiny before pronouncing the death sentence. Accordingly, the sentencing Court will now have to hear the drug offender on the question of punishment and can decide to award a sentence other than death.

A plain reading of section 37 suggests that notwithstanding anything contained in the Cr.P.C, the court can grant bail only in such rare cases where it is satisfied that there are reasonable grounds for believing that the accused has neither committed the alleged offence nor he is likely to commit such an offence while on bail. However, these provisions have been subjected to varying interpretations by the courts and have thus attained a lot of elasticity.

3.4 Bail in Ganja cases

There have been conflicting judicial pronouncement on the question as to whether the restrictions imposed by virtue of section 37(1) (b) on the powers of the court to grant bail apply to the offences relating to 'ganja' covered by section 20(i) of the Act. These offences are punishable with "rigorous imprisonment for a term which may extend to five years". On the other hand, restrictions under section 37(1) (b) apply to offences punishable for a term of "imprisonment of five years or more".

In Rajendra Panda v. State of Orissa[12],the High Court of Orissa held that the language used in section 37(1) (b) is clear to the effect that offences which carry punishment of five years or more are covered by it and that "there is nothing in the language of the statute to infer that the sentence intended was minimum limit and not maximum limit". The court therefore, concluded that offences in relation to 'ganja' fell within the scope of section 37(1) (b) of the Act.

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[9] 2010 Vol 112(7)1 Bom L R.

[10] Criminal Writ Petition No. 1784 of 2010, High Court of Bombay

[11] *Ibid*.

[12] 1992 Cri. LJ 491.

The Orissa High Court in Sanatan Sahu v. State of Orissa[13] has taken the same view and denied bail to an accused found in possession of ganja applying the provisions of section 37 of the Act to the case. But the Karnataka High Court has taken a contrary view in AV Dharma Singh v. State of Karnataka[14], and held that "if the intention of the legislature was to make section 37 of the Act applicable to the offences which are punishable even up to 5 years or less, then the legislature would not have used the expression '5 years or more'". Consequently, the High Court held that section 37 would not be applicable to offences relating to 'ganja'.
In Sundaresan alias Meganathan alias Mega v. State[15], the Madras High Court has taken the view that section 37 of the NDPS Act is applicable to the offences relating to 'ganja' covered by section 20(b) (1) of the Act.

3.5 Violation of mandatory provision and grant of bail

It is a pertinent question that whether the accused is entitled to get bail when there is non-compliance with the mandatory provisions of NDPS Act. In Bidyadhar v. State[16],the Orissa High Court held that when there is a definite allegation made by the accused of non-compliance with the mandatory provisions of Ss.42, 50, 52 and 57 of the Act and the state has not been able to satisfy that there are no such violation, then their release has to be considered because the arrest and detention of the accused becomes illegal and in such a case, the prayer for release should have to be considered by invoking inherent power under section 482 Cr.P.C and the court should not be fettered by the restraints of section 37(1) (b) of the NDPS Act. But the Full Bench of Orissa High Court[17] set aside the said judgment of Bidyadhar Case and observed that only because there are allegations of infraction of some statutory provision, they are not sufficient to quash arrest and detention of the accused.
The trend of judicial decisions reveals that there are decisions of some High Courts to take the view that compliance or non-compliance with the mandatory provisions of search and seizure have no impact on the grant or refusal of bail. Other decisions are to the effect that non-compliance would result in bar of section 37 being lifted and some other High Courts have held that prima facie compliance of provisions of search and seizure are established bail is to be refused.
Even though there are no authoritative decisions of the Supreme Court in this issue sufficient indication is given in State of Himachal Pradesh v. Prithi Chand[18] by the Supreme Court that the compliance or non-compliance of the mandatory provisions regarding search and seizure under NDPS Act are questions of fact to be proved at the trial and the sessions Judge cannot discharge an accused on the alleged ground of non-compliance of section 50 of the Act.
While analyzing various decisions of different High Courts and the observations of Supreme Court it is correct to say that courts discretion to grant bail is subject to the provisions of NDPS Act and the technicality of non-compliance of mandatory provisions will not entails the accused to get bail. Even the inherent power of the court under section 482 cannot use as an overriding provision to deal with bail matters.

[13] 1992 Cri. LJ 352.
[14] 1993 Cri. LJ 94.
[15] 1993 Cri. LJ 3342.
[16] 1993 Cri. LJ 260 (ori)
[17] *Barkha Das* v. *State of Orissa* 1993 LJ 442 (F.B)
[18] (1996)2SCC37:1996AIR SCW 422.

3.6 Narcotic drug or substance from the possession of the accused – refusal or grant bail; section 37 of NDPS Act and its applicability

While considering the question of bail, the court must bear in mind the mandatory provisions of Section 37 of the NDPS Act, before deciding an application of bail in case an accused in facing a trial under the provisions or the NDPS Act. Bail granted without bearing in mind these provisions, held liable to be quashed.[19]

The Supreme Court in Union of India v. Ram Samujh[20] held that in cases under the NDPS Act, the jurisdiction of the court to grant bail is circumscribed by the provisions of section 37 of the NDPS Act. It can be granted in case where there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. It is the mandate of the legislature which is required to be followed. Considering that those persons who are dealing in narcotic drugs are instrument in causing death or in inflicting death blow to number of innocent young victims, who are vulnerable; it causes deleterious effect and deadly impact on the society; they are hazard to the society; even if they are released temporarily in all probably they would continue their nefarious activities of trafficking and or dealing the menace of dangerous drugs flooding the market. The parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless mandatory conditions provided in section 37 are satisfied.

But in Bhanwar Singh v. State of Rajasthan[21], the court held that the power to grant bail under section 439 Cr.P.C are subject to the limitations contained in section 37 of the NDPS Act. In other words, the Apex court has restricted the bail powers of the High Court under section 37 of the Act. Hence, the limitations contained in section 37 of the Act will have to be borne in mind by the High Court while suspending the sentence and enlarging the accused on bail. Even at this stage the High Court will have to bear in mind the object of the Act and it should exercise its powers with great care and caution so that the very object of the Act is not defeated.

4. Inconsistency between section 37 and provisions of Cr.P.C. regarding bail

Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything contained in the Code of Criminal Procedure, 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The NDPS Act is a special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances.

That being the underlying object and particularly when the provisions of section 37 of the said Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C regarding bail, the decision in Narcotics Control Bureau v. Kishan Lal[22], is pertinent and in this case it was held that the High Court's power to grant bail under section 439 Cr.P.C. are subject to the limitation mentioned under section 37 of the NDPS Act is judicious. The non-obstante clause with which the section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between sections 439Cr.P.C. and section 37 of the NDPS Act, section 37 shall prevail.

The power to grant bail under any of the provisions of the Code of Criminal Procedure should necessarily be subject to the conditions mentioned in section 37 of the NDPS Act. In Balchand Jain

[19] *Union of India* v. *Ikram* Khan, AIR 2000 SC 3397: 2000 (A) SCC 221.
[20] 1999 (4) Crimes 134 (SC)
[21] 1996 Cri. LJ 3086 (Raj)
[22] AIR 1991 SC 558.

v. State of Madhya Pradesh[23], similar question arose with regard to the provisions of the Code of Criminal Procedure regarding bail and Rule 184 of the Defense and Internal Security of India Rules, 1971. It was held that both the provisions operate at two different stages. There is no inconsistency between the two. In Usmanbhai's case[24], a question, whether the provisions of sub-sections (8) and (9) of section 20 of the TADA Act limit the scope of sections 437 and 439 Cr.P.C, came up for consideration. It was found that the language of sub-section (8) and (9) of section 20 of TADA Act is analogous to section 37 of NDPS Act.

The Supreme Court in Kishan Lal's case took into Consideration both the above decisions of the same Court and concluded that it emerges from the Usmanbhai's case, that no contrary opinion was expressed as to what has been observed in Balchand's case and on the other hand at more than one place in Usmanbhai's case it was observed that such enactments should prevail over the general enactment and the non-obstante clause must be given its due importance. Hence held that the powers of the High Court to grant bail under section 439 are subject to the limitations contained in the amended section 37 of the NDPS Act and the restrictions placed on the powers of the Court under the said section are applicable to the High Court also in the matter of granting bail.

For those offences punishable under various provisions of the NDPS Act, discretionary power given to the Court under section 37 to order release of a person has to be used cautiously unlike order to release a person on bail by exercising the power under section 439 of the Code.

