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BAILINCOUNTERTERRORISMLAWLEGISLATIVEEMBARGOANDJUDICIALRESPONSE

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Bail in Counter-Terrorism Law: Legislative Embargo and Judicial Response

Souvik Ghosh [α] & Professor Dr. Sarfaraz Ahmed Khan [σ]

Abstract- Bail is an issue of serious concern in the discourse of counter-terrorism law owing to the looming threat of the crime, protection of witnesses, and tampering with evidence. The bail provision provides additional restrictions for the courts in granting bail as it requires the court to prima facie determine the guilt/innocence of the accused based on the evidence in the police report and case diary. If courts entertain a reasonable belief as to the guilt of the accused on the basis of the police report and case diary, bail would be refused. Courts use judicial minimalism and avoid constitutional scrutiny while the bail mechanism under the UA(P) Act serves as a vehicle for the indefinite detention of the accused throwing the importance of expeditious trial to perpetual oblivion. The Article concludes that the statutory impediment created against bail robs the lower court of its discretion when the same is expected to serve as a first line of defence against erosion of rights.

I. Prologue

The state treats extremism as a security concern without analyzing the cause of the movement and the extent of people's involvement. (Chakraborty, 2014;) While this vision seems pragmatic in the short run, it suffers from myopia if the government policy is unable to treat the root cause of the grievances of the people. Democratic Nations often find themselves amidst difficulty in keeping their safety, security, and territorial integrity intact. (Bhattacharya, 2013) It is indisputable that violence unleashed by terrorist acts has wreaked havoc on the peace-loving population. (Carr, 2007) Political and societal morality, followed by India's obligation to uphold treaties and resolutions under international law nonetheless substantially eclipses constitutional morality in the context of the enforcement of counter-terrorism law. (Sampath, 2024). The role of the judiciary under the legal discourse of counter-terrorism (starting from the application of bail, and trial followed by either conviction or acquittal) is exposed to overt sensationalism and overbearing political pressure. (Satish & Chandra, 2009) The political class justifies the rights derogation mechanism of counter-terrorism law for its responsibility to protect its subject from indiscriminate violence outweighs the protection of the right of fair trial, and due process rights of the accused persons. A deeper reflection of the various offences under the UA(P) Act such as punishment for entering into a criminal conspiracy to facilitate terrorist acts, harbouring a terrorist, membership in a proscribed organization leads to a proposition that justice to the victim is not the primary factor behind this policy of penalization instead it seeks to rope various actions that may not be directly and proportionately connected to terrorist act per se. (Michaelsen, 2005) The paper wishes to argue that the additional conditions of bail to be satisfied by the accused are not normatively unethical if it is read down separately, however, the reading of the counter-terrorism law in its entirety culls out the designed hardship it creates for the defence which entails profound inroads into the individual rights of the accused. The paper would also evaluate the nature and impact of selective judicial decisions on the aspect of bail exclusively as the protector of rights of accused vis-à-vis its duty towards community. Though the constitutionality of the bail provision under the UA(P) Act 1967 had been challenged before the Court as the impugned provision makes the grant of bail an uphill impossibility (Xavier, 2021), the Court is highly unlikely to strike down the bail provision of the law any time soon by an authoritative pronouncement and, therefore the subject would remain one of the focal points of legal debate and judicial engagement. The journey of Indian Courts in the field of special criminal law is markedly deferential to the legislative policy. (Satish & Chandra, 2009) The UA(P) Act though claimed as the special and substantive piece of legislation designed for more effective prevention of unlawful activities and terrorist acts yet it hardly makes any substantive contribution for the effective prevention of terrorism. (Suresh & Raja, 2012)

II. Rights & Judicial Discretion in Bail

The paper problematizes the dilemma of bail as a right being applicable to counter-terrorism law and if it is at all applicable then to what extent. National Security is so peculiar a matter that it cannot be left to be decided by the wisdom of judges who are equally susceptible to human idiosyncrasies. The definition of terrorism is a vexing issue of international concern. (Hodgson & Tadros, 2013) The argument we advance is that the gravity of the offence alleged in question is not the sole consideration as the gravity of the offence in

