



JUDICIAL TRENDS OF BAIL UNDER UMLAWFUL ACTIVITIES PREVENTIO ACT, 1967

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ABSTRACT

The Unlawful Activities (Prevention) Act (UAPA) has been a subject of contentious debate due to its impact on the principles of justice, particularly concerning bail proceedings. This paper critically examines select bail proceedings under the UAPA, highlighting instances where judicial interpretations have strayed from established legal principles. Through an analysis of cases such as Safoora Zargar's and Asif Iqbal Tanha's, the paper elucidates how the burden of proof has been shifted onto the accused, compromising the presumption of innocence. Furthermore, it explores the inherent ambiguities in UAPA provisions, such as Section 43D(5), which require courts to deny bail based on prima facie belief in the prosecution's case. The paper scrutinizes how vague terms like "conspiracy" and "unprecedented scale" have been used to establish prima facie cases, often circumventing factual scrutiny. Additionally, it discusses how courts have expanded the definition of "terrorism" under the UAPA, potentially encompassing acts of dissent within its ambit. Drawing from cases like Thwaha Fasal vs Union of India and Jyoti Jagtap vs National Investigative Agency, the paper underscores the need for judicial restraint and adherence to constitutional rights in UAPA proceedings. Finally, it delineates contrasting approaches by different high courts, indicating ongoing legal and constitutional battles surrounding the UAPA's application. Ultimately, the paper contends that every UAPA case serves as a pivotal battleground in the struggle against state impunity and underscores the significance of evolving legal precedents in safeguarding individual liberties within the UAPA framework.

Keywords: Unlawful Activities Prevention Act, Bail under UAPA, Interpretation of bail

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INTRODUCTION

Terrorism as a concept is not new but the terminology is fairly new which came into use in daily usage among people mostly after September 9/11 attacks of twin towers in United States of America. Terrorism has different meanings in different context, one very famous example is of our own freedom fighter Bhagat Singh, who threw bombs in Central Assembly as an act of rebellion while fighting for his country, but was dubbed as terrorist by the colonisers i.e. ruling British government of that time and was hanged to death.

The Unlawful Activities (Prevention) Act (UAPA) in India must be justified by a thorough analysis of its legislative background, underlying goals, and contextual necessity in light of a wider range of national security issues and constitutional imperatives. Enacted in 1967 and later amended, the UAPA is an essential piece of legislation designed to combat a variety of illegal activities that threaten the integrity and stability of the country, such as organized crime, terrorism, and insurgency. From a legal perspective, the UAPA provides law enforcement agencies with enhanced investigative and prosecutorial powers to effectively combat acts of terrorism and other unlawful activities. It delineates specific offenses and penalties, facilitates the designation of individuals and organizations as "terrorist" entities, and establishes procedural mechanisms for investigation, arrest, detention, and trial of suspects involved in such activities. By delineating clear legal parameters and procedural safeguards, the UAPA seeks to ensure the accountability and transparency of anti-terror operations while upholding the principles of due process and fair trial rights enshrined in the Indian Constitution.

The purpose of this Act is to more effectively prohibit specific illegal behaviours by people and organizations. Any group or combination of people is referred to in this Act as an association, and any action taken by such a person or association whether by deeds, words, written or spoken, signs, visible representation, or another means is considered an unlawful activity - which denies, challenges, disrupts, or is meant to disrupt India's sovereignty and territorial integrity; which encourages any individual or group of individuals to bring about the cession or secession of any portion of its territory from the Union; or which is intended, or supports any claim, to bring about the cession or secession of any portion of India's territory from the Union.

THE UNLAWFUL ACTIVITIES (PREVENTION) Act, 1967, or UAPA, India's umbrella anti-terrorist legislation, stands out not because of its record of prosecuting and convicting terrorists, but because of how it allows—and almost requires—extended jail time before trial or conviction. This is achieved through Section 4143(D)(5) of the UAPA, which prohibits the grant of bail 'if the Court, on a perusal of the case diary or the report made under section 173 of the [Criminal Procedure] Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true'. In simple language, this means that if on a bare, un-contradicted surface reading of the police's version of events, the accusations appear to be true, the court is statutorily prohibited from granting bail.