As held in the case of Eyas v. State of Karnataka[25], the non-obstante clause contained in section 37 curtails the power of Special Court by clause (1) (b) (ii) which is enjoyed by an accused under section 439 of the Code in all cases including the cases under the NDPS Act but subject to conditions enumerated under clause 1 (b) (ii).In view of specific wording contained in clause (1) (b) (ii), which not only concerns but also affects the personal liberty of an individual citizen, the approach to the question should be broad and liberal. If a provision which curtails personal liberty should be construed with some strictness, the protection provided to safeguard the liberty must be liberally interpreted.

The words "the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is likely to commit any offence while on bail" has got a special significance. This satisfaction is arrived on the basis of material placed before the Court. If such materials are available then only the Court can record a finding of satisfaction contained in clause 1 (b) (ii).

In order to grant bail, both the conditions prescribed under Section 37(l)(b)(ii) i.e. satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty and that he is not likely to commit any offence while on bail, must be satisfied. If either of these two conditions is not satisfied, the bar operates and the accused cannot be released on bail. Explaining the meaning of expression "reasonable grounds'', there must be existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged. However, the court is not required to record a finding of "not guilty" as it does while pronouncing a judgement of acquittal. Existence of some material is also necessary for coming to conclusion as to second condition that the accused is not likely to commit any offence while on bail.

[23] AIR 1977 SC 366.
[24] AIR 1988 SC 922.
[25] 1994 (3) Crimes 444

The expression used in Section 37(1)(Vii) is "reasonable grounds". The expression means something, more than prima facie grounds. It connotes substantial probable cause for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.
The court while considering the application for bail with reference to Section 37 of the NDPS Act is not called upon to record a finding of not guilty.Additionally, the court has to record a finding while on bail the accused is not likely to commit any offence and there should also exist some materials to come to such a conclusion.[26]

5. Conflict between section 167(2), Cr.P.C And section 37, NDPS Act

Section 167(2) of Cr.P.C provides inter alia, that if the charge sheet or the complaint is not filed in the court within the statutory period of 60 days or 90 days, as applicable, the accused shall be released on bail. In the case under the NDPS Act 1985, where the prosecution fails to file the charge sheet or the complaint within the said period, the accused often claim a right to be released on bail under the said section. Therefore, the question arises whether Section 167(2), Cr.P.C. overrides the provisions contained in section 37 of the NDPS Act 1985. There are conflicting judicial pronouncements on this issue, as mentioned hereafter.
The Kerala High Court in its Full Bench Judgment in Berlin Joseph alias Ravi v. State[27], held that section 167(2), Cr.P.C would operate even for offences under the NDPS Act 1985, and then section 37 of the said Act would have no application. According to the court section 37 of the NDPS Act 1985 did not override section 167(2) of the Cr. P.C. The court opined that if the provisions contained in section 167(2) of the code are allowed to be overridden by section 37 of the NDPS Act, the former section would become ineffective and a dead letter.
In Kalua v.State of Rajasthan[28], the High Court of Rajasthan held that a person arrested under the NDPS Act will be entitled to be released on bail in terms of section 167(2) Cr.P.C. if the charge-sheet had been filed after expiry of the period prescribed under the said section. However, a contrary view has been taken by the same High Court in subsequent cases i.e. Rashid Khan alias Rashid v. State[29] and Harendra alias HariSingh v. State of Rajasthan.[30]
The High court of Madhya Pradesh had initially expressed the view in Kalika Prasad and another v. State of Madhya Pradesh[31] that section 167(2), Cr.P.C would prevail over section 37 of the NDPS Act 1985. However, a Full Bench Judgment of Ram Dayal v. Central Narcotics Bureau[32], the said High Court has overruled its judgment in Kalika Prasad and has also dissented expressly with the Full Bench decision of the Kerala High Court in Berlin Joseph. In Ram Dayal, the Madhya Pradesh High Court has held that section 167 2) of the Criminal Procedure Code was not applicable to proceedings under the NDPS Act.

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[26] *Union of India* v. *ShivShankar Kesari*, (2007) 7 SCC 798: (2007) 3 SCC (Cri) 505: (2007) 6 All LJ 355.
[27] 1992(1) Cur Cri. R 1047: 1992 (1) Crimes 1221 (Kerala)
[28] Cri. M.P. NO. 853 of 1991, Decided on 11th July 1991.
[29] 1993 Cri. LJ 3776 (Raj)
[30] 1994 Cri. LJ 50 (Raj)
[31] No. 330 of 1991, Decided on 31st October, 1991.
[32] 1993 Cri. LJ 1443.

In Banka Das v. State of Orissa[33], the court ruled that the said section overrides section 167(2), Cr. P. C. 1973 because the NDPS Act, 1985 is a special statute.

When analyzing the provisions of bail under the Cr.P.C with the provisions of Section 37 of NDPS Act regarding bail a question may arise as to whether the bail provision under the Cr.P.C will override Section 37 of NDPS Act or not. It is submitted that NDPS Act being a special statute the provisions of bail under the Cr.P.C will not override the special act. If the bail provisions under the Cr.P.C are overriding the legislature would have specifically mention the matter in the NDPS Act being the same has been enacted after 1973, the year in which Cr.P.C has been enacted. It is also submitted that the main object of the act being the control and regulation of narcotic drugs and psychotropic substances bail provisions and conditions are stringent. Thus, the limitations provided under the Act are in addition to the limitations provided under the Cr.P.C provisions dealing with bail. So, the bail provisions under the Cr.P.C will not override the provisions of NDPS Act.

6. Distinction between provisions of Cr.P.C. Relating to bail and Section 37 of NDPS Act 1985

Section 437 or 439 Cr.P.C. impose restriction on the power to release the accused on bail if reasonable grounds exist for the belief that, accused is guilty whereas limitation on this power in section 37 of NDPS Act is in the nature of condition precedent for the exercise of that power, so that, the accused shall not be released on bail unless the court is satisfied that there are reasonable grounds to believe that he is not guilty. Under section 437 Cr.P.C. it is for the prosecution to show reasonable ground showing involvement of the accused in the commission of the crime to attract the restriction on the power to grant bail whereas under section 37 of NDPS Act, it is the accused who has to show the existence of the ground for the belief that he is not guilty of the offence he is charged. In the first case, burden to prove that accused is prima facie guilty is on the prosecution but in the latter case, burden is on the accused to satisfy the court that he is not guilty. Moreover, the court has to be satisfied that accused is not likely to commit any offence while on bail when the public prosecutor opposed the bail. The provision of section 37 of NDPS Act is more stringent than section 437 Cr P.C, as held in the case of Antma Ram v. State of Rajasthan.[34] It could be convinced by the decision of Intelligence Officer, Narcotic Control Bureau v. Naushad Ali Abdul Aziz[35], in which court held that while the court exercising power either under section 437 or 439 Cr. P. C. shall do so subject to limitations contained in amended section 37 of the NDPS Act.

No accused can be released on bail when the application is opposed by the Public prosecutor unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. The court has to record a finding in terms of section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act. Grant of bail on ground of prima facie violation of section 52, as compliance of these provisions is a matter which could be established only at the trial and could not be prejudged at the stage of consideration for bail.[36]

[33] 1993 Cri. LJ 442.
[34] 1996 (3) Crimes 412.
[35] 1996 (2) Crimes 158.
[36] *Suprndt; Narcotic Control Bureau*, *Chennai* v. *R. Paulsamy*, AIR 2000 SC 3661; 2009 (9) SCC 549: 2001 Cri. LJ 117.

7.Conflict between section 37 of NDPS act and section 12(1) of Juvenile Justice (Care and Protection of Children) Act

When a Juvenile is arrested under the provisions of the NDPS Act, 1985 seeks bail under section 12(1) of the Juvenile Justice (Care and Protection of Children) Act 2000 there exists a conflict when analyzing these two sections. As per the later Act a Juvenile shall ordinarily be released on bail notwithstanding anything contained in the criminal procedure code, 1973, or any other law for the time being in force. Since section 37 of NDPS Act, 1985 and section 12(1) of Juvenile Justice (Care and Protection of Children) Act 2000 contradict each other so far as juveniles are concerned, and both the section contain non-obstante clauses, the question arises as to which one of these two provisions would prevail in such a situation. It may be noted that there is no difference between section 12(1) of the Juvenile Justice (Care and Protection of Children) Act 2000 and section 18(1) of its predecessor i.e. Juvenile Justice Act 1986. While analyzing the section with section 37 of NDPS Act 1985 the Orissa High Court in Antaryami Patra v. State of Orissa[37] held that the Juvenile Justice Act 1986 is being a general statute and the NDPS Act being a special statute, the NDPS Act 1985 would prevail over the Juvenile Justice Act 1986. However, considering the Juvenile Justice Act 1986 as a special statute for the protection of children, and the NDPS Act, 1985 as a part of the general criminal law, cannot be ruled out.

