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PRE-TRIAL PUNISHMENT BY PROCESS: A STRUCTURAL EXAMINATION OF UAPA, BNSS, AND THE NEED FOR BAIL REFORM

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Abstract:

This paper critically examines the structural flaws in India's criminal justice process when dealing with national security offences, focusing on the interplay between the Unlawful Activities (Prevention) Act (UAPA) and the recently enacted Bharatiya Nagarik Suraksha Sanhita (BNSS). The analysis demonstrates that while the BNSS promises modernization and procedural streamlining, these reforms are superficial when measured against the extraordinary powers exercised under the UAPA. Section 43(D) of the UAPA is shown to entrench a regime where extended pre-trial detention, restricted access to evidence, and lowered bail thresholds undermine fundamental rights to liberty and the presumption of innocence guaranteed by Article 21 of the Constitution. The paper details how the UAPA allows police greater custody periods, denies meaningful judicial scrutiny, and shifts the burden of proof onto the accused, creating a procedural void not filled by the new BNSS framework.

Through comparative analysis of custody, bail, and the so-called "half ground" provisions concerning undertrial prisoners, the limitations and exclusions faced by those charged under special laws are brought to light. The very low conviction rate under the UAPA, juxtaposed with its harsh pre-trial detention practices, suggests systemic failures that jeopardize justice and liberty. The paper concludes by proposing legislative reforms—establishing statutory compensation for wrongful incarceration, actualizing the principle that "bail is the rule, jail is the exception," and instituting upper limits on pre-trial detention—that are needed to restore

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balance in India's criminal justice system. The study ultimately argues that meaningful reform must tackle the structural features that perpetuate long-term incarceration without trial, to protect individual liberty even amid legitimate state security concerns.

Introduction

The Indian criminal justice system has long struggled to strike a balance between national security and individual liberty. Ordinary criminal procedure is grounded in constitutional commitments to fairness, proportionality, and the presumption of innocence. National security laws, however, function separately from the ordinary laws, and in case of conflict, the special laws will prevail. The clearest example of this shift is the Unlawful Activities (Prevention) Act (UAPA). What began as a law to regulate unlawful associations has evolved into a comprehensive anti-terrorism statute. It allows the State to detain individuals for extended periods, restrict access to bail, and initiate prosecution without the evidentiary thresholds required under general criminal law. Together, these departures create a procedural framework that significantly weakens the protections guaranteed by Article 21.

IndiaBNSS was said to modernize colonial-era laws, but upon deeper analysis, it reveals contradictions. On the surface, its procedures regarding custody and bail appear to enhance judicial control and procedural clarity. However, when viewed in relation to the UAPA, it becomes clear that these reforms have not addressed the systemic imbalance introduced by special legislation. Rather, the UAPA remains an extraordinary regime that supersedes basic procedural guarantees, and the BNSS does little to alleviate its effects.

This paper argues that Section 43(D) of the UAPA, which regulates detention and bail, entrenches a model of criminal process that departs sharply from constitutional norms. Extended police custody, restricted access to evidentiary material, and an unusually low threshold for denying bail together create a system where pre-trial incarceration becomes the default. These provisions, when placed against the procedural safeguards of the BNSS, expose a widening gap between ordinary criminal procedure and the extraordinary powers exercised under the UAPA. The result is a legal environment where individuals can be deprived of their liberty for years without meaningful judicial scrutiny.

This paper aims to analyze these procedural departures. It follows the pattern through which the UAPA custody and bail systems flout the principle of innocence, increase executive

authority, and undermine judicial oversight of investigative authority. It also assesses the role of BNSS in responding to these issues. The case presented here is quite simple: the UAPA creates a procedural void in criminal law, and the BNSS fails to balance this out. Any attempt to institute reform will have to address the structural aspects that enable extended detention, trial delays, and virtually unattainable bail.