In recent years, the UAPA has evolved into a hotly contentious arena where issues of human freedom, State impunity, and power have been discussed at all judicial levels, from trial courts to the Supreme Court. How far can a court go in challenging the police's account of events while deciding whether to grant bail under the UAPA? How far can the defense go in challenging it? How much should the police have to prove the connection between the accused and the incident, particularly if the prosecution is based on conspiracy theories? How widely—or narrowly—should the UAPA's substantive sections be interpreted? The answers a judge gives to these queries might be the difference between years of incarceration or freedom.

Cognizance of offence and applicability of Cr.P.C

Any offense under this Act must first receive the approval of the Central or State governments, as appropriate, in order to be prosecuted. The 1973 Criminal Procedure Code is relevant when it comes to arrests, bail, confessions, and the burden of proof. Confessions made before police personnel are no longer admissible, and for the first three months, bail cannot be rejected for those who have been arrested. Arrestees must appear before a magistrate within twenty-four hours. Additionally, the prosecution now bears the burden of proof due to the restoration of the presumption of innocence.

Collection of Evidence

The evidence collected through interception of wireless, electronic or oral communication under the provisions of the Indian Telegraph Act or the Information Technology Act or any law being in force has been made admissible as evidence against the accused in the court.

Punishments under the Act

The following penalties are stipulated in the modified Act: The Offense Has Penalties Having affiliation with an illegal organization a person who is and continues to be a member of such association, takes part in meetings, contributes to, or receives or solicits any donation for the purposes of the association or in any way aids the operations of such association. If this individual possesses illegal weapons, ammunition, explosives, or other weapons that have the potential to cause widespread harm and engages in any activity that ends up taking lives, seriously injuring someone, or seriously damaging property, and if that action has taken the life of someone. In all other cases, a fine and a term of imprisonment that might last up to two years.

The Parliamentary institution declares in *State v. Mohd. Afzal and Ors.* Court that "L'Etat, C'est La Nation"—that is, "The State, it is The Nation"—in its widespread dissemination.

Each country is the owner of its own destiny and the mediator of its own existence. With more than 100 crore citizens, this country, India, requires an organ or agent in order to function. This organ must symbolize and reflect India in all the guises and manifestations of its boundless existence. The Parliament is this body.

Terrorism does not stop at national boundaries. The nation is also under threat from cross-border terrorism, thus laws must be passed by Parliament alone, not by state legislatures, in order to address this issue. Judges of the Supreme Court confirmed that the judiciary adheres to the constitutional emphasis of giving security precedence above detunes rights, upholding Parliament's authority to enact harsh laws. The laws were interpreted by thirty judges in accordance with what they believed to be the intent of the Constituent Assembly; fundamental rights were protected by limitations placed on the basis of a national emergency that the Parliament would decide upon, and legal rights were suspended in situations involving state security. Thirty Judges read the laws in accordance with what they believed to be the intent of the Constituent Assembly; fundamental rights were protected by limitations placed on the basis of a national emergency that the Parliament would determine, and legal rights were suspended in situations involving matters of state security.

Bail under UAPA – Judicial Trend

In *PUCL v Union of India* where the validity of POTA was challenged, the Supreme Court said that the need of the Act —is a matter of policy and the court cannot go into the same, once legislation is passed, the government has an obligation to exercise all available options to prevent terrorism within the bounds of the constitution. Mere possibility of abuse cannot be a ground for denying the vesting of powers or for declaring a statute unconstitutionally.”³

There has been a lot of debate over the bail provisions and how court has been interpreting the bail under UAPA cases as opposed to what the true interpretation of bail is under India’s criminal justice system is. It has been clearly stated under many cases by honourable Supreme Court justices while interpreting code of criminal procedure that ‘bail is the rule, jail is exception”. But the same is not followed under the anti-terror law most importantly under UAPA, which has sparked a lot of debate.

