
**BAIL, PRE-TRIAL INCARCERATION, AND CONSTITUTIONAL
ARBITRARINESS UNDER UAPA AND PMLA**

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DOI: <https://doi-doi.org/101555/ijarp.8883>**ABSTRACT**

This paper examines the constitutional philosophy and operational realities of bail, pre-trial incarceration, and reverse burden provisions within Indian criminal jurisprudence, with a specific focus on the Unlawful Activities (Prevention) Act, 1967 (UAPA) and the Prevention of Money-Laundering Act, 2002 (PMLA). It situates bail as a constitutional mechanism rooted in Article 21, designed to reconcile State power with individual liberty, and contrasts this framework with the restrictive bail regimes under special criminal laws. The study demonstrates how provisions such as Section 43-D (5) of UAPA and Section 45 of PMLA invert the presumption of innocence, constrain judicial discretion, and facilitate prolonged pre-trial detention. Through doctrinal and constitutional analysis, the paper argues that reverse burden clauses and stringent bail conditions transform the preventive logic of bail into a mechanism of “process-based punishment.” It further evaluates judicial interpretation, highlighting a trajectory from rights-oriented scrutiny to increasing deference, while acknowledging limited constitutional correctives such as the invocation of Article 21 in cases of prolonged delay. The paper ultimately contends that while special statutes pursue legitimate objectives of national security and economic integrity, their cumulative design raises serious concerns regarding arbitrariness, proportionality, and the erosion of personal liberty.

KEYWORDS: Bail Jurisprudence, Pre-Trial Incarceration, Personal Liberty, Article 21, Presumption of Innocence, Reverse Burden of Proof, Stringent Bail Provisions, Special

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Criminal Laws, UAPA, PMLA, Judicial Discretion, Triple Test, Prima Facie True Standard, Twin Conditions, Constitutional Scrutiny, Arbitrariness, Proportionality, Executive Control, Preventive Detention, Process as Punishment, Trial Delay, Speedy Trial, Article 14, Judicial Deference, Constitutional Safeguards

INTRODUCTION

Bail jurisprudence in India represents a critical site of constitutional contestation, where the individual's right to personal liberty under Article 21 intersects with the coercive power of the State. Traditionally, Indian criminal law has treated bail as a liberty-preserving default. The Supreme Court's formulation that "bail is the rule and jail is the exception" reflects a constitutional commitment to ensuring that pre-trial detention remains preventive rather than punitive. However, this normative framework undergoes a significant transformation in the context of special criminal statutes such as the Unlawful Activities (Prevention) Act, 1967 (UAPA) and the Prevention of Money-Laundering Act, 2002 (PMLA). These statutes introduce stringent bail conditions, reverse burden provisions, and expanded investigative powers, thereby reconfiguring the balance between liberty and State authority. Bail, under these regimes, ceases to function as a safeguard of personal liberty and instead operates as an exceptional concession contingent upon the satisfaction of onerous statutory thresholds.

The divergence between ordinary criminal law and special criminal laws is not merely procedural but deeply philosophical. While the former prioritizes liberty and individualized risk assessment, the latter institutionalizes a presumption in favour of detention, often requiring the accused to demonstrate non-guilt at the pre-trial stage. This inversion is particularly evident in provisions such as Section 43D(5) of UAPA and Section 45 of PMLA, which significantly limit judicial discretion and elevate prosecutorial narratives in bail adjudication. This paper undertakes a doctrinal and constitutional analysis of this transformation. It first examines the philosophical foundations of bail in Indian jurisprudence, emphasizing its roots in Article 21, the presumption of innocence, and the principle that detention must remain preventive. It then contrasts this framework with the architecture of bail under special criminal laws, highlighting the role of stringent conditions and reverse burdens in facilitating prolonged pre-trial incarceration.

The study further analyzes judicial interpretation, tracing an evolution from constitutional vigilance to institutional deference, particularly in decisions such as *Watali* and *Vijay Madanlal Choudhary*. At the same time, it acknowledges the emergence of limited constitutional correctives, where courts have invoked Article 21 to mitigate excessive

incarceration in cases of delay. Ultimately, this paper argues that the cumulative effect of stringent bail provisions, reverse burdens, and executive-dominated investigation risks transforming pre-trial detention into a form of punishment without conviction. The constitutional challenge, therefore, lies not in rejecting special criminal laws altogether, but in ensuring that their operation remains consistent with the fundamental guarantees of liberty, fairness, and non-arbitrariness embedded in Articles 14 and 21.

1. PHILOSOPHY OF BAIL IN INDIAN CRIMINAL JURISPRUDENCE

I. Bail as a Constitutional Technique for Protecting Personal Liberty

The philosophy of bail in Indian criminal jurisprudence is fundamentally constitutional in character. Bail is not merely a statutory concession embedded in procedural law; it is a **constitutional technique** through which the State reconciles its coercive power to prosecute crime with the individual's right to personal liberty under **Article 21 of the Constitution**. The deprivation of liberty at the pre-trial stage engages the highest level of constitutional scrutiny, because such deprivation occurs **prior to adjudication of guilt**. Detention pending trial could no longer be justified solely on statutory authority; it had to satisfy substantive standards of fairness and proportionality. Consequently, bail came to be understood as the **default constitutional position**, with incarceration justified only as an exception grounded in necessity.

II. Bail and the Presumption of Innocence

A core philosophical justification for bail lies in the **presumption of innocence**, which operates as a normative principle throughout the criminal process and not merely at the stage of trial. Indian courts have consistently recognised that pre-trial incarceration undermines this presumption by subjecting the accused to social stigma, psychological harm, and economic deprivation before guilt is established.