Criminal Justice and UAPA, BNSS: Time to review

The laws governing special criminal acts in India have invariably been enacted during times of perceived crisis, and they often outlive the circumstances in which they were created. Laws like the Preventive Detention Act,[2] TADA[3], and POTA[4] came with robust investigative and detention authority, purportedly intended to address extraordinary threats. Most of these laws were repealed or lapsed over the years due to misuse. However, the UAPA has been taking a reverse direction. The changes over the past 20 years incorporated some elements of the abolished anti-terror policies and granted even more power to investigative agencies. Simultaneously, the common criminal procedure continued to evolve through judicial rulings, where the principles of equality and equal opportunity before the law, as well as the necessity of conducting trials in a timely manner, became increasingly crucial. The cases that reinforced the right to counsel, imposed restrictions on pre-trial detention, and reaffirmed that bail is the norm collectively influenced the structure of criminal procedure. However, this change has not affected the special laws and its stringent provisions. The BNSS, which replaced the Criminal Procedure Code, demonstrates the government's efforts to streamline procedures and shorten the trial timeline. This change has not affected the special laws and its stringent provisions, it does not affect the far-reaching Investigative powers granted in case of offences in special lawsgranted by special legislation. Consequently, the reforms that it presents are dwarfed by the architecture of outstanding laws. This necessitates an examination of the interactions between the UAPA and BNSS, and whether the latter reinforces or weakens the protection it purports to provide.

Section 43(D)(2) UAPA:

[2] Preventive Detention Act, 1950
[3] Terrorist and Disruptive Activities (Prevention) Act, 1987.
[4] Prevention of Terrorism Act, 2002.

Section 187 of the Bharatiya Nagarik Suraksha Sanhita (BNSS)[5] outlines the rules governing the maximum duration of police detention for the accused. It states that if the police wish to keep the accused in custody for more than 24 hours after arrest, they must produce the individual before a magistrate. The magistrate then has the discretion to authorize police custody for a further period of up to 15 days. Under the new statute, it is no longer mandatory for this 15-day custody period to be continuous. The investigation time can be broken up and used in parts. Once the 15 days are exhausted, the police can request an extension from the court, which is also at the discretion of the magistrate. This extension can last up to 90 days for serious offenses and up to 60 days for other offenses.

In contrast, the Unlawful Activities (Prevention) Act (UAPA)[6], a special or "super-national" law, under Section 43(D)(2)[7], gives the police extended powers. It allows them to seek 30 days of custody during the first production of the accused before a magistrate (after the initial 24-hour arrest period). The magistrate may grant a 30-day period, which can then be extended to 90 days, and further extended by an additional 90 days. These extensions are solely for the purpose of investigation. The police report itself is often considered sufficient by the court to deny bail to the accused and to grant the police further custody[8]. However, the accused is not given access to the report submitted by the police[9]. This creates a serious procedural gap and violation of audi alteram partem (Hear the other side) of natural law principle.

The Supreme Court has mandated that there must be a *specific and individualized* justification for denying bail and extending detention. Yet, this requirement is frequently ignored by the police. As a result, the police are left with unchecked authority to seek further detention without having to disclose the grounds for it. This lack of transparency makes it nearly impossible for the accused to defend themselves. Legal scholar Gautam Bhatia has described this situation as being forced to "*swim with both hands tied behind your back*"[10].

[5]Bharatiya Nagarik Suraksha Sanhita, 2023, s. 187.
[6] The Unlawful Activities (Prevention) Act, 1967.
[7]Unlawful Activities (Prevention) Act, 1967, s. 43(D)(2).
[8]Chitkara, Radhika, *"The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws"*, National Law School of India Review, Vol. 35: Iss. 1 (2024) Art. 8.
[9](1994) 5 SCC 410.
[10]Bhatia, Gautam, "Swimming With Your Arms Tied Behind Your Back: The Supreme Court's UAPA Bail Order in Iqbal Ahmed's Case", *Constitutional Law and Philosophy* (12 Feb 2022)