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question is subject to proof at the time of trial by the state. The court while being confronted with a bail application ought not to conduct a mini-trial to determine the veracity of the charges. The gravity of the offence in question is a triable issue which must be deferred until the trial begins. The judges are conferred with discretion to decide a bail matter. Judges often reject bail based on the gravity of the offence. Bail granted for a grave offence, perturbs the collective conscience of society and hence courts reject bail in sensitive cases unless pressing mitigating circumstances are shown to exist. The bail mechanism in the UA(P) Act 1967 places almost an insurmountable barrier which is well-nigh impossible for the defence to overcome. The argument is based on the condition that the courts must be satisfied that no offence as alleged by the prosecution is made out from a bare reading of the case diary and the police report. In other words, if the court from the bare reading of the case diary or the charge sheet, does not decipher logical inconsistencies or perversion in the police report, then bail cannot be granted to an accused. The impugned condition robs the accused of fair and equitable treatment.

III. Public Safety or Individual Liberty – A Case of Contest

The judicial response towards bail in counter-terrorism law has been chaotic and disparate – while some cases have preferred a textual approach to interpretation upholding the strict statutory embargo against the grant of bail, very few cases preferred to have read into the jurisprudence of human rights to dilute the rigours of the provisions to enlarge the accused on bail. The latter category wherein the court stressed the importance of personal freedom to grant bail is controversial as the courts apparently travel beyond the conspicuous edict of the parliament. Public tranquillity is the central theme of bail jurisprudence. The deprivation of the right of the accused person in adversarial criminal justice administration is also considered to be fatal yet people's right to live in a safer society is non-negotiable. (Gray, 2017) Bail, though, is mainly a procedural remedy yet it is intimately conflated with substantive justice. Stringent restrictions for the grant of bail are justified in a criminal justice administration where the speedy trial is not only preached in theory but is a living and working reality. An uphill bail provision in the special statute is often misused by prosecutorial agencies to create and perpetuate impunity. The history of repeal of the predecessors of the UA(P) A has been a tell-tale anecdote of abuse. (Silva et al., 2009) The duty of a state to protect the citizens stays on a far higher footing than that of the human rights of terrorists who unleashed disproportionate violence to usurp political power. There are numerous instances where accused persons have been found to be innocent after a cumbersome ordeal of a criminal trial. (Mahmood, 2021) The paper is concerned with two issues – the first being the nature of bail jurisprudence in the UA(P) Act 1967 vis-à-vis other laws considered comparable and the second being the constitutionality of bail provisions used in the law. There is no dearth of quality literature on the human rights aspect of counter-terrorism law, yet, there exists a lack of discussion on the issue of bail in the special statute and the judicial interpretation connected to it. (Birdsall, 2010) Unjustified deprivation of bail plays a pivotal role in the criminalization of lawful protest. (Esmonde, 2003) The definition of terrorism or terrorist acts in the statutes contributes to repressing political and socio-economic grievances. (Hodgson & Tadros, 2013) An agitation for a legitimate grievance against the state can be accused of being a terrorist act. The term 'prima facie case' appearing in the proviso to Section 43(D)(5) carries a fair amount of weightage in the discussion of bail jurisprudence as it plays a key role in the grant or denial of bail by the courts. The particular expression, however, has not been defined in the law. The expression could mean on the face of the record. If a court has to embark upon an enquiry which requires the court to adjudicate disputable issues of fact or law, at the time of granting of bail, such endeavour can certainly not be considered as being done prima facie. Granting bail is a discretionary power of the court that is dependent on multiple factors. Therefore, a law may not exhort courts to deny bail based upon heavily tilted and one-sided conditions.