In April 2019, in a judgment called *National Investigative Agency vs Zahoor Ahmad Shah Watali*, the Supreme Court interpreted the UAPA in a manner that skewed it further towards the State and away from the individual. It placed severe restrictions on the extent to which the courts could question the police case when considering the question of bail. The Supreme Court forbade courts from conducting a ‘mini trial’ at the stage of bail—a direction that seems fair enough at first glance, but becomes extremely unjust when you consider that if the only material that the court is allowed to consider in a UAPA bail case is material provided by the police, this effectively amounts to ordering the defence to fight with one arm tied behind its back. All UAPA adjudication has taken place under Watali's shadow since April 2019. It is a common complaint that judges are obligated by Watali to give bail under the UAPA, even though they would like to. But this lament misses the point of this work, which is that law is a field that is constantly up for debate. Laws and court rulings are

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always subject to interpretation; in the end, a judge has the discretion to support or oppose an interpretation that prioritizes liberty and freedom over the authority of the State.

Unlawful Activities Prevention Act, gives definitions of lot of terms including “terrorist act”, “unlawful activity”, “advocacy”, “likely to threaten”, “conspiracy”, “likely to strike terror”, very vaguely and gives agencies arbitrary powers.

Section 2(o)⁴ of the Act defines “unlawful activity”, as an activity in relation to an individual or association, means any action taken by such individual or association (whether by committing an act or by words, either spoken or written, or by signs or by visible representation or otherwise),—

- (i) which is intended, or supports any claim, to bring about, on any ground whatsoever, the cession of a part of the territory of India or the secession of a part of the territory of India from the Union, or which incites any individual or group of individuals to bring about such cession or secession; or
- (ii) which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India; or
- (iii) which causes or is intended to cause disaffection against India.⁶⁶

This leaves it all up to the judges to interpret the legislation according to their own understanding of the law, which leaves the door open for a great deal of subjectivity, thus, likely to result in quite different ruling for similar cases. There is also a lack of standards for prosecution. The act allows on blind reliance on police reports. This is why prosecution success in cases of UAPA are very few.

There have been numerous cases where Supreme Court, while denying bail under UAPA, relied on metaphors and reasoning which strayed away from the basic interpretation given under justice system for liberty and idea off innocent until proven guilty. These are some examples of bail proceedings under UAPA which created controversy and dialogue among the fraternity as well as citizens. The UAPA Amendment Act, 2008 introduced Section 43D (5), which required a Court to deny bail if there were reasonable grounds to believe that the case against the accused was prima facie true. It requires the accused to convince the court that it is unreasonable to consider the accusations as prima facie true. By shifting this burden onto the accused, the fundamental principle of criminal law, which presumes innocence until proven guilty, is altered within the framework of the UAPA.

In the case of *Safoora Zargar* also known as “*Delhi riot case*”, a close reading of bail order following points are noticeable:

⁴ Section 2(o) Unlawful Activities Prevention Act, 1967

1. Taking only the prosecution's case (as this was a bail hearing), there is evidence that there existed a 'conspiracy' to block a road in which the accused was involved (the role of the accused in this 'conspiracy'—even prima facie—is not spelt out, only some WhatsApp messages and disclosure statements are referred to).

2. "One cannot overlook the prosecution's case, which argues that the accused have planned to cause disruption of a scale and scope that would result in unprecedented disorder and disturbance of law and order." The definition of "unprecedented scale" is not made clear in the order. It is unclear from this passage if the "unprecedented scale" alludes to the same "conspiracy" mentioned in (1) or to something different. In the event that the latter, the order fails to explain how the accused's involvement in that distinct "conspiracy" was determined; in the event that the former, the order fails to explain the connection between the "conspiracy" to block the road and its "unprecedented scale," in a nation where road blockages occur on a biweekly basis.