Section 43(D)(5) UAPA:

This provision states that bail shall not be granted to the accused if the court is satisfied with the Public Prosecutor's submission. It also mandates that the Public Prosecutor must be heard before any bail is granted. Notably, the threshold under this section is low, the prosecutor's claims only need to appear prima facie true[11]. This goes against a foundational principle of criminal law: that prosecution must prove guilt *beyond reasonable doubt*. By allowing bail to be denied based on such a minimal standard, the provision tilts the scales heavily against the accused. Legal scholar Radhika Chitkara has pointed out that this section violates the presumption of innocence and undermines the principle that *"bail is the rule, and jail is the exception,"* which has been consistently upheld by the Supreme Court[12].

What makes Section 43(D)(5) of UAPA particularly concerning is that it acts as an additional barrier to bail, beyond what is already provided in the BNSS. Even when the Public Prosecutor fails to meet the prima facie standard, the accused may still be denied bail. In such cases, personal liberty is not given due weight. Instead, the accused and their counsel must argue not just against the allegations, but also against the very structure of the law that creates these presumptive restrictionsbefore the trial has even begun. The situation for foreign nationals is even more difficult when it comes to securing bail under the UAPA, due to the additional restrictions imposed by Section 43(D)(7) UAPA[13]. Relatively, this section does not even mandate this assessment, and results in mandatory detention based simply on the status of the accused[14].

Half Ground:

Section 436A of the Criminal Procedure Code (CrPC)[15] was introduced in 2006. It allows for the release on bail of undertrial prisoners who have served half of the maximum sentence prescribed for their offence (except in cases where the offence is punishable with the death

https://indconlawphil.wordpress.com/2022/02/12/swimming-with-your-arms-tied-behind-your-back-the-supreme-courts-uapa-bail-order-in-iqbal-ahmeds-case/.

[11]Unlawful Activities (Prevention) Act, 1967, s. 43(D)(5).

[12] State Of Rajasthan, Jaipur vs Balchand @ Baliay 1977 SCC(CRI) 594

[13]Unlawful Activities (Prevention) Act, 1967, s. 43(D)(7).

[14]Chitkara, Radhika, *"The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws"*, National Law School of India Review, Vol. 35: Iss. 1 (2024) Art. 8.

[15]Code of Criminal Procedure, 1973, s. 436A.

penalty). The use of the word "shall" in the provision makes it mandatory for the court to grant bail to such undertrials. This is commonly referred to as the *"half ground"*[16].

The Supreme Courts and various High courts has suggested for similar provision to be incorporated in the law such as *Bhim Singh v. Union of India (UOI)*[17], *Hussainara Khatoon v. Home Secretary, State of Bihar*[18], *Supreme Court Legal Aid Committee v. Union of India*[19]and Hasan Ali Khan v. State[20]. In the case of *Dipak Joshi*, the Calcutta High Court took suo motu cognizance and ordered the release of the undertrial, who had spent 41 years in jail without trial[21].

The corresponding provision is found in Section 479 BNSS. [22]. The government has claimed that the new provision expands the scope of bail and will help reduce overcrowding in prisons. However, with a closer scrutiny, it can be noted that, this relief is not available to those charged with "more than one offence."[23] The language of this clause is extremely broad[24], and it excludes a large number of undertrials, since the police routinely charge individuals with multiple offences in a single case[25].