On the basis of the conflicting interpretations pinpointed and high lightened above, there is a need for remedial legislative action, otherwise, there will be no uniformity in application of bail provisions for drug offenders throughout the country and this alone will be a great set back to our efforts to free the society from the menace of drugs.

Both are being special statutes it cannot say that one will override the other. When a juvenile commits an offence under the NDPS Act is eligible to get bail as provided under Section 12 of the Juvenile Justice (Care and Protection) of Children Act 2000 is a debatable issue. It is submitted that the wording in Section 12 of JJ Act 2000 that "Notwithstanding anything contained in the Cr.P.C or any other law for the time being in force JJ Act 2000 will prevail " means a juvenile is entitled to get bail because the word "any other law" in Section 12 includes the NDPS Act 1985 .Thus the Juvenile Justice (Care and Protection) of Children Act 2000 will override the NDPS Act.

8. Bail under the Terrorist and Disruptive Activities (Prevention) Act 1987

Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as the TADA) was primarily passed with a view to dealing with specific situations of terrorism in Punjab, Kashmir and even parts of the Northeast. The main object of the Act was to make special provisions for the prevention of, and for coping with, terrorist and disruptive activities and for matters connected therewith. It is not a penal law for prosecuting the terrorist because it provides detention of any individual for a period of at least one year by the police. Thus, the police and the magistrate have power to detain a person in custody even without a charge relating to an offence. Police is generally known as masters of manipulations. The outcome of TADA was predictable and brutal. It is evident from the incidents that happened in Punjab where in the police committed torture, murder, rapes and other atrocities against a large number of Sikh people. One of the vulnerable provisions under the Act is a confession to the police officer was made admissible in evidence and the trial and other proceedings were conducted in camera. Designated courts were established to deal with the cases under the provisions of TADA Act and even the fundamental rights of the accused persons curtailed. Police got the power to bring any person as an enemy of the state under the provisions of the Act.

[37] 1993 Cri. LJ 1908.

The Act vests sweeping powers in the State Governments which in effect means local politicians and the police which is likely to be misused. There were widespread complaints of misuse of the provisions of the Act.

The description of the offence and its punishment is prescribed under Section 3 of the Act. Section 3 provides six categories of offences and its punishment.

Section 20(8) of the Act imposes a restriction to grant bail to a person accused of an offence under the Act by the designated court or the High Court.

The court can grant bail where the public prosecutor opposes the bail application only if it is satisfied that he is not guilty of such offence "and that he is not likely to commit any offence while on bail". In Union of India v. Muhammed Sadiq Rather[38], it was held that before a person accused of an offence under TADA is released on bail two conditions must be fulfilled.

a) an opportunity must be given to the public prosecutor to oppose the application for such release.

b) the court must be satisfied that there are reasonable grounds for believing that the said accused is not guilty of such offence.

Hence an application for bail filed on behalf of a person who has been accused of an offence punishable under the Act has to be examined carefully and cautiously on basis of the charges leveled in the FIR, and the evidence collected in the course of investigation. The condition for grant of bail specified under sub-section (8) of section 20 of the TADA Act in addition to those under the court has made explicit by section 20(9).

9. Designated Court's power to grant bail under section 20(4) of TADA Act

The Designated Court has the power to grant bail under sub-section (4) of section 20 of the Act on default when the investigation is not completed within 180 days of the date of arrest. The Supreme Court in Hitendra Vishnu Takur v. State[39] has made it clear that the bail on default under section 20(4) of the Act is a right and the Designated Court has no power to remand on the ground of gravity of offence. It is also pointed out that the general considerations under section 20(8) of the Act are also inapplicable to grant bail under section 20(4) of the Act. It is also pointed out that both section 20(4) and section 20(8) operate in different situations and are controlled and guided by different considerations.

In Mohammed Iqubal Madar Sheikh v. State of Maharashtra[40], it is also reiterated that on default of submission of the charge-sheet within the statutory period the accused becomes entitled to be released on bail, but if he fails to apply for bail when such right accrued, he cannot exercise that right after the charge-sheet has been filed and cognizance had been taken. However, the right of the accused to be released on bail should not be defeated by keeping the application pending till the charge-sheet is submitted. Where, however, the charge-sheet has been submitted within a period of one year under section 20(4) (b) as stood prior to the amendment of the Act in 1993, then no order for bail on default in submission of the charge-sheet within the statutory period can be granted.

10.Whether the High Court has jurisdiction to entertain an application for bail in cases under Terrorist and Disruptive Activities (Prevention) Act, 1985?

[38] (1993) 1 SCC 8:1993 SCC(Cri)8:AIR 1993 SC 379

[39] (1994) 4 SCC 602: AIR 1944 SC 2623: 1994 SCC (Cr.) 1087.

[40] (1996) 1 SCC 722: 1996 SCC (Cr) 202.

It is an admitted fact that under Section 9 of the Terrorist Act, exclusive jurisdiction is conferred upon the Designated Court established as per provisions of Section 7 of the Terrorist Act to try every offence punishable under any provision of the Terrorist Act or any rule made there under. No other Court has jurisdiction to deal with or try the person who is involved in any offence punishable under the Terrorist Act.

The entire Cr.P.C is not made applicable but some specific provisions are made applicable or some provisions of the Cr.P.C with modifications are made applicable.

The following provisions of the Terrorist Act would make it clear that the entire Cr. P.C. is not made applicable. Under Section 8 of the Terrorist Act a designated Court is entitled to sit at any of its jurisdictional place than the ordinary place of its sitting, in the State in which it is constituted. Sub-section (2) of Section 9 of the Terrorist Act provides for transfer of case from one designated Court to another designated Court. That power is conferred upon the Central Government and is to be exercised with the concurrence of the Chief Justice of India. So, it is clear that the provisions of transfer which are there in the Cr.P.C would not be applicable.

Under Section 10 of the Terrorist Act the jurisdiction is conferred upon the designated Court to try any other offence with which the accused may, under the Cr.P.C, be charged at the same trial, if the offence is connected with such other offence, but for this provision the designated Court would have no jurisdiction to try the accused for any other offence. Other important provision is Section 11 of the Terrorist Act which provides that for every designated Court, the State Government shall appoint a person to be the public prosecutor and may one or more persons to be the Additional Public Prosecutor or Additional Public Prosecutors or Special Public Prosecutor. That means the Public Prosecutor appointed under the Cr.P.C would have no right to conduct the trial or appear before the designated Court as a Public Prosecutor unless he is specifically appointed under Section 11 of the Terrorist Act.

As discussed above, same is the position with regard to the procedure prescribed under Section 12 of the Terrorist Act. The provisions of appeal and revision are not made applicable. In this view of the matter, it is amply clear that the entire Cr.P.C is not made applicable to Terrorist Act but some provisions of the Cr.P.C are made applicable with or without modifications. Therefore, there is no reason to hold that provisions of section 439 or 482 of the Cr.P.C are applicable to a person accused of an offence punishable under the Terrorist Act.

This clearly indicates that entire provisions of the Cr. P.C. with regard to bail, remand or sending the accused to judicial custody are not made applicable. Otherwise there was no necessity of providing that Section 167 of the Cr. P.C. shall apply in relation to the case involving the offence punishable under the Terrorist Act. Sub-section (3) of Section 17 of the Terrorist Act provides that Sections 366 to 371 and Section 392 of the Cr.P.C shall apply in relation to a case involving an offence triable by a designated Court subject to the modifications that references to 'Court of Session' and 'High Court', wherever occurring therein, shall be construed as references to "Designated Court" and 'Supreme Court' respectively. Sections 366 to371 of the Cr. P.C. deals with submission of death sentence for confirmation.

The sub-section (5) of Section 17 of the Terrorist Act lays down entirely different criteria for deciding the bail application. In view of this sub-section the provisions of bail provided under the Cr.P.C would not be applicable and the bail application is required to be decided as per the criteria laid down under sub-sections (5) and (6) of Section 17 and Nowhere it is provided that Section 439 of the Code is applicable. Therefore, there is no question of applying Section 439 of the Code and entertain the application under it. As against this, reliance was placed upon sub-section (6) of Section 17 of the Terrorist Act and it was contended that Sections437 and 439 of the Cr.P.C. would be applicable. lt is total misreading of sub-section (6) of Section17 of the Terrorist Act.