3. That although there was no evidence of the accused committing any act or making any speech that instigated violence, nonetheless, as there existed a 'conspiracy', 'when you choose to play with embers, you cannot blame the wind to have carried the spark a bit too far and spread the fire'. Consequently, the 'acts and inflammatory speeches of the co-conspirators are admissible against the accused'. Now, since the order makes no mention of the "acts," it is unclear what they are; similarly, the order makes no mention of the "inflammatory speeches.

The reasons of the order using words like conspiracy and unprecedented were very vague to say the least. It is also said that the accused is a prima facie conspirator because the inflammatory speeches were automatically attributed to her, which were also not specified as which were the speeches that the accused has given. Upon examining the order, it becomes evident that the court overcame two obstacles in favour of bail: first, it circumvented legal doctrine by substituting a metaphor of its own creation for the doctrine, and second, it avoided the need for an explanation by replacing an accounting of the facts with a series of adjectives, such as "unprecedented scale" and "inflammatory speeches," instead of providing one. In this sense, a prima facie UAPA case was established by stretching the law from one side and the facts from the other.

In *Asif Iqbal Tanha Vs State of NCT of Delhi*,⁵ Asif Iqbal Tanha, Devangana Kalita, and Natasha Narwal were granted bail by a two-judge panel of the Delhi High Court (Mridul and Bhambani JJ).⁵ The three, along with numerous others, were charged under the Unlawful Activities (Prevention) Act with conspiring to incite violence following the anti-CAA rallies. The High Court's orders are significant, as it is the first instance of regular bail—i.e., bail on merits—being granted to individuals who have been charge sheeted under the UAPA in the Delhi riots cases. In relation to this I want to discuss some points of Watali Case which is an important precedence related to UAPA cases. As is well known, Section 43(D)(5) of the UAPA prohibits the granting of bail in the event that the court determines that there "are reasonable grounds for believing that the accusation against such person is prima facie true" after reviewing the case diary. Essentially, then, the

⁵ *Asif Iqbal Tanha vs State of NCT of Delhi*, CrI. A. 39/2021 (15 June 2021)

UAPA restricts the court to considering the prosecution's account and forbids the granting of bail if, without having been subjected to cross-examination or dispute, the prosecution's version seems accurate prima facie. The effect of this is to make the grant of bail almost impossible until the end of the trial (which could take years).

At the heart of the lead judgment/order (*Asif Iqbal Tanha vs. State of NCT of Delhi*) is the basic insight that the gravamen of offences under the UAPA is 'terrorism', and the word 'terrorism' has to be given a specific meaning—in light of the context and history of the Act—that distinguishes it from offences that are dealt with under ordinary law (paragraphs 28–39). This is particularly important, as the court notes—correctly—that a 'sacrosanct principle of interpretation of penal provisions is that they must be construed strictly and narrowly, to ensure that a person who was not within the legislative intendment does not get roped into a penal provision. Also, the more stringent a penal provision, the more strictly it must be construed [paragraph 40].' Based on these interpretive principles—and prior Supreme Court precedent—the court goes on to hold: The extent and reach of terrorist activity must travel beyond the effect of an ordinary crime and must not arise merely by causing disturbance of law and order or even public order; and must be such that it travels beyond the capacity of the ordinary law enforcement agencies to deal with it under the ordinary penal law [paragraph 49].

Examining the Delhi riots cases reveals that: (i) the State fills in the gaps by claiming conspiracy and the "likelihood" of causing violence under the UAPA; (ii) violence occurred but no evidence links the accused to it; and (iii) the actual evidence against the accused relates to organizing protests and chakka jam. The court properly points out this gap and observes that merely drawing conclusions is insufficient to establish a prima facie case under the UAPA, which might be used to refuse the accused's request for bail for an extended period of time. Under this case there was no actual evidence other than that the accused gave a sim-card to the co accused, no weapons of any kind were recovered and no actual evidence of the accused leading the mob to violence who became violent. The prosecution kept on alleging that the anti-CAA protest would be aggravated and could harm the nation. The court once again notes that none of this is based on any factual assertion, but rather 'based upon inferences drawn by the prosecuting agency'.