Ordinarily, the grant of regular bail is guided by the *triple test*—whether the accused is a flight risk, might tamper with evidence, or influence witnesses. But here, merely being charged with more than one offence becomes a ground to deny bail. This is difficult to justify, as most serious cases involve charges under multiple sections [26]. The problem of half

[16]Babu, Hany & Gadling, Surendra, "Guest Post: How Long is Too Long? – On the Maximum Period that an Undertrial Prisoner can be Detained", *Constitutional Law and Philosophy* (13 October 2024) https://indconlawphil.wordpress.com/2024/10/13/guest-post-how-long-is-too-long-on-the-maximum-period-that-an-undertrial-prisoner-can-be-detained/.
[17] (2015) 13 SCC 605.
[18] (1980) 1 SCC 98.
[19] (1994) 6 SCC 731.
[20] 2015 SCC OnLine Bom 8695.
[21] Indulia, Bhumika, "Man in detention without trial for almost 41 years, compensation granted: Cal HC", *SCC Times* (9 Dec. 2021) https://www.scconline.com/blog/post/2021/12/09/man-in-detention-without-trial-for-almost-41-years-compensation-granted/.
[22]Bharatiya Nagarik Suraksha Sanhita, 2023, s. 479.
[23]Bharatiya Nagarik Suraksha Sanhita, 2023, s. 479(2).
[24]Shuaib, Asma, "Bail Provisions in BNSS", *Common Cause*, Vol. XLIII No. 3 (July–September 2024).
[25]"Criminal Law Bills 2023: Decoded #22: Provisions Pertaining to Bail and Bonds", *P39A Criminal Blog* (15 Nov 2023) https://p39ablog.com/2023/11/criminal-law-bills-2023-decoded-22-provisions-pertaining-to-bail-and-bonds/.
[26]Shuaib, Asma, "Bail Provisions in BNSS", *Common Cause*, Vol. XLIII No. 3 (July–September 2024).

ground and the setting of the upper limit, as suggested by Professor Hany Babu[27] would be discussed in the later part of this paper.

Presumption of Innocence and the UAPA

The State, by its very nature, wields superior power in criminal proceedings, supported by extensive surveillance and enforcement mechanisms. It also operates a sophisticated network of well-resourced institutions, including police, forensic laboratories, courts, and tribunals that enables it to execute its powers on a scale no individual can realistically match[28]. This creates an inherent inequality between the parties in any criminal case, with the State acting as the prosecutor and the individual as the accused[29].

The principle of presumption of innocence is central to criminal law. It holds that every accused person is presumed innocent until proven guilty by the State. This principle requires the prosecution to establish the offence beyond a reasonable doubt, ensuring that the accused's legal status as innocent is respected at every stage prior to conviction. This principle serves a truth-seeking function, compelling the prosecutor to produce credible evidence to substantiate their claim. The legal burden of proof rests entirely with the prosecution and remains constant throughout the trial. Even if the evidential burden temporarily shifts to the accused to raise a reasonable doubt, the ultimate legal burden continues to rest with the prosecution[30].

This principle also plays a crucial role in protecting the rights of undertrial prisoners by ensuring that cases are brought before the court without undue delay. Prolonged detention without sufficient evidence undermines this principle, and it is well-established that if the prosecution fails to introduce adequate evidence, the accused must be acquitted[31]. However, this fundamental principle is significantly weakened under certain special statutes, including the UAPA, PMLA, and NDPS. These laws reverse the burden of proof, requiring the accused to demonstrate their innocence. Under such provisions, the police are empowered to file

[27]Babu, Hany & Gadling, Surendra, "Guest Post: How Long is Too Long? – On the Maximum Period that an Undertrial Prisoner can be Detained", *Constitutional Law and Philosophy* (13 October 2024)
[28]Chitkara, Radhika, *"The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws"*, National Law School of India Review, Vol. 35: Iss. 1 (2024) Art. 8.
[29]Ashworth, Andrew, *Principles of Criminal Law*, Oxford University Press, latest edn., p. 249.
[30] WIGMORE, Evidence 285 (12th ed., Little, Brown and Company, 1964).
[31] McKelvey, Evidence 97 (5th ed., Sweet & Maxwell, 1952).

charges without the obligation to prove them, effectively shifting the burden onto the accused. This structural imbalance not only heightens the*inherent inequality between the State and the individual*[32]but also constitutes a direct violation of the presumption of innocence.