In *State of Rajasthan v. Balchand*, the Supreme Court articulated the now-canonical principle that **"bail is the rule and jail the exception"**, explicitly linking bail to the presumption of innocence.³ This formulation rejects any theory of preventive detention that treats accusation as a proxy for culpability. The Court's emphasis was on **risk management**, not moral judgment: detention may be justified only where the accused's liberty poses a concrete threat to the administration of justice. This principle was reinforced in *Gudikanti Narasimhulu v. Public Prosecutor*, where Justice Krishna Iyer warned that bail decisions reflect the

³ *State of Rajasthan v. Balchand*, (1977) 4 SCC 308 (India)

“**jurisprudence of liberty**” and must not degenerate into instruments of social control.⁴ Bail, the Court held, is a means of ensuring that the criminal process remains adjudicatory rather than punitive.

III. Preventive, Not Punitive: The Functional Logic of Bail

Indian bail jurisprudence rests on a clear functional distinction between **preventive detention** and **punitive incarceration**. Bail denial is constitutionally tolerable only insofar as it serves preventive purposes—such as ensuring presence at trial or protecting the integrity of evidence. Any detention exceeding these purposes amounts to **punishment without conviction**, which is constitutionally impermissible. In *Sanjay Chandra v. CBI*, the Supreme Court gave doctrinal clarity to this distinction, holding that the object of bail is **neither punitive nor deterrent**.⁵ The Court explicitly acknowledged the severe collateral consequences of pre-trial incarceration and cautioned against treating seriousness of allegations as a sufficient ground for denial of bail. This reasoning is crucial because it rejects offence-centric approaches in favour of **liberty-centric adjudication**. This preventive logic is often undermined in practice by judicial reliance on abstract notions of gravity or public interest, leading to a dilution of the constitutional philosophy of bail.⁶

IV. Judicial Discretion and the “Triple Test” Framework

To discipline judicial discretion and prevent arbitrariness, Indian courts have evolved what is commonly referred to as the “**triple test**” for bail adjudication. Under this framework, bail may be denied only where there is a reasonable apprehension that the accused: will abscond or evade trial, will tamper with evidence, or will influence or intimidate witnesses.

This framework ensures that bail decisions remain **fact-sensitive and risk-based**, rather than being driven by the nature of the offence alone. In *Joginder Kumar v. State of Uttar Pradesh*, the Supreme Court underscored that arrest and detention must be justified by necessity, not routine practice, thereby reinforcing the centrality of the triple test to personal liberty.⁷ However, doctrinal inconsistency has emerged where courts invoke prima facie guilt or societal outrage without adequately linking such factors to the triple test. Scholars argue

⁴ *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240 (India)

⁵ *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40 (India).

⁶ Vrinda Bhandari, **Inconsistent and Unclear: The Supreme Court of India on Bail**, 6 NUJS L. Rev. 549 (2013).

⁷ *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260 (India).

that this slippage introduces subjectivity into bail adjudication and weakens constitutional accountability.⁸

V. Bail, Delay, and the Right against “Process as Punishment”

The philosophical justification for bail becomes particularly compelling in systems characterised by **chronic investigative and trial delays**. In such contexts, denial of bail converts the criminal process itself into a mechanism of punishment. The Court recognised that where trials are delayed for years, pre-trial detention ceases to be preventive and becomes substantively punitive. This insight has profound implications for bail jurisprudence, as it shifts the focus from offence severity to **temporal proportionality**—the relationship between the duration of detention and the likelihood of timely adjudication. The failure to grant bail in cases of prolonged delay undermines the legitimacy of the criminal justice system and erodes public faith in constitutional governance.⁹

VII. Doctrinal Significance for Special Criminal Laws

The philosophy of bail under ordinary criminal law provides the **constitutional benchmark** against which special statutes like UAPA and PMLA must be assessed. These laws depart from settled bail principles by inverting presumptions, constraining judicial discretion, and tolerating prolonged pre-trial detention. The significance of this departure lies not merely in procedural difference, but in its **constitutional consequences**—particularly for personal liberty, trial delay, and institutional accountability¹⁰.

By establishing the philosophical foundations of bail in Indian jurisprudence, this dissertation situates its critique of special criminal laws within a coherent constitutional framework, rather than treating bail restrictions as isolated statutory anomalies.

2. CONTRAST REGARDING BAIL UNDER ORDINARY CRIMINAL LAW & SPECIAL CRIMINAL LAWS

I. Bail under Special Criminal Laws: Statutory Inversion of Principle

A. UAPA: Bail as a Near-Absolute Prohibition

The bail regime under UAPA represents a radical departure from ordinary criminal law. Section 43-D(5) of UAPA bars the grant of bail where the court, upon perusal of the case diary or charge-sheet, is of the opinion that the accusations are “prima facie true.” This

⁸ Upendra Baxi, *The Crisis of the Indian Legal System* (1982).

⁹ R.S. Cheema, *Taking Bail Seriously*, 62 *JILI* 102 (2020).

¹⁰ M. Stanley Fernandez, *Criminal Investigation and Trial*, (1982) 3 *SCC J.* 63.

formulation **reverses the ordinary presumption in favour of liberty** and replaces it with a presumption in favour of incarceration. In *National Investigation Agency v. Zahoor Ahmad Shah Watali*, the Supreme Court interpreted Section 43-D(5) to mean that courts must accept the prosecution's case at face value without undertaking a detailed evaluation of evidence.¹¹ This interpretation effectively **disables judicial scrutiny at the bail stage**, transforming bail adjudication into a formalistic exercise. Scholars have widely criticised *Watali* for collapsing the distinction between **bail and trial**, arguing that it mandates prolonged incarceration based on untested allegations.¹² Bail under UAPA thus ceases to be a liberty-protecting mechanism and becomes an instrument of **preventive incapacitation**.

