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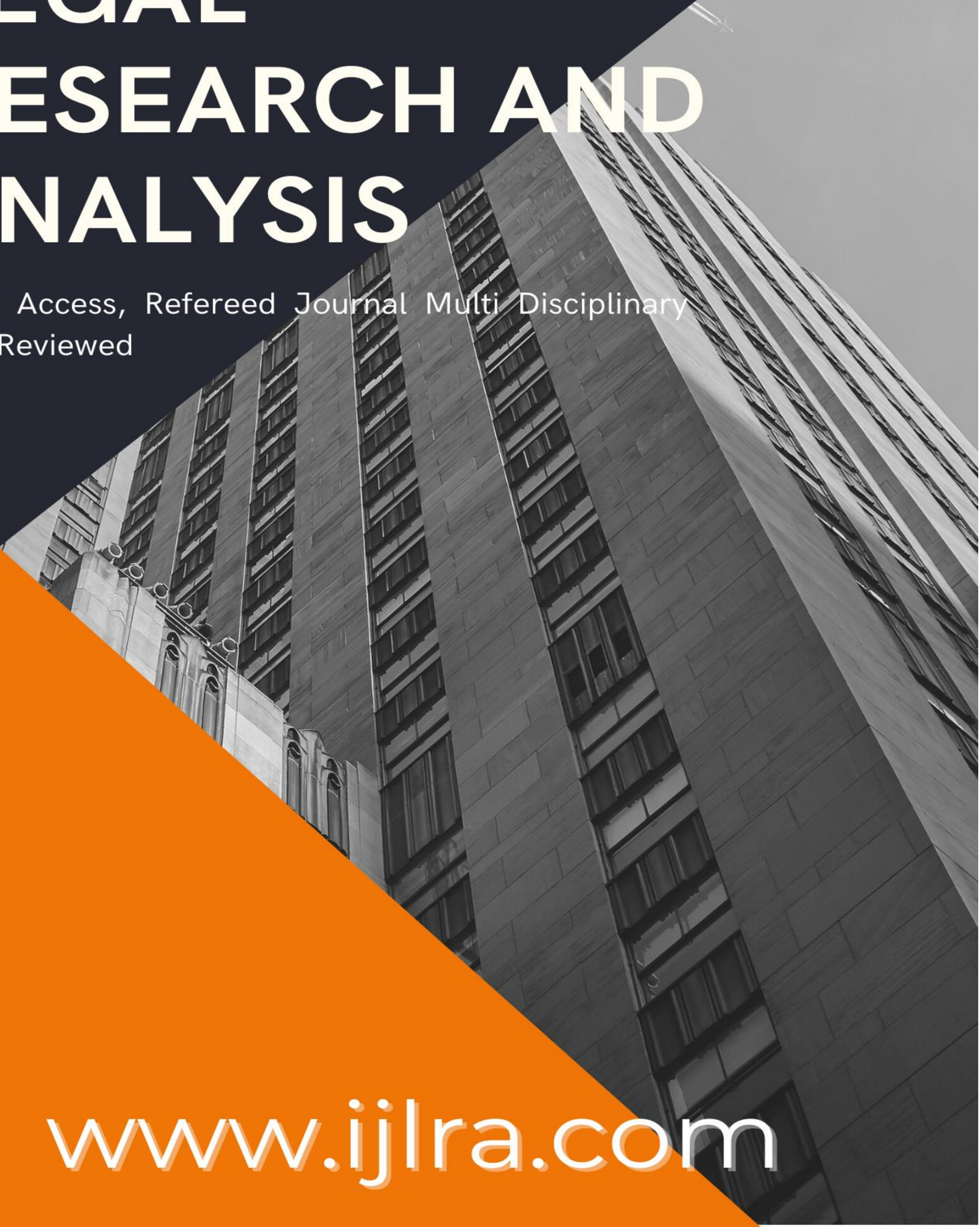

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ANTICIPATORY BAIL AND THE UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967: A CONSTITUTIONAL AND INTERNATIONAL HUMAN RIGHTS APPRAISAL OF SECTION 43D(4)