Low rate of conviction in UAPA:

The conviction rate in UAPA cases is less than 3% [33], or in other words, it can be said that acquittal rate is more than 97% [34]. The same has been confirmed by the government in the Rajya Sabha in response to an unstarred question asked by MP, Dr. John Brittas.[35] The Ministry also stated that "*There is no provision made for providing support or compensation to individuals acquitted under UAPA*[36]" and there is no separate record of UAPA charges against the journalist.[37]

It is very clear that the UAPA has failed to secure enough convictions, which is evident from the reports and government databases. The lower conviction rate highlights the negligence of the police and the poor investigation.[38] This inefficiency of the investigating agency causes a serious threat to the personal liberty enshrined in Article 21 of the Constitution [39] and various landmark judgements which upheld the principle of life and liberty of all citizens. Hence, the scraping of UAPA was demanded by civil and political rights activists.[40]

Suggestions:

[32]Chitkara, Radhika, *"The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws"*, National Law School of India Review, Vol. 35: Iss. 1 (2024) Art. 8.
[33]*"Less than 3% arrests under UAPA resulted in conviction between 2015 and 2020, shows report"*, Scroll.in (16 Sept. 2022) https://scroll.in/latest/1033009/less-than-3-arrests-under-uapa-resulted-in-conviction-between-2015-and-2020-shows-report (visited on 18 Nov 2025).
[34]Suresh, V., Madhura S. B. & Lekshmi Sujatha, *UAPA: Criminalising Dissent and State Terror – Study of UAPA Abuse in India, 2009–2022* (People's Union for Civil Liberties, 28 September 2022) https://pucl.org/wp-content/uploads/2023/05/PUCL-28.09.2022.pdf.
[35]Government of India, Ministry of Home Affairs, Rajya Sabha Unstarred Question No. 1045 for 4 Dec 2024: "Cases filed under Unlawful Activities (Prevention) Act, 1967" https://www.mha.gov.in/MHA1/Par2017/pdfs/par2024-pdfs/RS04122024/1045.pdf.
[36]Ibid.
[37]Ibid.
[38]Bhargav, Pankaj Kumar, *"Factors Responsible for Low Conviction Rates in Trials"*, *International Journal of Recent Research Aspects*, Vol. 5 Issue 1 (March 2018) https://www.ijrra.net/Vol5issue1/IJRRA-05-01-82.pdf.
[39]Constitution of India, art. 21.
[40]*"UAPA should be scrapped as 97 percent accused are proven innocent, says Prof Haragopal"*, The Hindu (29 Jan 2024https://www.thehindu.com/news/national/andhra-pradesh/uapa-should-be-scrapped-as-97-percent-accused-are-proven-innocent-says-prof-haragopal/article67786071.ece(visited 19 Nov 2025).

1. Compensation

In the 277th[41] law commission report titled "wrongful prosecution (miscarriage of justice) legal remedies", it is discussed in length about the compensation for wrongful incarceration. There is a large number of undertrials who are incarcerated for 5 years or more.[42] The wrongful incarceration and its "sense of injustice" cause not just serious psychological injury, [43] but there are other damages for health, loss of income, legal expenditure, emotional harm caused to the accused and their family.[44]

The USA[45], UK[46] and Canada[47] have separate statutes and guidelines to provide compensation for the individuals whose liberty was wrongfully curtailed. Importantly, there is also an international obligation to provide compensation, which is noted by Article 14(6)[48] and 9(5)[49] of the International Covenant on Civil and Political Rights,1966.

The Indian Supreme Court has emphasized in several judgments the need for compensation in the cases of *Rudul Shah*[50], *Nambi Narayana*[51] and *Bhim Singh*[52]. However, there have been no significant legislative efforts to enact a statute for compensating state errors.[53]The least the states can do to address the curtailment of personal liberty by wrongfully incarcerating is to adequately compensate the individual.