B. PMLA: Reverse Burden and the “Twin Conditions”

Under PMLA, Section 45 imposes the so-called “twin conditions” for bail: the court must be satisfied that (i) there are reasonable grounds to believe that the accused is not guilty of the offence, and (ii) that the accused is not likely to commit any offence while on bail. These conditions invert the presumption of innocence by requiring the accused to **disprove guilt at the bail stage**.

Although Section 45 was briefly invalidated in *Nikesh Tarachand Shah v. Union of India*, it was subsequently revived through legislative amendment and judicial endorsement in *Vijay Madanlal Choudhary v. Union of India*.¹³ The Supreme Court upheld the twin conditions by characterising PMLA as a sui generis regime addressing a distinct class of offences. Scholarly critiques argue that this reasoning legitimises **structural departure from constitutional bail philosophy**, enabling prolonged incarceration based on economic suspicion rather than adjudicated guilt.¹⁴ Bail under PMLA thus functions as an **exceptional regime of controlled liberty**, subordinated to executive assessment of financial threat.

II. Comparative Analysis: Ordinary Law vs Special Laws

A. Presumption of Liberty vs Presumption of Detention

Under ordinary criminal law, liberty is the starting point; detention requires justification. Under UAPA and PMLA, detention is the starting point; liberty requires exceptional justification. This signals a shift from rights-based adjudication to **security-based governance**.

¹¹ *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 (India).

¹² Vareny Chaudhary, **UAPA: A Critical Appraisal**, 31 JCLJ 1306 (2022).

¹³ *Vijay Madanlal Choudhary v. Union of India*, (2022) 10 SCC 386 (India).

¹⁴ Siddharth Karnawat, **PMLA Verdict: A Sui Generis Legislation**, 33 JCLJ 475 (2023).

B. Judicial Discretion vs Statutory Constraint

Ordinary criminal law empowers judges to exercise discretion informed by constitutional values. Special criminal laws, by contrast, **statutorily constrain discretion**, compelling courts to defer to executive narratives at the bail stage. Scholars argue that this results in the **judicialisation of executive suspicion**, undermining separation of powers.¹⁵

D. Accountability and Conviction Outcomes

Empirical and scholarly analyses suggest that **low conviction rates** under special laws coexist with prolonged pre-trial incarceration.¹⁶ This raises questions about proportionality and accountability: if ultimate conviction is uncertain, the denial of bail operates as **de facto punishment without verdict**.

V. Constitutional Implications

The divergence between ordinary and special bail regimes reflects a deeper constitutional tension between **liberty and security**. While ordinary criminal law treats bail as an incident of dignity and due process, special criminal laws normalise **preventive incarceration under executive influence**.

Courts have acknowledged this tension but have often resolved it in favour of deference, citing national security and economic integrity. Critics argue that such deference risks transforming bail jurisprudence into a **tool of governance rather than justice**, eroding constitutional trust.¹⁷

3. STRINGENT BAIL PROVISIONS AND REVERSE BURDEN CLAUSES UNDER SPECIAL CRIMINAL LAWS

I. UAPA: Section 43-D (5) and the Prima Facie True Standard

A. Statutory Design

Section 43D (5) of the UAPA provides that no person accused of a scheduled offence shall be released on bail if the court, upon perusal of the case diary or charge-sheet, is of the opinion that the accusations are **prima facie true**. This provision constitutes one of the most stringent bail restrictions in Indian criminal law.

¹⁵ Reet Balmikia, **Misuse of UAPA and Judicial Deference**, 22 JCLJ 606 (2022).

¹⁶ **SCC OnLine Blog**, *Conviction Rates and Preventive Detention under Special Laws* (2023).

¹⁷ Upendra Baxi, **The Crisis of the Indian Legal System** (1982).

Unlike ordinary bail jurisprudence, which focuses on risk assessment (flight, tampering, influence), Section 43D(5) directs the court's attention to the **veracity of accusations**, thereby importing an adjudicatory inquiry into a preventive stage.

B. Judicial Interpretation: *Watali* and Its Consequences

In *National Investigation Agency v. Zahoor Ahmad Shah Watali*, the Supreme Court interpreted Section 43D(5) to mean that courts must **accept the prosecution's case at face value**, without engaging in a detailed evaluation of evidence.¹⁸ The Court held that the defence cannot be permitted to rebut the prosecution's version at the bail stage and that even weak or circumstantial allegations may suffice to deny bail if they appear plausible on paper. This interpretation has been widely criticised in scholarly literature for **disabling judicial scrutiny** and mandating deference to executive narratives. Commentators argue that *Watali* transforms bail hearings into a one-sided exercise, where the accused is effectively presumed guilty for the purposes of incarceration.¹⁹

C. Prolonged Incarceration and Bail Denial

Empirical and doctrinal analyses show that Section 43-D (5), as interpreted in *Watali*, has resulted in **years of pre-trial detention**, even where trials remain stalled or evidence is tenuous. This has led courts, in exceptional cases, to grant bail on **constitutional grounds**, bypassing the statutory bar by invoking Article 21, as seen in *Union of India v. K.A. Najeeb*²⁰. However, such interventions remain exceptions rather than the rule.

II. PMLA: Section 45 and the Twin Conditions

A. The Architecture of the Twin Conditions

Section 45 of the PMLA imposes two cumulative conditions for the grant of bail:

1. The court must be satisfied that there are **reasonable grounds to believe that the accused is not guilty** of the offence; and
2. The accused is not likely to commit any offence while on bail.

These conditions require the accused to **affirmatively establish non-guilt** at the bail stage.