Sub-section (5) and sub-section (6) of Section 17 of the Terrorist Act are to be read together. Sub-section (6) of Section 17 of the Terrorist Act lays down that the limitations on granting of bail specified in sub-section (5) of Section 17 of the Terrorist Act are in addition to the limitations under the Cr.P.C or any other law for the time being in force on granting of bail. So the limitations which are provided in Section 437 of the Cr.P.C are also made applicable by sub section (6) of Section 17 of the Terrorist Act. But it cannot be said that Section 439 of the Cr. P.C. which provides that the High Court or the Court of Session may direct that any person accused of an offence and in custody be released on bail if the offence is of the nature specified in sub-section (3) of Section 437, is applicable. The limitations on granting bail as provided in s.437 Cr.P.C are not provided under Section 439 of the Cr.P.C which confers powers on the High Court or the Court of Session regarding bail.

While considering similar provisions with regard to the Special Courts Bill l978[41],in re:Special Court Bill, constitutional validity of the said Bill was examined, by the Supreme Court. In that case, it was urged that a person put up for trial before the Special Court is denied the benefit of Section 439 of the Cr. P.C under which, High Court or a Court of Session may release an accused on bail. The Supreme Court observed that as regards bail, it is open to the accused to ask for it and in appropriate cases, the Special Court would be justified in enlarging him on bail.

In that reference the Court also construed the contention that the Parliament has no power to create a Court outside the hierarchy of Courts recognized by the Constitution and that the creation of a Trial Court which is not subject to the control and superintendence of High Court is detrimental to constitutional concept of judicial independence and held that Parliament is entitled to set up Courts of the same kind and designation as are referred to in the Special Courts Bill and create newer Special Courts. The Court also observed that it is also true to say that the Special Courts are not District Courts within the meaning of Article 235, with the result that the control over them will not be vested in any High Court.

But courts do not accept that by reason of this consideration, the creation of Special Courts is calculated to damage or destroy the constitutional safeguards of judicial independence. The reasons given by the Supreme Court in the aforesaid reference are confirmed by it in the case of State (Delhi Administration) v.V.C Shukla[42]. In this view of the matter, no application under Section 439 of the Cr.P.C is maintainable either to this Court or to the Sessions Court.

No general section conferring inherent power can be invoked in the face of that but it is argued that these sections in the Act are ultra vires because they contravene section 561-A. Section 561-A cannot possibly have been intended to relate to powers which were not in existence at all at the date when it was passed. It does not give a power of superintendence or of revision in respect of matters which have been specially created by legislature at a later date. If the Legislature chooses to confer those powers upon any Court or body and state that there shall neither be appeal nor revision it has every right and power to do so. We are familiar with the exercise of these powers on the civil side.

In the past decade, the widely accepted notion that judges have discretion to legislate has been sharply challenged by Ronald Dworkin in a series of articles[43].

Many Special Acts are passed conferring special and extraordinary powers upon Courts, persons or bodies stating that there shall be no appeal from orders made under those Acts or stating that

[41] AIR 1979 SC 478.

[42] AIR 1980 SC 1382.

[43] Dworkin, Judicial Discretion, 60 J. Phil 624 (1963): The Model of Rules, 35 U.Chi. L. Rev. 14 (1967); Social Rules and Legal Theory, 81 Yale L.J. 855 (1972).

an appeal shall not lie in the Civil Courts. It would be impossible to argue that these Acts are ultra vires because inherent powers are conferred upon High Court on its civil side by section 115, Cr.P.C. The same reasoning applies here.

In this view of the matter when there is specific bar under Section 16(2)of the Terrorist Act, this Court cannot exercise the inherent Jurisdiction under Section 482 of the code. It is for designated court to decide whether there is sufficient material collected during the investigation and find out whether the accusation is well founded High Court has no jurisdiction to interfere with the prima facie finding of the Designated Court. In the result, the application under Section 439 and or Section 482 of the Cr.P.C is not maintainable against the order passed by the designated court under the Terrorist and Disruptive Activities (Prevention)Act.[44]

In conclusion it may be said that the exercise of judicial discretion in these times affords an opportunity (in the language of Dean Pound) "for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles; for putting the human factor in the central place and relegating logic to its true position as an instrument.[45]

11.Bail of TADA accused: dividing the accused in to four classes; Supreme Court's Guidelines

In Saheen Welfare Association v. Union of India[46], the Supreme Court has observed that a pragmatic approach should be made in the case conflict between individual liberty and protection from terrorism and disruptive activities when there is deprivation of personal liberty without prospect of trial being concluded within a reasonable time justifying invocation of Art.21 of the constitution. TADA under trials should be divided into four classes namely (a) hard-core under trials whose release would prejudice the prosecution case and whose liberty will be proved a menace to the society in general and the complaint of prosecution witness in particular (b) other under-trials whose overt cause or inducement directly attracts sections 3 and or 4 of the TADA (c) under-trials who are roped in, not because of any activities directly attracting sections 3 and 4 but by virtue of section 120 B or section 149 IPC and (d) those under-trials who were found possessing incriminating Articles in notified areas and are booked under section 5 of the Act.

Those under-trials falling in group (a) cannot receive liberal treatment. Cases of under trials falling in group (b) would have to be differently dealt with. Cases of under trials falling in group (c) and (d) can be dealt with leniently and they can be released if they have been in jail for three years and two years respectively. Those falling in group (b) when released on bail, may be released on bail of not less than Rs. 50,000/- of one surety of like amount and those falling in groups (c) and (d) may be released on bail on their executing a bond of Rs. 30,000/- with one surety of like amount, subject to the following terms and conditions.

(1) The accused shall report to the police station concerned once a week;

(2) The accused shall remain within the area of jurisdiction of the Designated Court pending trial and shall not leave the area without the permission of the Designated Court;

(3) The accused shall deposit his passport, if any, with the Designated Court. If he does not hold a passport he shall file an affidavit to that effect before the Designated Court. The Designated court may ascertain the correct position from the Passport Authority, if he deems necessary.

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[44]*Usmanbhai Pareedbhai* v. *State of Gujarath*,1987 Cri.LJ at pp. 1960-1965(Guj)

[45] Pound, Mechanical Jurisprudence (19o8) 8 Col. L. Rev. 605, 609

[46] (1996) 2 SCC 616: 1996 SCC (Cr) 366: 1996 Cr. LJ. 1866.

(4) The Designated Court will be at liberty to cancel the bail, if any of the conditions is violated or a case for cancellation of bail is otherwise made out.
(5) Before granting bail a notice shall be given to the Public Prosecutor and an opportunity shall be given to him to oppose the application for such release. The Designated Court may refuse the bail in a very special circumstance for reasons to be recorded in writing.
These conditions may be released in cases of those two groups (c) and (d) and for special reasons to be recorded, in cases of group (b) prisoners.
The report of the Review Committee is another important factor to consider whether bail is to be granted or not. In Kartar Singh v. State of Punjab[47], the Supreme Court directed the Central and State Governments to constitute a Review Committee.
While perusing the provisions of TADA Act and the extend of judicial discretion in TADA Cases to grant bail it can be seen that no court even the High Court or the Supreme Court can use its discretion to grant bail. Section 20(4) and 20(8) are mandatory provisions and no court can supersede these provisions of the Act. Section 439 and 482 has no application while considering bail application in TADA cases. The High Court can entertain petition under Article 227 and 226 only when it is satisfied that there is no material to show that the petitioner is involved in any TADA offences. So, the power of the High Court under Article 227 is also studded with certain conditions. The Supreme Court in Kartar Singh's case has observed that an application for bail under Article 226 of the constitution and pass orders either way on cases under the TADA Act, the power should be used sparingly. So, the inherent power of the High Court under Section 482 and the constitutional power under Article 226 and 227 also cannot be used, to grant bail to a TADA accused except in certain exceptional cases. So, the judicial discretion to grant bail cannot be used in TADA cases.