As no prima facie case of terrorism was made out in accordance with the UAP Act the court considered the general principles of bail in this case. The court also draws upon the judgment in *A.K. Najeeb* case, which stated that section 45 D (5) is not inflexible and does not override constitutional rights. Similarly in the *Natasha Narwal* order, the court observes: Allegations relating to inflammatory speeches, organising of chakka jaam, instigating women to protest and to stock-pile various articles and other similar allegations, in our view, at worst, are evidence that the appellant participated in organising protests, but we can discern no specific or particularised allegation, much less any material to bear out the allegation, that the appellant incited violence, what to talk of committing a terrorist act or a conspiracy or act preparatory to the commission of a terrorist act as understood in the UAPA [paragraph 35].

In *Thwaha Fasal vs Union of India*, the accused had been booked under the UAPA for alleged association with the banned Communist Party of India (Maoist). The evidence against them consisted of: (a) possession of certain books; (b) the making of 'cloth banners'; and (c) attendance of various meetings. There was no allegation that they had themselves committed any violent act or provided material support to any terrorist organization. However, the high court seized upon the allegations to hold that the accused were 'protagonists' of the CPI (Maoist), had close links with people who, in turn, had close links with the CPI (Maoist), and that the literature in their possession had the 'seeds of promoting secessionist ideology'. As had been pointed out at the time, this was in flagrant contradiction of the well-established Supreme Court jurisprudence that limited membership of unlawful organizations under the UAPA to 'active membership',

i.e., to actual incitement of violence.⁶

The court observed section 38 and section 39 of the Act.

38. Offence relating to membership of a terrorist organisation⁷.—(1) A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation: Provided that this sub-section shall not apply where the person charged is able to prove— (a) that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and (b) that he has not taken part in the activities of the organisation at any time during its inclusion in the Schedule as a terrorist organisation.

(2) A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.⁸

39. Offence relating to support given to a terrorist organisation⁹.—(1) A person commits the offence relating to support given to a terrorist organisation,— (a) who, with intention to further the activity of a terrorist organisation,— (i) invites support for the terrorist organization; and (ii) the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b) who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is— (i) to support the terrorist organization; or (ii) to further the activity of the terrorist organization; or (iii) to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

⁶ Unsealed covers, Gautam Bhatia, pg 41, HarperCollins Publishers, Epub Edition © July 2023

⁷ Section 38, Unlawful Activities Prevention Act, 1967

⁸ *ibid*

⁹ Section 39, Unlawful Activities Prevention Act, 1967

(c) who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2) A person, who commits the offence relating to support given to a terrorist organisation under subsection (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.¹⁰

As the reading of both sections it can be seen that prima facie case under the UAPA cannot be made out as there was no material evidence to demonstrate that the actions were to be done in furtherance of the intentions. The bench of Oka and Rastogi JJ held: Even if an accused allegedly supports a terrorist organization by committing acts referred in clauses (a) to (c) of subsection (1) of Section 39, he cannot be held guilty of the offence punishable under Section 39 if it is not established that the acts of support are done with intention to further the activities of a terrorist organization [paragraph 13].

Here, Oka J states that the charge sheet must show some overt act from which it is fair to conclude that the accused meant to facilitate terrorist acts or activities of the proscribed organization in order for Sections 38 and 39 to be implicated even prima facie. To put it another way, nebulous accusations of conspiracy based on the accused's overall actions or any evidence that may have been found on them are insufficient; the charge sheet must prove the existence of the necessary intent based on certain overt acts. If that isn't done, it won't be enough to just demonstrate that the accused was "associated" in some manner with the relevant organization—that affiliation needs to be active.