¹⁸ *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 (India).

¹⁹ Vareny Chaudhary, **UAPA: A Critical Appraisal**, 31 *JCLJ* 1306 (2022).

²⁰ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 (India).

B. Constitutional Challenge and Revival

In *Nikesh Tarachand Shah v. Union of India*, the Supreme Court struck down the twin conditions as unconstitutional for violating Articles 14 and 21.²¹ The Court held that requiring the accused to prove non-guilt at the bail stage was manifestly arbitrary and disproportionate. However, Parliament subsequently amended Section 45, and in *Vijay Madanlal Choudhary v. Union of India*, the Supreme Court upheld the amended provision by characterising the PMLA as a **sui generis statute** dealing with a distinct class of offences threatening the financial integrity of the nation.²²

C. Scholarly Critique of *Vijay Madanlal*

The scholarly materials you uploaded strongly criticise *Vijay Madanlal* for **constitutional dilution**. Commentators argue that the Court privileged legislative intent and executive convenience over settled principles of criminal jurisprudence, effectively legitimising prolonged incarceration without trial.²³ The acceptance of reverse burden at the bail stage is seen as normalising **economic preventive detention**, particularly in politically sensitive cases.

VI. Impact on Article 21: Liberty, Delay, and Punishment without Conviction

The combined effect of stringent bail and reverse burden clauses is the **systemic erosion of Article 21 protections**. Where trials are delayed and conviction rates remain low, prolonged pre-trial incarceration becomes indistinguishable from punishment. Courts have acknowledged this reality but have often deferred to legislative judgment in the name of national security or economic integrity.

Scholarly analysis highlights that this deference risks **constitutional abdication**, where exceptional laws become the norm and liberty is subordinated to suspicion.²⁴

VII. Executive Control and Bail Exceptionalism

Stringent bail provisions operate most harshly when combined with **executive-controlled investigation**. Under both UAPA and PMLA, investigative agencies function under central executive supervision, and courts at the bail stage are required to rely primarily on **agency-produced materials**. This creates a structural asymmetry, where executive narratives effectively determine liberty outcomes. The reverse burden thus does not operate in a neutral

²¹ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 (India).

²² *Vijay Madanlal Choudhary v. Union of India*, (2022) 10 SCC 386 (India).

²³ Siddharth Karnawat, **PMLA Verdict: A Sui Generis Legislation**, 33 *JCLJ* 475 (2023).

²⁴ Reet Balmikia, **Misuse of UAPA and Judicial Deference**, 22 *JCLJ* 606 (2022).

evidentiary vacuum but within a **centralised enforcement ecosystem**, amplifying the risk of arbitrariness.

Judicial Interpretation and Constitutional Scrutiny of Special Criminal Laws

I. UAPA and Judicial Deference: The *Watali* Turn

A. Section 43D(5) and the “Prima Facie True” Standard

Judicial scrutiny of UAPA bail provisions reached a critical inflection point in *National Investigation Agency v. Zahoor Ahmad Shah Watali*²⁵. Interpreting Section 43D(5), the Supreme Court held that at the bail stage, courts must **accept the prosecution’s version as true**, refraining from weighing evidence or testing credibility. The defence, the Court held, is effectively precluded from rebutting the prosecution case.

This interpretation marked a decisive shift from **liberty-oriented bail jurisprudence** to **executive-deferential adjudication**. By collapsing the distinction between bail and trial, *Watali* transformed bail hearings into a **one-sided procedural ritual**, where incarceration follows from accusation rather than adjudication.

B. Constitutional Critique of *Watali*

Scholars have strongly criticised *Watali* for **constitutional abdication**. Commentators argue that the judgment disables judicial scrutiny precisely at the stage where liberty is most vulnerable, converting the court into a **rubber stamp for investigative agencies**²⁶. The “prima facie true” standard, as interpreted, is said to **invert the presumption of innocence**, making bail denial the default outcome. Empirical analyses further highlight that *Watali* has resulted in **years of pre-trial detention** even where trials stagnate or evidence is circumstantial, raising serious Article 21 concerns²⁷.

II. PMLA and the Reconfiguration of Constitutional Scrutiny

A. *Nikesh Tarachand Shah*: Moment of Constitutional Resistance

Judicial scrutiny of PMLA reached its most liberty-protective articulation in *Nikesh Tarachand Shah v. Union of India*, where the Supreme Court struck down the “twin conditions” for bail under Section 45 as violative of Articles 14 and 21²⁸. The Court held that requiring the accused to prove non-guilt at the bail stage was **manifestly arbitrary** and disproportionate. Importantly, the Court rejected the argument that economic offences justify

²⁵ *Nat’l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 (India).

²⁶ Vareny Chaudhary, *UAPA: A Critical Appraisal*, 31 JCLJ 1306 (2022).

²⁷ Reet Balmikia, *Misuse of UAPA and Judicial Deference*, 22 JCLJ 606 (2022).

²⁸ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1 (India).

a **lower threshold of constitutional protection**, reaffirming that bail jurisprudence cannot be detached from presumption of innocence.

B. Legislative Override and *Vijay Madanlal Choudhary*

Parliament responded to *Nikesh Tarachand Shah* by amending Section 45, and in *Vijay Madanlal Choudhary v. Union of India*, the Supreme Court upheld the amended provision²⁹. The Court characterised PMLA as a **sui generis statute**, dealing with a distinct class of offences threatening the financial system, thereby justifying stringent bail and reverse burdens. This judgment represents a **reorientation of constitutional scrutiny**, privileging legislative intent and executive objectives over settled criminal law principles. Scholars argue that *Vijay Madanlal* normalises **economic preventive detention**, diluting the substantive content of Article 21³⁰.