12. Bail under the Unlawful Activities (Prevention)Act 1967(UAPA)

The unlawful activities (prevention) Act 1967 was passed with an object of imposing reasonable restrictions in the interests of the sovereignty and integrity of India on the
(i) Freedom of speech and expression
(ii) Right to assemble peacefully and without arms; and
(iii) Right to form associations or union
So the act gives powers for dealing with activities directed against the integrity and sovereignty of India. It was amended five times in the year 1969,1986,2004,2008 and 2012.It provides for the more effective prevention of certain unlawful activities of individuals and associations[48](and dealing with terrorist activities)and for matters connected therewith.
The Unlawful Activities (Prevention) Act (UAPA) was enacted in the Indian parliament in the year of 1967, which has been curbing the democratic rights of the citizens till now. A large number of innocents falsely implicated in terror cases by this act are languishing in various jails in different parts of the country. The basic reason for the illegal arrest and subsequent detention of these innocent victims is the existence of the very UAPA. The original act was amended thrice in the years 2004, 2008 and 2012. By adding new clauses to the original law by these amendments, it has become more vulnerable and inhuman than the previous terror laws.

[47] (1994) 3 SCC 969: 1994 SCC (Cr.) 899: 1914 Cr. LJ 3139.
[48] Ins. By Act 29 of 2004, Sec.2(w.e.f. 21-09-2004)

12.1 Amendment of 2004

In the 2004 Amendments of UAPA, it was incorporated provisions from TADA and POTA, both being the terror laws that had led to severe rights violations. Among other issues, the amended 2004 UAPA made substantial changes to the definition of 'unlawful activity including the definition of 'terrorist act' from the POTA, which lapsed, and also introduced the concept of a 'terrorist gang'.

12.2 Amendment of 2008

On 17 December 2008, another amendment of the UAPA was moved and adopted following the attack by armed gunmen in Mumbai on 26th November 2008. Barely a few days after the attack, the then Congress-led UPA government pushed through an amended UAPA which accorded even more powers to the central executive.

In contrast to at least some members casting doubts on the UAPA Bill during the debate in Parliament in 1967, only a few voices were raised in 2004 and 2008 against the abridgement of fundamental rights and the expansion of the executive's powers over citizens. With this, the UAPA became an omnibus and permanent act that provided the government with the grounds to ban associations under two provisions: under Sec. 2 as an 'unlawful association' and under Sec. 35 as a 'terrorist organization'. Indeed, some of the provisions of the existing UAPA are far worse than POTA. For the 2008 amendment, obviously, the Government was using the scary atmosphere created in the wake of the terrorist attack on Mumbai.

The 13.12.2001 (attack on Parliament) was followed by Pota (Prevention of Terrorist Activities Act) and 26/11 2008 (terrorists' siege of Mumbai) was followed by amendment to the UAPA (Unlawful Activities Prevention Act)".

The safeguards of those statutes, TADA and POTA, however insignificant, were not incorporated in the Amendment. Further, unlike those laws, however, the UAPA is an ordinary law, and thus binding indefinitely, till repealed.

Several provisions that were assimilated into UAPA were criticized globally as repressive and hugely open to misuse. These provisions enable the State in the enforcement of its whims and fancies, and can, and have led to numerous human rights violations

This 2008 Amendment defined terrorism in an imprecise and vague manner, including under the ambit of 'terrorist act' damage to property and "disruption of supplies or services essential to community". The covert purpose of this amendment is arguably to enable the State to brand as terrorists even those engaged in peaceful protests such as rail strike. With no restraint on the scope of such a provision, this clearly infringes on the fundamental right of citizens to demonstrate, which has been held to be a component of the fundamental right to speech and expression.

While the State must prove its case before a tribunal, the State has the right to withhold evidence from the incriminated organisation on grounds of public welfare. This effectively disables the functioning of any association towards which there is State antipathy. Several other disturbing provisions were integrated into the act; these included empowering the police to search, seizure and arrest without warrant or court order, the power to detain an accused for 180 days without filing charges against him, including up to 90 days in police custody and provisions regarding in camera hearings, secret witnesses and it is nothing but the illegal license given to the police, which will have freedom to extract 'confessions' through torture of arrested persons. The amendments to UAPA provide the police ample powers to misuse the provisions to the maximum extent possible.

Another provision creates a rebuttable presumption of guilt on the basis of certain evidence. Thus, the onus of proof is on the accused to prove his innocence when weapons believed to have been used in the commission of the offence are seized from her possession. Some human rights activists have noted that the real possibility of planted evidence has passed unremarked.

As a common law country, India follows an adversarial justice system, one of the basic tenets of which is a presumption of innocence of the accused. Unlike the civil law inquisitorial system, an adversarial system has a neutral judge giving a reasoned judgment after the presentation of arguments for both sides. Thus, the notion that the prosecutor must prove the case (beyond reasonable doubt in criminal matter) is fundamental to the notion of an adversarial justice system. Further, Indian courts have always strongly endorsed the human rights notion of a presumption of innocence, with the Supreme Court noting that proof cannot ever be displaced by suspicion, not the matter how strong.

12.3 Amendment of 2012

In 2010, India became a member of the Financial Action Task Force (FATF), an international body that combats the financing of terrorism through various counter measures. It was this membership that was used by the government to support its amendment of the already draconian UAPA.

The 2012 Amendment, the added provisions that only further the trend of State inhibition of human and civil rights. It added a provision that holds 'person' to include associations of people, whether incorporated or not. The Standing Committee report noted that apprehensions had risen over whether the Bill would enable investigating officers to threaten and harass innocent people. The rather inane response of the Home Secretary to this was that since some unregistered 'clubs' in the North- 6 East procure and hold funds for terrorist groups, and these bodies would be covered by the Amendment.

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Economic offences, too, have been included within the ambit of terrorism. Thus, an economic offender would be subject to the harsh UAPA law as opposed to the other ordinary laws such as the Indian Penal Code. This has been strongly criticized as redundant and unnecessary. The effect of such amendment is to make economic offences punishable with a sentence of five years to life imprisonment.

The rationale behind this addition to the statute was that it had been noted that there had been high quality counterfeiting of Indian currency by "one particular country" to directly fund terrorism as well as to tamper with India's financial well-being. It was to combat these "sovereign factories" that the provision was included. The possible indirect application of the clause to minor counterfeiters was believed to be efficiently neutralized by the use of the term "high-quality counterfeits" in the Act. In reality, however, it can be seen that UAPA has been invoked in cases of intra-nation counterfeiting, which has been covered by the Indian penal Code, 1860.

Thus, domestic counterfeiters are being convicted under draconian terror laws, showing a decided lack of nexus between the application of the act and its primary objective. The lack of a single effective and substantive safeguard further enhances the possibility of extreme misuse of this statute by the state, a result that was foreseen by the legislators while drafting this law.

A simple yet effective safeguard might be a periodical review of the Act and sunset clauses. Another possible step towards lesser abuse of the law would be to re-define terrorism with a reduced ambit. A clear nexus must exist between the objectives of the law and the implications of its provisions.

The enactment of each Amendment for the Act drew cries of outrage from human rights groups and civil liberty associations in India; these subsided with unresponsive legislators and indifferent citizens. The case of Professor Saibaba demonstrates the active and immediate threat continuously presented by the UAPA even today. Former Chief Justice of Delhi High Court Rajinder Sachar in this context commented the "Unlawful Activities Prevention Act (UAPA) under which he has been convicted is unconstitutional."

12.4 Limitations and Drawbacks of the Act

The Act though essential from the point of national security, it contains more or less same provisions of the repealed TADA and POTA and provides the authorities with uncontrolled power to detain innocent persons and trample upon their human rights. It is reminiscent of the two draconian laws under which Gujarat had arrested 18,686 persons followed by Punjab where 15,314 were detained. In both cases the detained persons belonged to minority communities, i.e., Muslims and Sikhs. During the same period 15,225 Muslims were arrested in Jammu and Kashmir and 12,715 in Assam. The total detainees amounted to 77,500 but the conviction rate was only 0.81%. The TADA review committees had found that in most cases TADA was wrongly used. Manipur has highest number of UAPA cases, last year.

The latest National Crime Records Bureau figures state that out of the 975 UAPA cases filed across India in 2014, 630 are from Manipur, with 659 people from the small north-eastern State charged with offences under it. Manipur is home to just 0.2 per cent of India's population, but accounts for nearly 65 per cent of the cases filed under the UAPA in the country. Manipur is followed by Assam, which has recorded 148 cases under the Act. The two States account for 80 per cent of the UAPA cases. Meghalaya has recorded seven cases.