In *Jyoti Jagtap vs National Investigative Agency and Ors*, the division bench of Bombay High Court denied bail to Jyoti Jagtap who is a member of Kabir Kala Manch Troupe. She had been alleged to have made provocative speeches and performed plays in order to provoke the public to overthrow the government which was tied to the larger conspiracy in connection with the banned CPI(Maoist). The prosecution also relied upon certain witness statements from 2011 (which had not been subjected to cross-examination at this stage of the proceedings) to the effect that Jyoti Jagtap had been seen in the forest and in meetings with Naxalites.

The Bombay High Court's deliberation in the case of Jyoti Jagtap delineated several aspects to substantiate her purported "active membership" within the proscribed CPI (Maoist). Firstly, it cited witness statements purportedly indicating her involvement in arms training and attendance at meetings with Naxalite factions, suggestive of an entrenched affiliation. Secondly, documentary evidence, including receipts and organizational documents related to the Elgar Parishad event, were presented to underscore her organizational role therein. Moreover, the court highlighted instances of purported "incitement of hatred and passion" during the event, wherein derogatory references to prominent political figures and discussions on social issues were interpreted as indicative of seditious intent. Notably, references to the Prime Minister and critical commentary on governmental policies were

¹⁰ Section 39, Unlawful Activities Prevention Act, 1967

construed as fostering a climate of dissent and disaffection. Additionally, the court invoked the National Investigation Agency's characterization of the CPI (Maoist), as documented in preceding legal proceedings, to frame Jagtap's actions within the context of a broader conspiracy orchestrated by the said organization. Consequently, the court contended that Jagtap's activities warranted evaluation within the overarching narrative of the CPI (Maoist)'s purported agenda, thus justifying her continued detention under the auspices of the Unlawful Activities (Prevention) Act.

The actual events that occurred were violent in nature and the accused was no where related to them as per the evidence. She was accused of violent act following the event of Elgar Parishad, of which she was only said to be allegedly organising and performing on the day but there was no evidence to show that she was related to the violence. To fill in the gaps in the prosecution's case through inferences, the Bombay High Court resorted to increasingly strained logic as Guatam Bhatia in his book explains "ridiculing the Prime Minister, his catchphrases and his policies, and statements on Shivaji, Tipu Sultan and on atrocities against Dalits were all construed as 'inciting passion' and in furtherance of the 'larger conspiracy'. The high court was forced to do this because the actual evidence against Jyoti Jagtap, as we have seen, was negligible. Thus, the only way to establish the 'prima facie' case against her and deny her bail under the UAPA was for the prosecution and the court to create a set of inferences that would connect her (innocuous) acts, such as playing an organizational role in the event and speaking at it, to the (actual) events—the violence—through the (unproven) vehicle of a 'larger conspiracy'."

In *Umar Khalid's case*, The high court notes that, after the passage of the Citizenship Amendment Bill, (a) a WhatsApp group called the 'Muslim Students of JNU' was formed, of which Umar Khalid was a member; (b) the day after, the United Against Hate group conducts an agitation against the CAA, which Umar Khalid attends and—allegedly—supports a call for 'chakka jam'; and (c) another WhatsApp group called 'CAB Team' is formed, of which—again—Umar Khalid is a member.¹¹ The high court concludes that, therefore, 'a collective reading of the events that unfolded on each day after 04.12.2019 cannot be shrugged aside and it cannot be said that nothing incriminating has been.

In [Paragraph 55]¹² High Court notes that It may be reminded that under the UAPA, it is not just the intent to threaten the unity and integrity but the likelihood to threaten the unity and integrity; not just the intent to strike terror but the likelihood to strike terror; not just the use of firearms but the use of any means of whatsoever nature, not just causing but likely to cause not just death but injuries to any person or persons or loss or damage or destruction of property, that constitutes a terrorist act, within the meaning of section 15 of UAPA. Moreover, under section 18 of UAPA, not merely conspiracy to commit a terrorist act but an attempt to commit or advocating the commission or advising it or inciting or directing or knowingly facilitating commission of a terrorist act that is also punishable. In fact, even

¹¹ Umar Khalid vs State of National Capital Territory of Delhi, IN THE HIGH COURT OF DELHI AT NEW DELHI, NEUTRAL CITATION NO: 2022/DHC/004325

¹² *ibid*

acts preparatory to commission of terrorist acts are punishable under section 18 of UAPA. Thus, the objection of the appellant that a case is not made out under UAPA is based on assessing the degree of sufficiency and credibility of evidence not the absence of its existence but the extent of its applicability; but such objection of the appellant is outside the scope and ambit of section 43D(5) of the UAPA.