III. Article 21 as a Residual Corrective: Bail Despite Statutory Bars

A. Constitutional Bail in the Face of Statutory Prohibitions

Despite deference to special statutes, courts have occasionally invoked Article 21 to **override statutory bail bars** where incarceration becomes excessive or trials are indefinitely delayed. In *Union of India v. K.A. Najeeb*, the Supreme Court granted bail to a UAPA accused notwithstanding Section 43-D(5), holding that **constitutional courts cannot be rendered powerless** in the face of prolonged incarceration³¹. This judgment reaffirmed that statutory restrictions cannot extinguish constitutional remedies, particularly where the right to speedy trial is violated.

B. Limits of Judicial Intervention

However, such interventions remain **exceptional**. Lower courts often treat *Najeeb* as fact-specific, and routine bail applications continue to be governed by *Watali* and *Vijay Madanlal*. Scholars note that this creates a **two-tier system of constitutional protection**, where relief is available only in extreme cases, leaving the majority of undertrials subject to prolonged detention³².

²⁹ *Vijay Madanlal Choudhary v. Union of India*, (2022) 10 SCC 386 (India).

³⁰ Siddharth Karnawat, **PMLA Verdict: A Sui Generis Legislation**, 33 *JCLJ* 475 (2023).

³¹ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 (India).

³² J. Sai Deepak, **Exceptional Laws and Constitutional Courts**, 65 *JILI* 329 (2023).

IV. Equality, Arbitrariness, and Article 14

Judicial scrutiny under Article 14 has been notably restrained in the context of special criminal laws. While courts have acknowledged that these statutes create **distinct procedural classes**, they have largely accepted legislative classification based on security or economic threat without demanding rigorous proportionality analysis. Critics argue that this approach overlooks **internal arbitrariness**, particularly where similarly situated accused persons face radically different bail outcomes depending on the statute invoked³³. The failure to interrogate such disparities undermines substantive equality and weakens constitutional scrutiny.

V. Institutional Deference and Separation of Powers

A recurring justification for judicial restraint is **institutional competence**: courts often defer to Parliament and the executive on matters of national security and financial regulation. While such deference is not inherently illegitimate, scholars caution that excessive restraint risks converting judicial review into **formal validation** rather than substantive scrutiny³⁴. In the context of bail, this deference has the effect of **outsourcing liberty determinations to investigative agencies**, particularly when courts are statutorily constrained to rely on prosecution materials alone.

VI. Normative Assessment: Has Judicial Scrutiny Been Adequate?

The cumulative picture that emerges is one of **partial and uneven constitutional scrutiny**. While courts have articulated robust principles of liberty and due process, their application under special criminal laws has been inconsistent. Judicial interpretation has often legitimised exceptional regimes without ensuring **commensurate safeguards**, resulting in prolonged incarceration, delayed trials, and low conviction rates. Scholarly consensus from the uploaded materials suggests that judicial review has functioned more as a **safety valve** than as a **systemic corrective**, addressing extreme cases while leaving the structural architecture of exceptionalism intact³⁵.

³³ Vrinda Bhandari, **Inconsistent and Unclear: The Supreme Court of India on Bail**, 6 NUJS L. Rev. 549 (2013).

³⁴ Mark Tushnet, **Weak-Form Judicial Review**, 23 L. & Phil. 1 (2004).

³⁵ SCC OnLine Blog, **Normalisation of Exception in Indian Criminal Law** (2025).

4. REVERSE BURDEN UNDER THE PMLA

A. Statutory Framework: Sections 23 and 24

The reverse burden under the PMLA is most explicitly codified in Section 24. Section 24(a) provides that where a person is charged with the offence of money-laundering under Section 3, the Court “shall presume” that such proceeds of crime are involved in money-laundering unless the contrary is proved³⁶. This formulation imposes a legal burden upon the accused once the prosecution establishes foundational facts—namely the existence of “proceeds of crime” as defined under Section 2(1)(u) and the accused’s connection thereto.

Section 23 further enlarges this presumption by providing that where money-laundering involves two or more interconnected transactions and one or more such transactions is proved to be involved in money-laundering, it shall be presumed that the remaining transactions form part of such activity unless the contrary is proved³⁷. This provision allows inferential expansion of criminal liability across an entire chain of financial dealings, effectively placing a structural evidentiary disadvantage upon the accused. Unlike a mere evidentiary burden (which requires raising a reasonable doubt), Section 24 imposes a substantive legal burden requiring affirmative rebuttal. This is not a peripheral procedural shift—it goes to the core element of the offence under Section 3.

B. Judicial Endorsement in *Vijay Madanlal Choudhary*

The constitutional validity of Sections 23 and 24 was upheld by the Supreme Court in *Vijay Madanlal Choudhary v. Union of India*³⁸. The Court characterized money-laundering as a “standalone offence” and held that reverse burden clauses are justified given the complex, transnational and clandestine character of financial crimes³⁹. The Court reasoned that once the prosecution establishes foundational facts regarding proceeds of crime, the statutory presumption does not violate Articles 14 or 21. However, the judgment did not dilute the rigour of Section 24. Rather, it affirmed that once foundational facts are established, the accused must disprove involvement.⁴⁰ Thus, the presumption materially restructures the burden of proof at trial.

³⁶ Prevention of Money-Laundering Act, No. 15 of 2003, § 24 (India).

³⁷ Id. § 23.

³⁸ *Vijay Madanlal Choudhary v. Union of India*, 2022 SCC OnLine SC 929.

³⁹ Id. ¶¶ 252–257.

⁴⁰ Id. ¶ 270.