[41]Law Commission of India, *Report No 277: Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (Aug 2018).
[42]Ministry of Law and Justice, National Judicial Data Grid, https://njdg.ecourts.gov.in/njdgnew/index.php (last visited Feb 28, 2021).
[43] John Wilson, A Perpetual Battle of the Mind, The Frontline (Oct 31, 2002), https://www.pbs.org/wgbh/pages/frontline/shows/burden/cameras/memo.html (last visited Mar 1, 2021).
[44] Law Commission of India, Wrongful Prosecution (Miscarriage of Justice): Legal Remedies (2018), https://lawcommissionofindia.nic.in/reports/Report277.pdf (last visited Mar 1, 2021).
[45]Innocence Project, *Compensation Statutes* (2017) https://www.innocenceproject.org/wp-content/uploads/2017/09/Adeles_Compensation-Chart_Version-2017.pdf.
[46]*"Applying for compensation after a miscarriage of justice,"* GOV.UK (Ministry of Justice) (visited 19 Nov 2025) https://www.gov.uk/government/publications/applying-for-compensation-after-a-miscarriage-of-justice.
[47]Mason Robert, *Wrongful Convictions in Canada* Background Paper No 2020-77-E (Library of Parliament, Ottawa, 23 Sept 2020) https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/BackgroundPapers/PDF/2020-77-e.pdf.
[48] International Covenant on Civil and Political Rights, Art. 14(6), Dec 16, 1966.
[49] International Covenant on Civil and Political Rights, Art. 9(5), Dec 16, 1966.
[50] Rudal Sah v. State of Bihar AIR 1983 SC 1086 (India).
[51] S. Nambi Narayanan vs Siby Mathews & Others Etc (2018) 10 SCC 804 (India).
[52] Bhim Singh, MLA v. State of J & K & Ors (1985) 4 SCC 677 (India).
[53] Singh, Udai Yashvir & Singh, Smita, "Right to Compensation for Wrongful Prosecution, Incarceration and Conviction—A Necessity of the Contemporary Indian Socio-Legal Framework", International Journal of Law

2. Bail is the rule, jail is an exception:

The 268th[54] law commission report has mentioned the need for separate bail act in its report. This came after the judgment of the Satendra Kumar case.[55] The need for separate bail has many reasons to substantiate, one of which is the inconsistency in granting bail. In few instances Installation of Non-Chinese LED television[56], donating Rs.25000 to PMCARES[57] and uninstalling WhatsApp and Facebook for 2 months[58] were the conditions required for getting the bail. These judgments raise the criteria or the standard of granting bail. The UK[59], USA[60], New Zealand[61], Sri Lanka[62], Australia[63], Mauritius[64], Malawi[65] all had the separate bail act to deal with bail matters.

3. Setting an Upper Limit for the Half-Ground Provision

Professor Hany Babu, an undertrial prisoner in the Bhima Koregaon case and a faculty member at Delhi University, authored an essay titled "How Long is Too Long? – On the Maximum Period that an Undertrial Prisoner Can Be Detained"[66] In this essay, he poses a fundamental question: "How long is too long?" for an undertrial prisoner. The question exposes a deep structural flaw in the criminal justice system,

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Management & Humanities, Vol.5 Issue 1 (2024) https://ijlmh.com/paper/right-to-compensation-for-wrongful-prosecution-incarceration-and-conviction-a-necessity-of-the-contemporary-indian-socio-legal-framework/.

[54]Law Commission of India, *Report No. 268: Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (March 2017).

[55](2022)10 SCC 773.

[56]Saxena, Akshita, "Madhya Pradesh HC Directs Installation of 'Non-Chinese' LED TV at a Local District Hospital as Pre-Condition for Bail", *LiveLaw* (30 June 2020) https://www.livelaw.in/news-updates/madhya-pradesh-hc-directs-installation-of-non-chinese-led-tv-at-a-local-district-hospital-as-pre-condition-for-bail-159132 (visited 19 Nov 2025).

