

# PROJECT MISHKAT



www.projectmishkat.org



## PUNISHMENT WITHOUT CONVICTION:

### UAPA AND THE CRISIS OF INDEFINITE INCARCERATION

#### **Introduction:**

The recent decision by the Supreme Court denying bail to student activists Umar Khalid and Sharjeel Imam and granting bail to the rest raises serious questions about the constitutionality of the Unlawful Activities Prevention Act (UAPA) of 1967. While Umar Khalid and Sharjeel Imam were booked under sections 13, 16, 17 and 18 of UAPA in the year 2020, they are still awaiting a trial, for almost 6 years. The judgement in *Gulfisha Fatima vs State (NCT Delhi)*<sup>i</sup> deserves an analysis of the relevant statute's provisions and whether they align with constitutional morality.

#### **Usage of vague terminology under UAPA**

Section 13 of the UAPA Act prescribes the punishment to curb “*unlawful activities*”, which has been defined under section 2(o). It enumerates a number of chaotic wordings leading to uncertain and disadvantageous interpretations. It defines “*unlawful activity*” as any act that is intended to result in cession or secession of parts of Indian territory or disrupts sovereignty and territorial integrity, or is intended to cause disaffection against India. However, a few terminologies used here require clarity and precision.

On bare perusal of the provision, it is unclear and vague as to what exactly ‘disaffection against India’ means. This is similar to section 124A of the Indian Penal Code, 1860 (IPC), which elaborates on Seditious and the punishment for the same, which however, at least, defines disaffection as disloyalty and all feelings of enmity. Nevertheless, no such definition or explanation has been provided under the UAPA, leaving the interpretation to be subjective and broader in nature.

Moreover, it includes activities which are ‘intended’ to disrupt the sovereignty of India. Here, the burden to establish intent remains with the prosecution, however, it becomes the onus of the accused for claiming bail. It is argued that this onus acts as a threat to pre-trial and undertrial prisoners, since they need to prove their innocence before even undergoing a trial. This means, presumption of innocence is absent for those who are charged under UAPA. Recently, the Hon’ble Apex Court in the case of *Javed Gulam Nabi Sheikh v The State of Maharashtra and Anr*<sup>ii</sup> reiterated the basic principle of Indian criminal law that an accused is presumed to be innocent until proven guilty, however stringent the penal law may be.

On top of that, the court, while deciding on whether the acts committed amounted to “terrorist acts” or not, as contemplated u/s 15, had relied on the phrase, “*by any other means of whatever nature*”. This phrase, it is averred, does not reflect clarity or precision, and the interpretation in the case at hand has been very much broader as well as hazy. It defeats legislative foreseeability.

### **Contrary to the Constitution**

Section 43D(5)<sup>iii</sup> comes into play, when there arises the issue of bail for those who are charged under UAPA. This section prescribes that bail cannot be granted if the Court believes that there is a *prima facie* case against the accused. This specific provision seriously constrains the principle of *audi alteram partem* (the right to be heard), since it does not provide the accused a chance to defend himself. Further, it grants the courts the power to decide upon whether a *prima facie* case exists or not, before even the commencement of trial, which endangers the Right to Life and Personal Liberty under Article 21 of the Constitution of India. Hence, the *prima facie* test which has been wholly relied on for refusal of bail, is highly arbitrary and flouts Constitutional mandates. Article 21 of the Indian Constitution guarantees the right to fair trial, and a fair trial is generally perceived as one that upholds the rule of law and follows the principles of Natural Justice. According to A.V.Chandrashekar, Judge, High Court of Karnataka, Fair Trial and avoiding inordinate delay form an integral part of Article 21, the breach of which violates the Constitution.<sup>iv</sup> In key archaic rulings such as *Hussainara Khatoon v. State of Bihar*<sup>v</sup> the court

wondered how the State Government could keep undertrial prisoners for long in confinements, and held that prolonged incarceration goes against the Constitutional mandates of the country. The issue in *Hussainara Khatoon* was the prolonged confinement of thousands of undertrial prisoners in the state of Bihar, resulting in uncertainty coupled with continued languishment of the prisoners awaiting trial, which is a breach of Article 21, i.e., the right to speedy trial. Justice PN Bhagwati in the said case, had also accentuated that the procedure established by law under Article 21, needs to be reasonable, fair and just. The ruling in this precedent deserves to be highly considered, for the reason that it is one of the first significant cases in the Indian Judicial history to have come up with the issue of undertrial prisoners as a human right violation.