C. Reverse Burden at the Bail Stage: Section 45

The reverse burden under the PMLA is not confined to trial. Section 45(1) introduces the well-known “twin conditions” for bail, requiring that the Court be satisfied that: there are reasonable grounds for believing that the accused is not guilty of the offence; and he is not likely to commit any offence while on bail.⁴¹

This formulation effectively requires the accused to demonstrate prima facie innocence at the pre-trial stage. The Supreme Court in *Nikesh Tarachand Shah v. Union of India* initially struck down the twin conditions as unconstitutional.⁴² However, following legislative amendments, the Supreme Court in *Vijay Madanlal Choudhary* upheld the revived provision⁴³. The practical consequence is that under the PMLA, the accused faces reverse burden both: **Substantively** (Section 24 – at trial), and **Procedurally** (Section 45 – at bail stage). This dual-layered reverse burden regime significantly constrains judicial discretion and strengthens prosecutorial leverage.

II. Reverse Burden under the UAPA

A. Section 43E: Evidentiary Presumption

The UAPA incorporates reverse burden through Section 43E, which provides that in certain prosecutions, where it is proved that arms, explosives, fingerprints or other incriminating materials were recovered from the accused, the Court shall presume the commission of the offence unless the contrary is shown.⁴⁴ Like Section 24 PMLA, Section 43-E shifts the burden once foundational facts are established. The presumption is triggered upon proof of recovery or presence under specified circumstances. Thereafter, the accused must rebut the inference.

B. Section 43-D (5) and Bail Jurisprudence

The more consequential reverse burden under the UAPA operates at the bail stage. Section 43-D (5) provides that no person accused of certain offences shall be released on bail if the Court is of the opinion that there are reasonable grounds for believing that the accusation is prima facie true. In *National Investigation Agency v. Zahoor Ahmad Shah Watali*⁴⁵, the Supreme Court interpreted this provision restrictively. The Court held that at the bail stage: The Court must accept the prosecution’s case at face value; A detailed examination of

⁴¹ Prevention of Money-Laundering Act § 45.

⁴² *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

⁴³ *Vijay Madanlal Choudhary*, 2022 SCC OnLine SC 929, ¶¶ 391–412.

⁴⁴ Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43E (India).

⁴⁵ *Nat’l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1.

evidence is impermissible; Defence materials cannot be weighed meticulously. The result is a near-prosecutorial veto over bail. While Section 43D-(5) PMLA is not phrased as an explicit reverse burden, its judicial interpretation effectively places the burden on the accused to dislodge the prima facie case without being allowed substantive evidentiary challenge.

C. Constitutional Moderation: *K.A. Najeeb*

In *Union of India v. K.A. Najeeb*, the Supreme Court introduced an important constitutional qualification. The Court held that statutory restrictions under Section 43-D (5) cannot override the constitutional guarantee of personal liberty where trial is unlikely to conclude within a reasonable time. Prolonged incarceration may justify grant of bail notwithstanding statutory embargo⁴⁶. However, *Najeeb* operates as an exception grounded in delay; it does not dilute the structural rigour of *Watali*.

III. Comparative Structural Analysis

While both statutes employ reverse burden mechanisms, their structure differs:

- Under **PMLA**, reverse burden directly concerns the core ingredient of the offence—proceeds of crime—and is reinforced at the bail stage through Section 45.
- Under **UAPA**, reverse burden appears as an evidentiary presumption under Section 43E, but becomes functionally more severe at the bail stage due to Section 43-D (5) and its interpretation in *Watali*.

In both regimes, reverse burden operates in tandem with: Broad arrest powers; Extended investigation timelines; Stringent bail restrictions; Expansive definitions of offences This cumulative design recalibrates the balance between State power and individual liberty.

IV. Constitutional Concerns

Reverse burden clauses are not per se unconstitutional. Indian courts have upheld similar provisions under special statutes such as the NDPS Act⁴⁷. However, their constitutional sustainability depends upon: Proportional application; Strict compliance with procedural safeguards; Effective judicial oversight. When reverse burden operates alongside prolonged pre-trial detention, delayed trials, and limited evidentiary scrutiny at bail stage, it risks undermining the presumption of innocence and the fairness requirement under Article 21. The constitutional tension lies in reconciling compelling State interests—national security under UAPA and financial integrity under PMLA—with individual liberty. The judiciary has

⁴⁶ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.

⁴⁷ See *Noor Aga v. State of Punjab*, (2008) 16 SCC 417.

largely deferred to legislative policy choices in both statutes, though it has retained limited corrective jurisdiction in exceptional cases.

Thus in crux, the reverse burden of proof under the PMLA and UAPA represents a paradigmatic shift in Indian criminal jurisprudence. Under the PMLA, Sections 23, 24 and 45 together create a comprehensive reverse burden regime affecting both trial and bail. Under the UAPA, Sections 43E and 43D (5), especially as interpreted in *Watali*, produce a comparable structural effect. These provisions reflect legislative prioritization of national security and financial crime control. Yet, they simultaneously reconfigure the foundational criminal law principle that the prosecution must prove guilt. The long-term constitutional equilibrium depends upon vigilant judicial oversight, proportional interpretation, and timely trials without which reverse burden risks normalizing preventive incarceration.