13. Unlawful Activities Prevention Act, 1967-Restriction on grant of bail

Where respondent was alleged to be a member of the organisation, the members of which were alleged to have assaulted and injured the victim for writing against Islam. The role attributed to the respondent was that he treated one of the injured assailants by stitching his wound on the back at a place 45 kms away from the place of incident. However, there was no allegation that respondent was one of the assailants and there was no prima facie proof that the respondent was involved in the crime, hence, the Proviso to Section 43-D had not been violated and further fact that there was yet no evidence as yet to prove that the organisation, of which the respondent was alleged to be a member, was a terrorist organization. Therefore, the Supreme Court was of the opinion that the only offence that can be levelled against respondent was that under Section 202, IPC that is of omitting to give information of the crime to the police and the offence under Section 202 is a bailable offence. So, no reason was found to deny the bail to respondent, more so, when the respondent had already spent 66 days in custody.[49]

Where appellants were alleged to be involved in terrorist activities joining hands with banned terrorist organizations and their activities were threat to security unity and integrity of the nation. There were reasonable grounds for believing that accusation against appellants was prima facie true and it was held that the appellants were not entitled to be released on bail in the light of Proviso to Section 43-D of the 1967 Act.[50]

In terms of Section 43-D of the Unlawful Activities Act, 1967, the Public Prosecutor has been vested with a duty even at the stage of investigation, being authorized to submit a report in Court

[49]*State of Kerala* v. *Raneef*,2011 Cri.LJ 982(SC)

[50]*Mohammed Nainar and another* v.*State of Kerala* and another,2011 Cri.LJ 1729 (Ker)

where investigation has not been completed within the statutory period by seeking extension of time for completion of investigation. In the instant case, the Public Prosecutor was never appointed and extension of time for completion of investigation was allowed on the report of the person who was never appointed as Public Prosecutor. Therefore, in view of the fact that the Court is conferred with the power to exercise its jurisdiction to extend the period of investigation based only on the report of the person authorized lawfully to do so, the order of extension of time based on the report of the person who was not lawfully authorized was set aside".[51]

13.1 Why the UAPA is to be opposed?

Because UAPA contain the following rights violations:

- An individual who has not physically committed a crime can be prosecuted
- An organisation which is questioning government policies can be banned
- Police gets excessive powers to arrest and torture people
- Allows prolonged detention of under-trials without granting bail
- Not the prosecution, but the accused has to produce proof
- Infringes freedom of expression, assembly and association
- Widely misused against tribals, minorities, political dissidents

UAPA is India's foremost anti-terrorism legislation, which has been amended thrice in 2004, 2008 and 2012; the law has become increasingly repressive, regressive and draconian. UAPA violates the norms of natural justice as it puts the onus of proof on the accused and not on the prosecution. The draconian act was also being used to detain poor tribals in West Bengal and Chhattisgarh, who were trying to stop the seizure of their precious farm land by mining companies.

The amended UAPA will strengthen an already suspicious State, where anyone and everyone can be booked for terrorist acts, so broad are its definitions and sweeping its scope. Not only can't the UAPA, any law that is against humanity, be a law in favour of people or the Constitution. It is warranted by the time that the social and human rights activists and organizations have to come forward as a mass movement to fight this injustice until this black legation is repealed or to be made it subjective to the periodical review of the Parliament as well as the people's debate. Like the earlier terror laws TADA and POTA, this UAPA Act should also be allowed to lapse by considering the democratic and constitutional values.

14.Bail under the Prevention of Terrorism Act (POTA)

In 2002, India introduced the Prevention of Terrorism Act (POTA), and after strong opposition, it was removed in 2004.The same provisions as TADA applied, except for the fact a person could not be convicted of activities not in the national interest, on mere suspicion, without evidence.

The bail provisions under the POTA is dealt with Ss.49(6) and 49(7). Under S.49(6) bail may be given to the accused after giving an opportunity of being heard to the public prosecutor. But Clause (7) of S.49 provides that when the public prosecutor opposes the application court shall not order bail to the accused until the court is satisfied that there are grounds for believing that he is not guilty of committing such an offence. In People's Union for Civil Liberties v.Union of India[52], Supreme Court held that the meaning of the proviso to S.49(7) is that an accused can resort to ordinary bail procedure under Cr.P.C after a period of one year. At the same time the proviso does not prevent such an accused to approach the court for bail in accordance with the

[51] *Saraswathi Rai* v. *Union of India* ,2011 Cri.LJ 3020(Cal)

[52] (2004)9 SCC 580.

provisions of POTA under S.49(6)and(7) thereof. So, the opinion of the court that the accused is not guilty of committing such an offence and the stand of the public prosecutor whether to accept or oppose the bail application is the deciding factor to grant or to deny the bail to an accused under the Act.

15. Economic offences – Grant of bail

The economic offences bring about total imbalance in the economy of the country which has the effect of making the lives of majority of people economically weaker and miserable; such economic offences are even treated worse than murders being committed in the country. In the case of Prem Kumar Parmar v. State[53], the allegation against the accused were that they had obtained huge subsidies from the Government by submitting statements which contained false facts and thus allegedly obtained about four crores. A large number of Documents were seized by the CBI, allegedly fictitious. The CBI had received information that the petitioner, when in police custody, had not disclosed various lockers and other ill-gotten assets and Smt. Savita Parmar, his wife, had operated certain lockers and had tampered with the evidence in that manner by concealing the assets which had been acquired on the basis of the falsely received money obtained from the Government. It was pointed out, that on secret information, a raid was conducted and pass books and FD worth of rupees seventy-five lakhs of different banks, 5 Kg of silver bricks and large number of documents were seized, and still certain assets have to be traced and seized and if the petitioners are released on bail they would see that the said assets never come to light. It appeared prima facie that the petitioner had committed very serious economic offences and hence did not deserve to be released on bail when the investigation was still in progress. There was possibility of the petitioners tampering with the evidence and hampering the investigation if they were released on bail.

16. Bail under the FERA Act

16.1 Introduction

The object of Foreign Exchange Regulation Act 1973(FERA) is to consolidate and amend the law regulating certain payments, dealings in foreign exchange and securities, transactions indirectly affecting foreign exchange and the import and export of currency and bullion for the conservation of the foreign exchange resources of the country and the proper utilization whereof in the interest of the economic development of the country. Though it is not specifically mentioned in the Act regulation of foreign capital is one of the major objectives of FERA. The Act mainly deals with three aspects such as

a) Regulation of foreign capital in India
b) Regulation of employment of foreigners in India
c) Making enforcement of provisions regarding foreign exchange leakage more rigorous.

16.2 Offence under FERA – Bail whether possible during investigation when aspect of likelihood of tampering and fleeing from justice exists

The offences under the FERA Act is a serious one since it adversely affects the very base of our economy. The question of bail in offences under the FERA Act is to be considered seriously. The Madras High Court by rejecting the bail application in N. Sasikala v. Enforcement Officer[54], held

[53] 1990 (2) Crimes 384.
[54] Enforcement Directorate, 1997 (1) Crimes 168

that considering the gravity of the offence and the possibility of influencing the witnesses and even the investigation bail could not be granted to the accused. The offences alleged in this case were under section 8(1),9(1) (a) and ((1) (c) read with section 68 of the Foreign Exchange Regulation Act, 1973. The charge was not for import but for the payment to the supplier which had not been made through normal authorized banking channels. Hence the charge under such provisions of the Act, the bail was sought on three grounds. Firstly, that the accused identically placed since release was granted bail in this case and hence it was pleaded that consistently required that the petitioner too be released on bail.

The High Court on having gone through the records found that the petitioner was leveled with an independent charge under section 68 (2) of the FERA and there was difference between the case of the petitioner and the accused already released on bail.

Regarding the aspect of likelihood of tampering and fleeing from justice, it is always proper to keep in mind, it was observed, the cumulative effect of all the circumstances involved in the case. But, as observed, it is always proper to keep in mind the caution by the Apex Court in Niranjan Singh v. Prabhakar[55], that while deciding the bail application, examination of the evidence and elaborate documentation of the merits of the case should be avoided, because no party should have the impression that his/her case has been prejudged or prejudiced. To be satisfied about a prima facie case is needed but not the exhaustive exploration of the merits. In this context reference was also made to the decision in State of Gujarat v. Mohanlal[56], in which note of care was given while deciding the application for bail, to the accused charged with heinous offence touching the economy of nation. In Haji Abdulla Haji Ibrahim Mandhra v. Superintendent of Customs[57], the High Court of Gujarat took the view, that where the accused are involved in the offence being a serious economic offence which will ultimately ruin the economy and break the backbone of the country, merely because the accused or one of them particularly, is a leading personality, would not be a ground for the court to release such person on bail.