[57]Saxena, Akshita, "Condition to Deposit Amount in PM CARES Fund for Granting Bail Is Improper: Madhya Pradesh HC Concurs With Kerala HC" *LiveLaw* (13 May 2020) https://www.livelaw.in/news-updates/condition-to-deposit-amount-in-pm-cares-fund-for-granting-bail-is-improper-156710 (visited 19 Nov 2025).

[58]Indulia, Bhumika, "MP HC | Digital Detoxification: Court imposes condition of staying away from Facebook and WhatsApp while granting bail", *SCC Times* (07 Aug. 2020) https://www.scconline.com/blog/post/2020/08/07/mp-hc-digital-detoxification-court-imposes-condition-of-staying-away-from-facebook-and-whatsapp-while-granting-bail/ (visited 19 Nov. 2025).

[59]Bail Act 1976 (UK).

[60]Bail Reform Act of 1984 (US).

[61]Bail Act 2000 (NZ).

[62]Bail Act (No. 30 of 1997) (Sri Lanka)

[63] Bail (Amendment) Act 1998 No. 39 of 1998

[64]Bail Act 1999 (Mauritius).

[65]Bail (Guidelines) Act, 2000 (Malawi).

[66]Babu, Hany & Gadling, Surendra, "Guest Post: How Long is Too Long? – On the Maximum Period that an Under-trial Prisoner can be Detained", *Constitutional Law and Philosophy* (13 Oct. 2024) https://indconlawphil.wordpress.com/2024/10/13/guest-post-how-long-is-too-long-on-the-maximum-period-that-an-undertrial-prisoner-can-be-detained/ (visited 19 Nov. 2025).

drawing attention to the prolonged periods of incarceration of undertrial prisoners, without evening beginning the trial.

Although Section 479 of the BNSS (formerly Section 436-A of the CrPC) allows an undertrial to seek bail after spending half of the maximum sentence prescribed for the alleged offence, the structural and practical flaws in this provision have been discussed earlier in this paper. The focus here is on introducing a maximum limit on how long an undertrial prisoner can be detained, rather than only setting a minimum period after which they may seek bail. Under the existing provision, a person who has served half of the potential sentence can apply for bail. Professor Babu suggests that an upper limit should also be introduced to cap the maximum period an undertrial can be kept in custody. He proposes a simple formula to operationalize this idea: for offences punishable with seven years, the maximum period of undertrial incarceration should be capped at three years; for offences punishable with three years, the cap should be one year. Professor Babu further argues that this upper limit should apply uniformly to all undertrial prisoners, regardless of whether they have been previously convicted. He emphasizes that explicitly setting an outer time limit for the conclusion of trials in the statute would not only make the provision uniformly applicable but also enforceable at the trial court level. This would ensure that justice is accessible to those who cannot afford to approach the higher constitutional courts.

Conclusion:

The contradiction between the BNSS and the UAPA reflects a deeper structural crisis within India's criminal justice system — one where legislative reform proceeds without dismantling the exceptionalism entrenched in national security laws. Procedural modernization under the BNSS cannot remedy the imbalance as long as the UAPA remains insulated from constitutional scrutiny. The result is a dual-track criminal process: one governed by constitutional values of liberty and fairness, and another that normalizes preventive detention and indefinite investigation.

The data on conviction rates, the denial of bail, and the erosion of the presumption of innocence collectively reveal that the UAPA functions less as an anti-terror measure and more as a tool of preventive control. Its broad procedural powers invert the fundamental

relationship between citizen and State — from liberty being the default to detention becoming the norm. This inversion undermines both Article 21 and the moral legitimacy of criminal procedure itself.

Meaningful reform, therefore, cannot be limited to cosmetic procedural changes. It must aim to restore constitutional proportionality in the pre-trial process, institute statutory compensation for wrongful incarceration, and operationalize the rule that bail is the norm, jail the exception. Unless these structural corrections are implemented, the promise of the BNSS will remain largely notional, and the safeguard of liberty under the Constitution will continue to erode in practice.