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Abstract

Section 43D(4) of the Unlawful Activities (Prevention) Act, 1967 (UAPA) withdraws, in absolute terms, the pre-arrest protection that Section 438 of the Code of Criminal Procedure, 1973 now Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 makes available to every other accused person in India. No other feature of India's counter-terrorism architecture removes an entire category of judicial discretion so completely, or at so early a stage of the criminal process. This article asks whether that removal can be reconciled with Articles 14, 19, 21 and 22 of the Constitution of India and with India's obligations under the International Covenant on Civil and Political Rights (ICCPR). It traces the doctrinal path by which anticipatory bail moved from a statutory convenience into a safeguard understood to flow from Article 21, examines the legislative history that transformed the UAPA from a 1967 statute about unlawful associations into India's principal anti-terrorism code, and reads Section 43D(4) against the jurisprudence generated by Gurbaksh Singh Sibbia, Kartar Singh, NIA v. Zahoor Ahmad Shah Watali, and Union of India v. K.A. Najeeb. The article's central claim is that Section 43D(4) is defensible only on a reading that excludes the ordinary statutory remedy while leaving the constitutional writ jurisdiction of the High Courts and the Supreme Court intact for cases of demonstrable mala fides or an absence of the statutory ingredients of the offence charged. A purely literal reading one that treats the provision as closing every avenue of pre-arrest scrutiny regardless of circumstance — is difficult to square with the standards of legality, necessity and proportionality that both Indian constitutional doctrine and international human rights law apply to any deprivation of liberty. The article closes by proposing a six-part interpretive and legislative framework intended to preserve the investigative purpose of Section 43D(4) without allowing it to operate as a standing suspension of judicial review.

Keywords: Anticipatory Bail; Unlawful Activities (Prevention) Act; Article 21; Personal Liberty; Counter-Terrorism Law; Proportionality; ICCPR; Constitutionalis

Introduction

Constitutional protections for personal liberty are rarely tested by ordinary crime. They are tested by the cases a state calls extraordinary and it is precisely in those cases that a legal system reveals whether its commitment to the rule of law is conditional. India's experience with anticipatory bail under counter-terrorism legislation supplies a clear illustration. *Article 21 of the Constitution provides that no person shall be deprived of life or personal liberty "except according to procedure established by law,"* and since Maneka Gandhi v. Union of India,[1] the Supreme Court has read that phrase to require not merely a procedure enacted by Parliament but one that is fair, just and reasonable. Bail jurisprudence has developed inside that constitutional frame: what began as a set of statutory rules regulating custody has become, in the Court's own language, an instrument for protecting the presumption of innocence and restraining arbitrary executive power.

Anticipatory bail occupies a particular place within that development. Introduced as Section 438 of the Code of Criminal Procedure, 1973 on the recommendation of the Forty-First Law Commission of India, it responded to a specific and well-documented mischief: the use of criminal accusation as a tool of harassment against political and personal rivals. [2]The Law Commission's reasoning was unambiguous: arrest itself, independent of any eventual conviction, damages reputation, livelihood and family life, and a person who can show a reasonable apprehension of arrest should be able to ask a court to pre-empt that damage.[3] The Constitution Bench in Gurbaksh Singh Sibbia v. State of Punjab subsequently declined to read restrictive conditions into Section 438 that Parliament itself had not enacted, holding that the denial of anticipatory bail engages personal liberty directly and that courts should not import limitations Parliament chose to omit.[4] Siddharam Satlingappa Mhetre v. State of Maharashtra[5], and the Constitution Bench in Sushila Aggarwal v. State (NCT of Delhi)[6] carried that reasoning further, holding that anticipatory bail need not be time-limited and may ordinarily continue until the conclusion of trial.

That constitutional trajectory meets a hard interruption in India's principal security statute. The Unlawful Activities (Prevention) Act, 1967 began as legislation aimed at unlawful associations threatening the sovereignty and integrity of India; through amendments in 2004, 2008, 2012

[1] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.
[2]LAW COMM'N OF INDIA, 41ST REPORT: THE CODE OF CRIMINAL PROCEDURE, 1898, ¶ 39.9 (1969).
[3] LAW COMM'N OF INDIA, 41ST REPORT: THE CODE OF CRIMINAL PROCEDURE, 1898, ¶ 39.9 (1969).
[4] Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565.
[5] Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694.
[6] Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1.

and 2019 following the repeal of the Terrorist and Disruptive Activities (Prevention) Act ("TADA") and the Prevention of Terrorism Act ("POTA") it became a comprehensive counter-terrorism code.[7] Among its most consequential provisions is Section 43D(4), inserted in 2008, which provides that nothing in Section 438 of the Code "shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act."[8] Section 43D(5), its companion provision, requires courts to refuse regular bail wherever the accusation appears, on the material before the court, "prima facie true."[9] Read together, the two provisions displace the ordinary presumption that liberty is the rule and detention the exception, and they do so for the entire span of a UAPA prosecution — from the moment an accusation surfaces until, at the earliest, the framing of charges.