It is pertinent to see that an accused person cannot claim parity and equity for grant of bail in economic offences. In Ramachandra Hansdab v. Republic of India(CBI)[58], court held that in the case of economic offences the fact that the co-accused enlarged on bail cannot be considered to grant bail to the petitioner since the case of the petitioner distinguishable from the co-accused.The petitioner is not entitled to claim parity and equity for grant of bail. It is also considered that the power to grant bail under S.439 of Cr.P.C is not applicable in economic offences. Since it causes huge loss of public fund. In Gautham Kundu v.Manoj Kumar,Assistant Director,Eastern Region Directorate of Enforcement[59],the petitioner was an accused under the Prevention of Money Laundering Act 2003.The court held that the provision of Prevention of Money Laundering Act 2003 has overriding effect and are binding on court. While considering application of bail under Section 439 of Cr.P.C.

16.3 Foreigners apprehended in cases of economic offences – bail

In the case of B.S. Rawat v. Andre Christopher Mydlarzz[60], the Intelligence Officer, Bombay, customs, had filed an affidavit in the court in which it was stated that from the records of the

[55] AIR 1980 SC 785.
[56] AIR 1987 SC 1321.
[57] 1992 Cri. LJ 2800.
[58] 2016 Cri.LJ 697.
[59] 2016 Cri.LJ 666.
[60] 1988 (2) Crimes 581.

customs Department, it was found that during the period of about two years, in all 97 foreign nationals were arrested by the Department for offences under the Narcotic Drugs and Psychotropic Substances Act, 1985. Out of them, 85 foreigners obtained bail and 84 of them absconded. The remaining 12 foreign nationals who were in custody were available for investigation and prosecution. During the said period, the Customs Department arrested in all 162 foreigners under the Customs Act, 1962, for smuggling of gold and other goods. All the foreigners who availed of the bail orders had absconded and only those who could not avail of the bail orders or who had been detained under the COFEPOSA were available for investigation and trial.

The foreigners arrested under such offences invariably absconded. Even when granted bail of an astronomical amount, the foreigners had fled the country, as the judicial experience will reveal. But it was observed that it did not mean that in every case a foreigner must be denied bail. But greater caution, it was suggested, had to be exercised while dealing with foreign nationals involved in such offences. It was further observed that in case the economic offences like smuggling which endanger the economy of the country in a substantial way are to be curbed, then, apart from the higher punishments which are prescribed by the law, the first essential thing is that the accused should be brought to book, and for that purpose, they must be available for the trial. It is in this context that the aspect of probability, of the accused fleeing from justice assumed importance.

16.4 Finance companies defrauding investors

In a case of defrauding investors by a finance company the petitioner, an accused charged u/ss 420,460,409,120-B of IPC. One of the Directors of Hoffland Group of Companies, being in jail for 26 months, was released on conditional bail, relying upon the Apex Court in VK. Sharma v. Union of India[61], released the petitioner therein on bail because he remained in jail for about 16 months. Dinbandhu Sharma v. State[62], the petitioner, an accused was charged for offences u/s 120-B/s 420/409 of IPC, and Ss. 3, 4, and 5 of Prize Chits and Money Circulation Scheme (Banning) Act, 1978. The petitioner who was only one of the Academic Instructors who induced several persons to join the scheme as business partners and to invest their money in a Trading Scheme was granted bail considering that the main accused in the case was already granted bail. The Court held that merely because a co accused was absconding and evading arrest was not sufficient justification for denying bail to the petitioner [Naresh Sharma v. State[63]].

In Mahesh Kumar Bhawsinghka v. State of Delhi[64], the appellant facing prosecution along with another person for offences under sections 120-B, 468, 477-A of IPC where the amount alleged to have been embezzled would have crossed the staggering mark of one crore. The trial court was directed to complete the trial before the expiry of three months and if the trial is not completed on or before the expiry of three months, the trial Judge is directed to release the appellant on bail on his executing a bond with two solvent sureties to his satisfaction but if the inability to complete the trial is attributable to the appellant, he will not get the benefit indicated.

17. Defense and Internal Security of India Act 1971

[61] (2000) 9 JT (SC) 32: 2000 (9) SCC 449.
[62] Cri LJ 4875 (Delhi)
[63] 2000 Cri LJ 4874 (Delhi)
[64] 2000 (9) SCC 383; 2000 Cr LJ 2786: 2000 (3) Crimes 83 (SC)

The object of the Act is to provide special measures to ensure public safety and interest, the defense of India and civil defense and for the trial of certain offences and for matters connected therewith. The offences under the Act are triable by a special tribunal and hence a question may arise whether any other court has jurisdiction to grant bail in relation with any offences committed under the Act.

In Ishwar chand v. State of H. P[65], the question arose before the Full Bench of the Himachal Pradesh High Court as to whether the High Court has jurisdiction to grant bail when a person is accused of an offence under s.3 of the Defense and Internal Security Act 1971. It has been observed that the right to apply for bail is not a right appertaining to any pending judicial proceeding against the accused although trial may take place before a subordinate Criminal Court, the power to grant bail has also been vested in the High Court under s. 439, Cr.P.C. It is a special power independently of the power of the Trial Court to grant bail, although in practice the High Court will require an application for bail to be first made in the Trial Court. In appropriate cases it may even in the first instance entertain a bail application even if it be assumed that the power of the subordinate Criminal Court to grant bail has now been transferred in law to the Special Tribunal. The jurisdiction of the High Court under Section 439 is not excluded and that neither in the Act nor in the Rules, there is anything to compel one to the conclusion that it was intended to exclude the powers of the High Court altogether. The fact that s.12(2) of the Act expressly vests the appellate jurisdiction in the High Court in restricted category of cases is immaterial and the power of the High Court to grant bail is not affected by the jurisdiction vested in the Special Tribunal to try offences under the Act.

18. Official Secrets Act 1923

The Official Secret Act 1923 is India's anti espionage (spy and secret agent) Act held over from British colonization. It states clearly those actions which involves helping an enemy state against India. It also states that one cannot approach inspect or even pass over a prohibited government site or area. According to this Act, helping the enemy state can be in the form of the communicating a sketch, plan, model of an official secret, or of official codes or passwords to the enemy. The disclosure of any information i.e. likely to affect the sovereignty and integrity of India, the security of the state or friendly relation with foreign state is punishable by this Act.

The offence under Section 3 of the Official Secrets Act is a serious one. The Supreme Court in State v. Captain Jagjit Singh[66], has cancelled the grant of bail made by High CourtThe Supreme Court cancelled the grant of bail finding the offence to be serious one. The Supreme Court has observed that if the High Court thought that it would not be proper at that stage where commitment proceeding was to take place to express an opinion on the question as to whether the case falls under Section 5 which is bailable or under s. 3'which is non-bailable, it should have proceeded to deal with the application on the assumption that the offence was under Section 3 and, therefore, not bailable.

The Delhi High Court having found that there is no material to deal the case of the accused in First Part of Section 3(1) of the Official Secrets Act, and the case prima facie falls under Second Part of Section 3(1), and also that the accused in already in jail since 15th February 1985 and there is no chance of his trial being concluded within three years of the arrest released the accused on bail on his furnishing a bail bond of a sum of Rs. 10,000 with one surety of the like amount to the

[65]1975 CLR 640 (FB)

[66] AIR 1962 SC 253.

satisfaction of the Trial Court on the condition that the petitioner will not leave the country without the permission of the Trial Court.[67]

19.The Extradition Act 1962

19.1 Introduction

It is an Act contains law relating to the extradition of criminal fugitive from India to foreign countries. This act has been amended and modified in the year 1993. The Extradition Act 1962 contains separate provisions for extradition to common wealth countries, but now rapid changes came into effect in this area and developed extradition law at international level. By the amendment act 1992 changes were made with the objectives of

1) to enable India to conclude extradition treaties with foreign states including the common wealth countries without treating them structurally different.
2) to provide for extra-territorial jurisdiction over foreigners for crimes committed by them outside India.
3) to incorporate composite offences in the definition of extradition offence.
4) to exclude political offence as a defense in cases of serious nature.
5) to cover extradition requests on the basis of international conventions.
6) to enable the central government to give assurance pursuant to a treaty obligation to the requested state for the non-execution of death penalty.