IV. Textualism and Constitutionalism – An Inevitable Brawl

It is trite that the legislative intention is to be found from the language used in the statute especially in case of criminal laws to satisfy the principle of legality in criminal law. In, *National Investigation Agency v. Zahoor Ahmad Shah Watali* (2019) The essence of the charges slapped against the accused was terror financing and instigating the separatist agenda by becoming a part of a larger conspiracy to realize the goal of secession of Jammu and Kashmir from the rest of India. The NIA special court rejected his prayer of bail as the weightage of evidence against him could not be overcome on a prima facie review. The High Court, however, enlarged the accused on bail. The Supreme Court was pleased to set aside the order of the Delhi High Court by literally interpreting section 43(D)(5) of the UA(P) Act 1967. Both the Delhi High Court and the Supreme Court placed strong reliance on the expression "prima facie". The interpretation of this expression holds a significant stake in granting or denying bail. The trial court observed that there were multiple unaccounted financial transactions, the accountant firm of the accused stated that the accused did not provide any

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supporting documents with respect to foreign remittances. The protected witnesses were compelled to sign the balance sheet of the business organization of the accused without being provided supporting documents for corroboration. The expert matched the signature of the accused and it was found that the accused after receiving funds from a proscribed terrorist organization remitted the funds to Hurriyat leaders. The trial court on the basis of the aforesaid material formed a prima facie opinion on the guilt of the accused. The public prosecutor also apprehended tampering of evidence by the accused. The investigation revealed that the accused brought money from an offshore location into India by layering the transactions through the creation of bogus companies that he had incorporated to create the impression of the legality of these transactions. The Supreme Court observed that the High Court fell into an error in rejecting the verbal testimony of the witnesses presented by the agency in a sealed cover. The law makes the granting of bail an exception. The legislative embargo on bail could only be lifted should the Court on a bare perusal of the charge sheet and case diary be of the opinion that no reasonable ground exists for believing that the accused has committed the stated offence. The proviso therefore exhorts the court to build satisfaction about the guilt or innocence of the accused exclusively from the material prepared by the investigation agency.

V. Judicial Minimalism

The decision of the Supreme Court is devoid of any discussion on the scope of judicial review of legislative action on the ground whether the impugned section constitutes an infraction of the right of the accused under part III of the Indian Constitution or not. A catena of decision under special criminal law on the question of the ambit of the bail provision is bereft of any legal debate as to the applicability of individual liberty and due process jurisprudence in the domain of special criminal law that deviates from the path ordained by the Code of Criminal Procedure. Instead, the decisions seek to grant or refusal to grant bail based on the ethos of textualism and judicial minimalism. Judicial minimalism implies a tool to adjudicate questions of fact or law on shallow ground to avert the risk of brazen contradiction with the policy behind the legislation. (Schmidt, 2022) One justification for the extensive application of judicial minimalism is that the judiciary is unfit to appreciate when a threat of terrorism ensues. (Suresh, 2019) The means (stringent conditions of bail) adopted to strengthen national security must not be too broad that it unnecessarily tramples upon rights of the accused. (Walker, 2016)

In *Thwaha Faisal v. Union of India* (2021), The decision arose from an appeal to the Supreme Court by the accused as he was aggrieved by the High Court's decision cancelling the bail granted by an NIA Special Court. The summary of allegations against the accused was that he is a Maoist conduit and protagonist of the proscribed organization of CPI Maoists. The high court while cancelling the bail granted by the trial court, opined that the recovery of Maoist literature is incriminating as the same brews out the seeds of secessionist tendency. The Supreme Court relying upon the jurisprudence of active and passive participation held that mens rea is an indispensable requirement of offences relating to the membership and support given to terrorist organizations. The Court further observed that the approach of the Court at the stage of bail is markedly different from the approach of the Court while conducting trial. Meticulous dissection of evidence is not warranted at the stage of bail. The court should refrain from evaluating individual pieces of evidence as a decision should be reached on the broader likelihood of the participation of the accused in the alleged offence, minus the circumstances where the case of the prosecution has been materially refuted by the defence.