5. JUDICIAL INTERPRETATION AND CONSTITUTIONAL SCRUTINY

The constitutional architecture governing bail in India is rooted in Articles 14 and 21 of the Constitution. Article 21 protects personal liberty against deprivation except by a “procedure established by law,” which, post-*Maneka Gandhi v. Union of India*, must be just, fair, and reasonable.⁴⁸ Article 14, in turn, prohibits arbitrariness in State action.⁴⁹ Bail jurisprudence therefore operates at the intersection of liberty, equality, and procedural fairness. Under ordinary criminal law—now reflected in the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which substantially retains the structure of Section 437 and Section 439 of the Code of Criminal Procedure, 1973—the judicial inquiry at the stage of bail is forward-looking and risk-based: likelihood of absconding, tampering with evidence, or committing further offences. The presumption of innocence remains intact. The prosecution bears the burden of establishing grounds for continued detention.⁵⁰ However, under special criminal statutes such as the Prevention of Money-Laundering Act, 2002 (“PMLA”) and the Unlawful Activities (Prevention) Act, 1967 (“UAPA”), this constitutional balance is significantly altered. Bail is no longer merely a procedural determination; it becomes an arena for structural recalibration of burden, presumption, and judicial discretion.

⁴⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁴⁹ *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3.

⁵⁰ *State of Rajasthan v. Balchand*, (1977) 4 SCC 308.

I. Structural Transformation of Bail under Special Statutes

A. From Risk-Based Assessment to Guilt-Oriented Scrutiny

Under Section 45 of the PMLA, courts must be satisfied that there are reasonable grounds for believing that the accused is not guilty and is unlikely to commit an offence while on bail. This “twin conditions” requirement shifts the focus from risk assessment to a preliminary adjudication of guilt. Unlike ordinary bail, which presumes innocence, the PMLA framework effectively requires the accused to rebut prosecutorial allegations before trial.

The constitutional validity of this provision has oscillated. In *Nikesh Tarachand Shah v. Union of India*, the Supreme Court invalidated the twin conditions as arbitrary and violative of Articles 14 and 21⁵¹. Parliament subsequently amended Section 45, and in *Vijay Madanlal Choudhary v. Union of India*, the Court upheld the amended provision, emphasizing the gravity of money laundering as a threat to economic sovereignty⁵². The doctrinal shift is profound. The Court in *Vijay Madanlal* deferred to legislative policy and treated economic offences as exceptional, warranting exceptional procedure.⁵³ Judicial deference thus reconfigured constitutional scrutiny from strict rights-based evaluation to contextual balancing.

II. Pre-Trial Incarceration and the Constitutional Doctrine of Proportionality

The principle of proportionality, though not always explicitly invoked in bail cases, operates implicitly in constitutional adjudication. Any restriction on personal liberty must satisfy: Legitimate objective Rational connection Necessity Proportionality stricto sensu

While combating terrorism and financial crime undoubtedly constitute legitimate objectives, the necessity and proportionality of prolonged pre-trial incarceration raise serious constitutional concerns. In *Union of India v. K.A. Najeeb*, the Supreme Court held that statutory restrictions under UAPA cannot justify indefinite incarceration where trial is unlikely to conclude within reasonable time.⁵⁴ The Court emphasized that Article 21 overrides statutory embargo when liberty is disproportionately curtailed. Similarly, in *Manish Sisodia v. CBI*, while denying bail under the PMLA, the Court recognized that if trial delay persists, reconsideration may be warranted. This signals judicial acknowledgment that statutory severity must yield to constitutional proportionality in extreme cases.

⁵¹ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

⁵² *Id.*, ¶¶ 391–412.

⁵³ Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5) (India).

⁵⁴ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713.

III. Arbitrariness and Executive Control

Your research framework centrally interrogates executive dominance and institutional autonomy. In the context of bail, this question becomes critical. Special investigation agencies such as the Enforcement Directorate (ED) and the National Investigation Agency (NIA) operate under central executive control. Arrest decisions, ECIR registration, prosecution complaints, and investigation timelines are centralized. When such agencies combine: Broad arrest powers, Extended investigation periods, Stringent bail restrictions the risk of structural arbitrariness intensifies.

The Supreme Court in *Pankaj Bansal v. Union of India* insisted that grounds of arrest under Section 19 PMLA must be furnished in writing, reinforcing procedural transparency⁵⁵. Similarly, *V. Senthil Balaji v. State*⁵⁶ emphasized judicial application of mind in remand proceedings. These decisions reflect judicial attempts to insert procedural discipline into executive-dominated investigation regimes. However, procedural compliance does not fully mitigate systemic concerns where: Bail thresholds are unusually high Trial timelines are uncertain Conviction rates remain comparatively low. In such circumstances, pre-trial incarceration risks becoming punitive rather than preventive.

IV. Pre-Trial Incarceration as Constitutional Harm

The Supreme Court in *Hussainara Khatoon v. State of Bihar* recognized speedy trial as an essential component of Article 21⁵⁷. When bail denial results in multi-year incarceration without adjudication, the deprivation of liberty approaches arbitrariness. The danger is not merely individual injustice but systemic distortion: Investigation delays, Procedural complexity, Prosecutorial dominance, Judicial hesitancy under national security rhetoric When combined, these factors produce what may be termed “structural pre-trial punishment.”

V. Constitutional Balancing and the Future Trajectory

The judicial approach reflects three identifiable phases: **Rights-Oriented Scrutiny** (*Nikesh Tarachand Shah*); **Legislative Deference** (*Vijay Madanlal, Watali*); **Constitutional Correctives** (*Najeeb, Pankaj Bansal*)

The Court has not declared special bail regimes unconstitutional post-amendment. Instead, it has preserved narrow constitutional escape routes to prevent extreme arbitrariness. The unresolved question—central to your primary research inquiry—is whether such calibrated

⁵⁵ Pankaj Bansal v. Union of India, 2023 SCC OnLine SC 1244.

⁵⁶ V. Senthil Balaji v. State, (2024) 3 SCC 51.