The case of Umar Khaleed's prolonged incarceration, lacking a fair and speedy trial does not go in line with the aforementioned precedents. Similarly, in contemporary rulings like *Union of India v. KA Najeeb*<sup>vi</sup>, the Supreme Court acknowledged that denial of bail on the sole metric of Section 43(D) UAPA is a breach of the Constitutional right of speedy trial.

Notably, the Hon'ble Supreme Court in *Arvind Dham v Directorate of Enforcement*<sup>vii</sup> most recently held that prolonged incarceration before trial becomes a punishment, and therefore such a detention cannot be countenanced. Even in cases involving stringent statutes like the UAPA, bail is the rule and jail is the exception as lack of trial implies lack of proof of prima facie case against the accused as observed by Justice Oka, in *Jalaluddin Khan v. Union of India*<sup>viii</sup>. When there is undue delay in trial, bail needs to be granted regardless of whether the statute is a special statute or not, as held in *Mohd. Muslim v. State (NCT of Delhi)*.<sup>ix</sup> Prolonged incarceration leads to an injury which is irrevocable when the appeal ends in the favour of accused, as rightly observed by the Supreme Court in *Gudikanti Narasimbulu and Ors. v. Public Prosecutor*.<sup>x</sup> The court in this case had granted bail on the basis of prolonged detention before commencement of trial.

## **International lens**

The Mandates of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism also recognizes that pre-trial detention is a preventive measure, aiming at averting further harm or obstruction of justice, rather than a punishment. The report<sup>xi</sup> also recommends it must not last longer than necessary, and the measure of pre-trial incarceration is an exception rather than a rule. It moreover criticized S. 43D of the UAPA Act, claiming that only the prosecution's version is considered by the courts in granting bail for offences under UAPA, which makes it arbitrary. Such international reports by Human Rights organizations needs to be considered by the Indian courts while applying the law, ensuring accountability and natural justice.

**Conclusion:**

Umar Khalid and Sharjeel Imam are two individuals among over 10,000 persons arrested under UAPA since 2019.<sup>xii</sup> Until 2023, out of the 10,000 Indian citizens whose liberty was compromised under the allegation of UAPA, only 335 individuals were convicted. The prolonged detention of Khalid and Imam echoes the tragedy of Fr. Stan Swamy—who died waiting for a trial that never began—and the miscarriage of justice suffered by Prof. G.N. Saibaba, who lost his health and years of life before being acquitted. These cases reveal a disturbing truth of indefinite incarceration under UAPA.

---

<sup>i</sup> 2026 INSC 2.

<sup>ii</sup> 2024 LiveLaw (SC) 437.

---

<sup>iii</sup> Unlawful Activities (Prevention) Act 1967, s 43D(5).

<sup>iv</sup> Hon'ble Justice AV Chandrasekhar, Role of Courts in Upholding Rule of Law, Karnataka Judicial Academy Bangalore Law Review.

<sup>v</sup> 1979 AIR 1369.

<sup>vi</sup> AIR 2021 SC 712.

<sup>vii</sup> AIR 2021 SC 712.

<sup>viii</sup> CrI.A. No. 3173/2024.

<sup>ix</sup> 2023 LiveLaw (SC) 260.

<sup>x</sup> 2023 LiveLaw (SC) 260.

<sup>xi</sup> UN Special Rapporteurs, 'Communication to the Government of India' (31 October 2023),

<https://fatfplatform.org/assets/Public-OL-IND-31.10.23-10.2023.pdf>.

<sup>xii</sup> Lok Sabha Unstarred Question No. 351, Persons arrested under UAPA, Ministry of Home Affairs, 2025.