19.2 Power of the Court to grant bail under the Act

Under the provisions of the Extradition Act 1962, the Magistrate has got the power to issue warrant of arrest to the fugitive criminal. Section 25 of the Extradition Act 1962 has clearly provided that in the case of a person who is a fugitive criminal arrested or detained under the Extradition Act, the provisions of the Code of Criminal Procedure 1898, (now the Code of Criminal Procedure 1973) relating to bail shall apply in the same manner as they would apply if such person were accused of committing in India, the offence of which he is accused or has been convicted and in relation to such bail the Magistrate before whom the fugitive criminal is brought shall have, as far as may be, the same powers of jurisdiction as a Court of Session under that Code. It is, therefore, clear that even in respect of such fugitive offender or criminal, the Magistrate has got the power of bail to the same extent as a Court of Session has got the power for the offence for which such fugitive offender or criminal is accused of or convicted.

20. Prevention of Corruption Act 1988

It is an Act of the parliament to combat corruption in government agencies and public sector business in India. The Act provides appointment of special judges to try the offences under the Act by following the procedures prescribed under the Cr.P.C to try warrant cases instituted up on a police report. Elaborate provisions are there which brings different activities of government agencies and public sector activities within the provisions of the Act which defines offences and prescribed punishment.

It was held following the decision in Gurcharan Singh v. State[68], unless exceptional circumstances were brought to the notice of the court which may defeat proper investigation and a fair trial, the overriding considerations in granting bail are the nature and gravity of the circumstances in

[67]V.*K Palaniswami* v. *State* (1986)20 DLT 143
[68] AIR 1978 SC 179.

which the offence was committed, the position and status of the accused with reference to the victim and the witnesses, the likelihood of the accused fleeing from justice, of repeating the offence, of jeopardizing his own life being faced with grim prospects of possible conviction in the case, of tampering with witnesses, the history of the case as well as of its investigation and other relevant grounds. A person, who had committed a criminal misconduct under section 13 of the Prevention of Corruption Act, is liable to be punished with imprisonment for a term which shall not be less than one year but which may extend up to seven years. The petitioner is a former Minister in the Union cabinet and has roots in the society. He and his family members are residing in Delhi and Himachal Pradesh. He is a known case of diabetes, mellitus and coronary artery disease for which he has undergone by-pass surgery. Therefore, the High Court found no reasons as to why the petitioner should flee from justice. He had already been thoroughly interrogated.
Even the Special Judge had observed that sufficient time was given to the investigating agency to interrogate the petitioner and he had not opened his mouth relating to the entries in the diary, there was no justification for extension of remand and if he is released on bail, observed the High Court, investigating agency can still be permitted to interrogate him. Except for alleged decoding of diaries, no further interrogation of the petitioner appeared to be necessary and if he was released on bail, the High Court felt that the petitioner cannot tamper with evidence. Hence the petitioner was granted bail.

21.Explosive Substance Act 1908

Explosive Substance Act 1908 was enacted with an object to regulate the manufacture, possession, use and sale of explosives. Prior to the present Act there exists Explosive Substance Act 1884 to achieve the above-mentioned objectives.

21.1 Explosives Act offences under - grant of bail

In the case of State v. Mohamad Hussain[69], the offences alleged were under section 120-B of IPC, section 5 of the Explosive Substances Act, sections 30 and 25 of the Arms Act and section 82 of the Prohibition Act and section 18 (c) of the Drugs and Cosmetics Act. It was found that huge quantities of highly explosive and prohibited mixture of potassium chlorate and sulphur as found unauthorizedly sold to a bogus customer and considerable quantities of other explosive substance and prohibited chemicals, powders etc. were also recovered. After the raid on the shops and go-downs of the accused petitioners' serious communal riots involving murder of one police man and injuries to several other policemen. The explosives used in such communal riots were suspected to have been supplied by the petitioner. It was also apprehended that in view of such serious crimes there is every likelihood of the petitioner absconding to Pakistan.
In this case there appeared to be considerable weight of evidence against the petitioner. They had relations in Pakistan and the danger of absconding could not be ruled out. It was observed that the danger of absconding could be overcome by ordering the petitioner to report to the police daily so that in case of any attempt of absconding the police can follow them close on their heels. It was stated by the prosecution that the investigation was mainly over, with only danger that the further search of explosives hidden stocks, may be hampered. The petitioners were only male members of the family and there was no one to carry on their businesses. They are also to be given opportunity to prepare their defense etc.
In view of such circumstances and in view to avoid punitive detention, the petitioners were directed to be released on bail with the condition that they will report to the police daily and shall

[69] AIR 1968 Bom 344.

not leave the municipal area without the leave of the court. If after such release, there appeared good reasons that the witnesses are tampered with, or they engage themselves in subversive and antinational activities or fermenting communal trouble, the police shall have the liberty to make an application for cancellation of the bail.

21.2 Offence Under Explosive Substances Act - no charge framed - accused in jail for three years without trial

In the case of Mohinder Sinigh Oberoi v. State[70], the accused persons were charged in various sections of the Penal Code, Explosive Substances Act and Arms Act. The accused persons were arrested as far as three years back but since then no charge was framed against them by the Sessions Court to whom they were committed and the case was adjourned from time to time. Prosecutors mainly relied on two other accused persons who became approver, who later on turned hostile. It was contended by the prosecution that delay in trial court be attributed to them as some other accused persons did not appear on the day of framing of charges. On such facts the High Court was inclined" to release the accused petitioners on bail of Explosive Substances (Amendment) Act 2001.

In many states, the right to bail before trial is expressly guaranteed by constitutional provisions, which make bail mandatory in all cases except ".... for capital offenses when the proof of guilt is evident or the presumption thereof is great."[71]

21.3 Conflicting Judicial Views

The first controversy is whether the words 'the court' contained in section 37 included within their scope of 'High Court' or the 'Supreme Court' so as to restrict the powers of these superior courts to grant bail to the drug offenders. This question was considered by the Bombay High Court in Ashak Hussain Allah Detha v. Assistant Collector of Customs[72] and held that the High Court or the Supreme Court did not fall within the meaning of the words 'the court' as appearing in section 37. The court observed that the parliament, aware of the special jurisdiction of the High Court had designedly refrained from employing the words 'High Court or Supreme Court' in section 37, and that a distinct and unequivocal enactment was required for the purpose of either adding to or taking from the jurisdiction of a superior court of law. A division bench of the Madras High Court also held in Oliver Fernando v. Assistant Collector of Madras[73], that section 37(1) (b) did not impose any restrictions on the powers of High Court to grant bail under section 439 of the Criminal Procedure Code. This controversy was finally laid to rest in Narcotics Control Bureau v. Kishan Lal[74] by the Supreme Court by holding that the powers of High Court to grant bail under section 439 Cr. P.C. were subject to the limitations contained in section 37(1) (b) of the NDPS Act, 1985, and therefore, the High Court could not ignore the conditions mentioned in section 37 while deciding a bail application.

Conclusion

[70] 1988 (20 Crimes 783.

[71] Quoted in page 59 in St. John's Law Review (2013) "Judicial Discretion in Granting Bail, " St. John's Law Review: Vol. 27: Issue. 1, Article 3.

[72] 1990 Cri. L.J. 2201.

[73] Cri. M.P. Nos. 14121, 15294 and 14748 etc. of 1989 Decided on 3rd May, 1990 reported in 1991 Mad.

[74] AIR 1991 SC 558: (1991 Cri. LJ 654)

It seems ludicrous that in a civilized democratic society like India, a citizen may be practically abducted by police, charged with perfunctory offences and incarcerated without bail on mere suspicion for an indefinite period of time. But this is indeed the situation in present-day India, with duly passed legislation sanctioning the inhumane state of affairs.The anticipatory bail law need be made 'modern' and 'pragmatic'[75].

The amended UAPA will strengthen an already suspicious State, where anyone and everyone can be booked for terrorist acts, so broad are its definitions and sweeping its scope. Not only can't the UAPA, any law that is against humanity, be a law in favour of people or the Constitution. It is warranted by the time that the social and human rights activists and organizations have to come forward as a mass movement to fight this injustice until this black legation is repealed or to be made it subjective to the periodical review of the Parliament as well as the people's debate. Like the earlier terror laws TADA and POTA, this UAPA Act should also be allowed to lapse by considering the democratic and constitutional values.

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[75] Shantimal Jain, "Anticipatory Bail – Bail before Jail", 1991 Cri. LJ p.106 para 8.