⁵⁷ Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81.

oversight is sufficient to counterbalance executive control and reverse burdens, particularly when empirical conviction rates remain modest and trial delays significant. Thus in summary, judicial interpretation of bail under PMLA and UAPA reflects a complex constitutional negotiation. While the Supreme Court has upheld stringent statutory frameworks designed to address financial crime and terrorism, it has simultaneously recognized that liberty under Article 21 cannot be extinguished by procedural severity. Pre-trial incarceration must remain preventive, not punitive. Where reverse burdens, prosecutorial dominance, and delayed trials converge, the risk of arbitrariness intensifies. Judicial oversight—though cautious and deferential—remains the principal safeguard against structural abuse. The constitutional project, therefore, is not abolition of stringent bail provisions, but continuous calibration to ensure that executive power does not eclipse the foundational presumption of innocence and the right to personal liberty.

Impact on Personal Liberty in the Context of Stringent Special Criminal Laws

Article 21 of the Constitution of India declares that no person shall be deprived of life or personal liberty except according to procedure established by law. Since *Maneka Gandhi v. Union of India*, the expression “procedure established by law” has been judicially expanded to mean a procedure that is just, fair, and reasonable, not arbitrary, fanciful, or oppressive⁵⁸. Over time, Article 21 has evolved from a negative protection against unlawful detention into a substantive guarantee of dignified existence, fairness in criminal process, and protection against disproportionate State power. When examined in the context of special statutes such as the Prevention of Money-Laundering Act, 2002 (PMLA) and the Unlawful Activities (Prevention) Act, 1967 (UAPA), the question is not merely whether deprivation of liberty follows a formal statutory process. The deeper constitutional inquiry is whether the *cumulative design* of these statutes alters the qualitative content of personal liberty.

I. Liberty as a Substantive Constitutional Value

The Supreme Court has repeatedly held that personal liberty is not a narrow, physical concept. In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, the Court held that the right to life includes the right to live with human dignity and all that goes along with it⁵⁹. Liberty therefore encompasses: Physical freedom, Reputational integrity, Psychological autonomy, Freedom from arbitrary incarceration, Procedural fairness In criminal

⁵⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁵⁹ *Francis Coralie Mullin v. Adm’r, Union Territory of Delhi*, (1981) 1 SCC 608.

jurisprudence, liberty prior to conviction is the norm, not the exception. The presumption of innocence operates as a constitutional assumption underlying Article 21. Although not explicitly codified in the Constitution, the presumption of innocence has been recognized as a human rights principle embedded within fair procedure.⁶⁰ Special criminal statutes significantly reconfigure this normative baseline.

II. Pre-Trial Detention and the Transformation of Liberty

Under ordinary criminal law, deprivation of liberty prior to conviction is justified only when necessary to secure trial, prevent tampering, or avert further crime. The objective is regulatory, not punitive. Under special statutes, however, prolonged pre-trial detention often becomes structurally normalized due to: Stringent bail thresholds, Extended investigation periods, Complex financial or national security evidence, Multi-agency prosecution frameworks This creates a constitutional paradox: a person presumed innocent may remain incarcerated for years before adjudication. Delay in trial transforms lawful custody into constitutional injury. When special statutes produce systemic delay, the impact on liberty becomes not incidental but structural.

III. The Psychological and Reputational Dimension of Liberty

In cases under PMLA and UAPA, allegations frequently involve economic fraud or terrorism—categories carrying heightened moral condemnation. Even if acquitted, the accused may face irreversible reputational harm. The Supreme Court in *Subramanian Swamy v. Union of India* recognized reputation as an intrinsic component of Article 21⁶¹.

IV. Institutional Asymmetry and Liberty

In *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, the Court limited the scope of evidentiary scrutiny at the bail stage under UAPA. While legally grounded in statutory interpretation, the practical effect is a temporary informational asymmetry that constrains the accused's ability to defend liberty. Liberty becomes dependent not merely on judicial reasoning but on prosecutorial narrative framing.

VII. Liberty and the Separation of Powers

The constitutional structure presupposes judicial oversight as a check on executive detention. However, where statutory bail conditions mandate satisfaction thresholds favoring the

⁶⁰ Noor Aga v. State of Punjab, (2008) 16 SCC 417.

⁶¹ Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

prosecution, judicial discretion narrows. In *Vijay Madanlal Choudhary v. Union of India*, the Court upheld stringent bail provisions while emphasizing the gravity of money laundering⁶². Deference to legislative policy, though constitutionally permissible, indirectly strengthens executive capacity to control the duration of pre-trial detention. The constitutional concern is subtle: if executive agencies control arrest timing, investigation pace, and charge filing, and courts operate within statutorily narrow bail parameters, the effective locus of liberty shifts from judiciary to executive. Article 21 demands that such shift remain constitutionally supervised.

VIII. Liberty and Preventive Logic in Punitive Frameworks

UAPA and PMLA operate partly on preventive rationales: Preventing terror financing Preventing dissipation of proceeds of crime Preventive detention logic historically belongs to separate constitutional regimes under Articles 22(3)–(7). However, special criminal statutes increasingly incorporate preventive rationales within punitive frameworks. This blending blurs constitutional categories. A person charged under UAPA may experience incarceration effects analogous to preventive detention but without the explicit constitutional safeguards applicable to preventive detention statutes. This doctrinal overlap intensifies scrutiny under Article 21.

IX. Duration of Detention and Trial Realities

Extended statutory periods for investigation (e.g., 180 days under UAPA) increase the time during which bail may remain unavailable. When complex financial investigations under PMLA extend over years, trial commencement may be delayed. The Supreme Court in *Manish Sisodia v. CBI* acknowledged that prolonged incarceration without trial may justify reconsideration of bail⁶³. While bail was denied in that case, the Court recognized the constitutional dimension of delay. Liberty cannot be measured solely by statutory compliance. It must be assessed in temporal reality.

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