In *Union of India v. K.A. Najeeb* (2021), the respondent was charged inter alia for the offence of dangerously attacking a professor. The professor was allegedly attacked for putting questions in the examination that were derogatory of the religious sentiment of a community. The members of the Popular Front of India, a proscribed organisation under the relevant schedule of the UA(P) Act 1967 conspired to teach a lesson. In pursuance of the plan, the group of people attacked the victim and chopped off his palm with lethal weapons and the group with a common object hurled bombs to deter the bystanders from coming to the aid of the victim-professor. They were charged under several sections of the Indian Penal Code, the Explosives Substances Act and the UA(P) Act. The respondent was alleged to be one of the key conspirators. The trial court declined bail as the respondent had facilitated the attack, arranged a vehicle to transport the offenders, harboured the alleged perpetrators and provided medical assistance to them and therefore had prima facie committed the offence of terrorist acts and hence the embargo of bail would apply. The respondent's prayer of bail was rejected by the special NIA Court even though he spent more than five years in custody. The trial Court opined that the police report indicates that the offences charged against the accused is prima facie true. The respondent approached the high court after spending four years in judicial custody. The high court emphasizing upon the mandate of speedy trial enlarged the accused on bail as there was no likelihood of the commencement of the trial. The appellant assailed the order of the High Court in granting the relief of bail and for brazenly disregarding the statutory barrier of prima facie case against the respondent accused. The NIA pressed into service the

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history of the respondent accused to demonstrate the flight risk of the accused if released on bail as he remained absconding for a significant period of time earlier. The respondent argued that other co-accused have either been acquitted or sentenced to an imprisonment of eight years. The respondent had already undergone imprisonment of more than five years as an undertrial. Continued incarceration of the respondent accused would be a gross infraction of his fundamental right. The Supreme Court chose to uphold the decision of the High Court in granting bail based mainly on procedural technicalities rather than on substantive counts. The Court observed that once the court below is shown to have exercised its discretion on relevant consideration, the appellate Court should be extremely slow in cancelling the order of bail save when pressing circumstances or overwhelming reasons arise. (*State of Bihar v. Rajvallav Prasad*, 2017) The Supreme Court enlarged the accused on bail as he had suffered incarceration without his guilt being proved and as umpteen number of witnesses were left to have been examined which would be time-taking. The top Court noted that the thirteen other co-accused who had been convicted were sentenced to eight years maximum. The role of the respondent, who had already suffered incarceration for five and half years in the alleged crime is much lesser than that of the other co-accused. The prosecution is still to examine two hundred and seventy-six witnesses which would require a great deal of time. The Court reasoned that even if the respondent is found guilty after trial, he would receive a punishment of not more than eight years out of which he has already spent more than five years and hence the continued incarceration of the respondent accused is unnecessary. The Supreme Court found no repugnance while harmonizing the statutory restriction to grant bail under the UA(P) Act 1967 with that of its duty as ordained by the Constitution. The Apex Court also noted that the statutory rigour created by section 43(D)(5) of the UA(P) Act 1967 is much lesser than its alter ego i.e. section 37 of the NDPS Act 1985. The bail provision under the NDPS Act requires the Court to be satisfied that the accused is prima facie not guilty and he will not commit any offence while on bail. The twin conditions imposed upon the court is sufficient to lead to the rejection of bail. Unduly harsh conditions for the grant of bail is a manifest disregard for the right of fair trial. A balance must be struck between the duty of the prosecution to adduce cogent evidence to discharge the onerous condition of proof beyond all reasonable doubt, the right of the society to be protected from people who endangers national security and have been let loose by the machinery of the criminal justice administration on the one hand and the inalienable freedom and the individual liberty of the accused. The discretion of a court while granting bail ought not to initiate with suspicion. A reasonable construction must be placed that ensures the availability of the accused during the trial without infringing the rights of the accused. Flight risk of the accused and the likelihood of manipulation of trial if the accused is released on bail, should be the dominant consideration while considering the prayer for bail. (*Sanjay Chandra v. Central Bureau of Investigation*, 2012) The gravity and seriousness of the charges against the accused cannot become the sole factor in rejecting bail. (*Prabhakar Tiwari v. State of U.P.*, 2020) The Constitutional validity of section 43(D)(5) had been challenged before the Bombay High Court. (Ojha, 2021) Such issues of considerable importance have been left undecided for a long period. The principle of proportionality constitutes a time hallowed principle of Indian law and includes elements of severity, duration and scope. The bail jurisprudence under the Counter-terrorism law is inverted as the provision stands on the jurisdiction of suspicion, unlike the bail jurisprudence under the general procedural law that is premised upon the presumption of innocence. (National Law School of India University, 2024)