The court wraps up its analysis in paragraphs 62 and 63, noting the following: Umar Khalid's membership in WhatsApp groups and speeches, the "flurry of calls," the existence of a "pre-meditated conspiracy" to carry out a chakka jam and incite violence, a "pre-planned" attack, and Umar Khalid's active participation in the protests against the CAA. The reason the high court must take these actions is because Umar Khalid never called for violence, publicly incited violence, committed violence, or took part in rioting, as the evidence amply shown. So far, all we have is participation in protests, a "flurry of calls" that likewise suggests a hazy "association," and membership in WhatsApp groups that indicate a vague "association."

The high court adds a sprinkling of Robespierre and Nehru and weaves all of this into an ever malleable web of "larger conspiracy." Therefore, as we wait for the trial to start, a person who has been detained for more than two years without a trial is sentenced to an additional, undetermined period of incarceration.

As stated by Guatam Bhatia in his book – “As with the Jyoti Jagtap bail order, let us identify the assumptions at work that the court uses to fill in the gaping holes in the prosecution’s case:

1. That calling for a chakka jam logically entails incitement to violence and riots.
2. That membership of WhatsApp groups is indicative of participation in a conspiracy.
3. That a ‘flurry of calls’ after a riot has started—between activists who have been engaged with the issue in question—is indicative of a conspiracy.
4. That Umar Khalid’s involvement in protests against the CAA is indicative of his participation in a conspiracy to cause riots.”¹³

The rulings in the cases of Jyoti Jagtap and Umar Khalid demonstrate that there is still debate in the courts on the UAPA, prosecutorial and state impunity, and detention of people awaiting trial. These two rulings fall under the "executive court" tradition, in which the court's language frequently mimics and even surpasses that of the executive branch. The executive court's decisions in UAPA bail cases are distinguished by the way judicial reasoning fills in the blanks in the prosecution's case with assumptions and inferences, how harmless and politically acceptable forms of dissent are made illegal by inserting them into a "larger conspiracy," and how the existence of the conspiracy itself is still an assumption.

¹³ Unsealed covers, Gautam Bhatia, pg 41, HarperCollins Publishers, Epub Edition © July 2023

But as we've seen, there are other options available to us under the UAPA. The bail rulings from the Bombay and Delhi High Courts in 2021 and 2022 demonstrate how a court that respects individual liberty claims can operate within the parameters of the UAPA. Therefore, a lot will depend on which of these two strategies eventually becomes "settled law." In the interim, every single case is a significant battleground in the legal and constitutional fight against the UAPA's entrenchment of State impunity.

The Unlawful Activities Prevention Act's bail provisions are examined, which highlights the fine line that must be drawn between individual liberties and the needs of national security. While the Act combats the serious threat of terrorism by offering procedures for preventive detention and strict bail requirements, worries about possible abuses of fundamental rights, especially the right to liberty and due process, are raised. The wide definitions of "terrorism" and "unlawful activities" in the Act, along with the assumption of guilt in some situations, cast doubt on the notion of proportionality and the presumption of innocence. Moreover, the authority granted to authorities to refuse bail without citing a cause could result in unfair or biased actions. There is a need for a nuanced approach that reconciles the imperative of national security with the protection of civil liberties. This may entail judicial scrutiny of bail decisions, legislative amendments to clarify and narrow the scope of the Act's provisions, and enhanced procedural safeguards to prevent abuse of power.