VI. Avoiding Judicial Review – Due Deference

In *Jalaluddin Khan v. Union of India* (2024) the summary of the allegations against the appellant is that he is a conduit of the organization, the popular front of India, an Islamic organization known to be involved in various forms of extremism and disrupting communal harmony. The appellant allegedly leased out his premises to the active members of the outlawed organization for carrying out anti-state activities and for peddling vicious propaganda. The prosecution claimed that the rent agreement is thoroughly bogus entered into between the conspirators to continue to use the premises for anti-state activities. The protected witness claimed to have seen the appellant in a meeting of the organization wherein the future plan of expansion of the activities and Islamic empowerment was discussed. The prosecution on the basis of the above material argued that the existence of a prima facie case is made out. As the action of the appellant fell within the purport of assisting, advocating, and facilitating unlawful activities and terrorist activities, the statutory embargo of bail ought to be invoked to deny the relief of bail. The defence argued that not even prima facie inference could be made to link the accused with the popular front of India. On the first floor of the premises, there were many occupants. The appellant installed a surveillance camera which further dispels the case of the prosecution about his link with the banned organization. The Supreme Court noted that even if the appellant-accused knew that the lessee of the property was associated with the PFI, it is not a banned organization added to the schedule of the UA(P) Act. The Popular Front of India has been declared an Unlawful

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Association. The court reasoned that the appellant would not have installed a surveillance camera if he were to allow the illegal activities of the popular front of India. The Court observed that the material portion of the statement of the witness has been completely distorted in the charge sheet as the witness stated that the conspiracy to kill Nupur Sharma, who used derogatory statements against the prophet, was not hatched at the meeting that took place in the premise of the appellant. What can be reasonably deduced from the distortion effect in the police report is that the agency desperately wished to make out a prima facie case against the appellant to pull in the embargo of bail under the Act. The court noted that certain statements that the protected witness did not utter, were attributed to him in the charge sheet. The Court noted that there are no allegations against the accused that he committed or participated in unlawful activities as defined in the law, neither there is any material to show that he advocated, or facilitated any terrorist act or materially advanced direct or indirect support for terrorism. The Popular front of India has not been listed as a terrorist organization in the first schedule of the Act. Thus, the Court held that in the absence of any prima facie case, the appellant could not be denied bail. The court must consider the charges objectively keeping in mind that bail is a rule. If a case for bail is made out, the court should grant it with no hesitation, lest the court would be violating its duty of protecting individual liberty. Once it is trite that bail is a facet of individual liberty of which due process of law is a part, the trinity of reasonableness, arbitrariness and unfairness ought to be pressed into service. The existence of arbitrariness is writ large in the provision of bail under the UA(P) Act 1967 as it essentially denies the applicant of bail a fair right of representation which also involves violation of natural justice. Natural justice is not a codified canon to act as a weapon to obtain an inequitable advantage.

VII. Substantive Rights of the Terror Accused – Judicial Overture or Sentinel on the Qui Vive?

The essence of the allegations in these three different cases is that the accused (Devangana Kalita, Natasha Narwal, and Asif Tanha) are part of a larger conspiracy to create communal disharmony with an intention to instigate violence in pursuance of which such riot had ensued costing lives and destruction of the property. One of the applicants for bail, Asif Iqbal tanha was directed to convince Muslims and imams to mobilize people for the protest against the enactment of Citizenship Amendment Act and National Register of Citizens. The applicants of bail were accused of creating a what's app group wherein information was readily circulated to organize protest and complete blockage of road. The Conspiracy to perpetrate such abject mayhem as per the prosecution was done to overawe the constitutional machineries of the state. The decisions of Delhi High Court granting bail to the student activists – Devangana Kalita, Natasha Narwal, and Asif Iqbal Tanha are lauded as being progressive. One notable feature of these three noted decisions is that they go into the analysis of the definition of a terrorist act to conclude that the acts alleged to have been committed by the accused even if proven could not be termed as terrorist acts. Terrorism is not what the government does not like. The court also recognized the due importance of the right to organize and protest peaceably against any law or policy of the government. (*Asif Iqbal Tanha v. State of NCT Delhi, 2021*)

VIII. Legal Analysis of Statutory Conditions

In procedural criminal law, each event starts from the application of bail, existence of prima facie case, discharge of the accused, pleading guilty or innocent, framing of charge against the accused, trial, and acquittal or conviction. If at the stage of bail, the court needs to be satisfied that the accused is not guilty as charged, the subsequent stages of criminal proceedings such as framing of charge and trial of the offence are rendered otiose as the court will have pronounced the verdict of innocence and the prosecution should not be able to dislodge the findings of the court. The parliament must not have intended such an interpretation of the law as it renders the whole purpose of a criminal trial, a mere formality. The eulogization of the system of procedure established by the law (as envisaged through relaxed bail provisions, presumption of innocence, and fair and speedy trial) is geared to put to rest the vicious cycle of vengeance against terrorists for our response to terrorism should imbibe a balanced system of criminal justice administration as its strength. (Schehr, 2017) It is pertinent to mention here that the wordings of section 43(D)(5) of the UA(P) Act 1967 are different from the wordings of Section 21(4) of the MCOCA 1999. Whereas, section 43(D))5) of the UA(P) Act requires the court to rely upon the police report and case diary to come to an objective finding that the accusation against the accused is prima facie true. Section 21(4) of the MCOCA 1999 exhorts that the court must have a reasonable basis for believing that the accused is innocent. Therefore, the MCOCA 1999 places almost an insurmountable burden on the court to release the accused on bail. The construction placed upon section 21(4) of the MCOCA must ensure a workable balance between conviction and acquittal. The comparison between the Maharashtra Control of Organized Crime Act 1999 and the UA(P) Act 1967 shows that the conditions for bail under the MCOCA is more stringent

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than the UA(P) Act which muddles the clarity on the legislative policies. (Sagar et al., 2022)

IX. Conclusion

In view of the analysis of some selected cases, a chaotic jurisprudence emerges. In some cases, the courts uphold statutory restrictions irrespective of consequences whereas in other cases, the constitutional courts have relaxed owing to delay in the commencement of trial. The Delhi High Court, however did go to the definition of terrorist act to grant bail holding no prima facie case of terrorist act is made out as protest against the policies of the administration cannot be considered as a terrorist act. The lower courts are shackled to afford the relief of bail owing to the gravity of charges and the legal impediment created by the concerned statute. The gravity of an offence under the counter-terrorism law has become an unsaid consideration for the courts to deny bail perfunctorily which outweighs other considerations brazenly. (Punwani, 2010) Though it is trite that the discretion of the judges is the law of a tyrant yet a statute should not brazenly impinge upon the discretion of the court doubly so when the consequence of the same is the deprivation of liberty. Whereas harsh bail provisions in counter-terrorism law may be justified to keep society reasonably free from dangerous criminals, it is also imperative that the trial of such heinous offences is carried out speedily and with reasonable competence. The lower courts ought to discharge the role as the first line of defence against the erosion of natural rights. (*Gudikanti Narasimhalu v. Public Prosecutor*, 1978) The relief of bail is a hallmark of adversarial system of administration of justice that should not be disproportionately curbed unless the presence of the accused person could not be reasonably secured at the trial. A terrorist can be convicted of the highest punishment the law provides even if he was on bail until conviction. Let the law befall upon terrorist harshly as penalty but the process of the law should not be punishment.

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