The constitutional questions this raises extend past the mechanics of criminal procedure. They engage Article 14's guarantee against arbitrary State action, Article 19's protection of speech, assembly and association freedoms frequently implicated in UAPA prosecutions arising from political protest, publication or association, Article 21's guarantee of fair procedure, and Article 22's safeguards against arbitrary arrest. They also engage India's obligations under the ICCPR, to which India is a party: Article 9 prohibits arbitrary detention and requires that pre-trial detention not be the general rule, and Article 14(2) restates the presumption of innocence.[10] International bodies with a specific mandate over these questions — the UN Human Rights Committee, the Working Group on Arbitrary Detention, and the Special Rapporteur on the promotion and protection of human rights while countering terrorism — have consistently required that counter-terrorism measures satisfy the cumulative tests of legality, necessity, proportionality and effective judicial oversight, whatever the seriousness of the alleged offence.[11] Whether Section 43D(4) meets that standard is the question this article sets out to answer.

Existing scholarship has tended to concentrate on Section 43D(5) and the "prima facie true" threshold, largely because that is the provision that determines whether a person already in custody stays there. Section 43D(4) has by comparison received only glancing treatment, usually as a preliminary aside before the discussion turns to regular bail. That asymmetry is

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[7] Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE, as amended by Unlawful Activities (Prevention) Amendment Acts of 2004, 2008, 2012 & 2019
[8] Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(4), INDIA CODE.
[9] Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5), INDIA CODE.
[10] International Covenant on Civil and Political Rights arts. 9, 14(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
[11] U.N. Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), U.N. Doc. CCPR/C/GC/35 (2014); Special Rapporteur on the Promotion and Prot. of Human Rights and Fundamental Freedoms while Countering Terrorism, Rep., U.N. Doc. A/HRC/13/42 (Feb. 19, 2010).

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worth correcting, because anticipatory bail performs a constitutionally distinct function: it operates before custody begins, and it is therefore the only mechanism capable of preventing the specific harm — reputational, professional, and psychological — that arrest itself inflicts independently of guilt or innocence. A statute that forecloses that mechanism entirely, for an entire class of offences, without regard to the facts of the individual case, deserves scrutiny on its own terms.

The central research question is accordingly framed as follows: can the absolute statutory exclusion of anticipatory bail under Section 43D(4) of the UAPA be constitutionally sustained in light of Articles 14, 19, 21 and 22 of the Constitution of India and India's obligations under international human rights law? This article argues that Parliament's competence to legislate exceptional procedure for terrorism offences is not in doubt, but that competence does not, by itself, immunise a provision from constitutional scrutiny. Section 43D(4) validly excludes the statutory jurisdiction created by Section 438 CrPC / Section 482 BNSS, but cannot be read to exclude the constitutional jurisdiction of the High Courts under Articles 226 and 227 or of the Supreme Court under Articles 32 and 136 to intervene where an arrest is demonstrably mala fide, where the material relied upon does not disclose the statutory ingredients of an offence under Chapters IV or VI of the Act, or where the exercise of executive power is otherwise manifestly arbitrary.

Research Gap

First, the provision is almost always discussed as a subordinate feature of the broader UAPA bail regime rather than as an independent constitutional question. Commentary tends to move quickly from Section 43D(4) to Section 43D(5), on the implicit assumption that the constitutional stakes of excluding pre-arrest protection are lower than those of restricting post-arrest release. That assumption is not self-evidently correct: an arrest that never needed to happen cannot be undone by a subsequent grant of bail.

Second, the judicial decisions most frequently cited in this field — Watali,[12] K.A. Najeeb,[13] Vernon v. State of Maharashtra,[14] Thwaha Fasal v. Union of India,[15] and Asif Iqbal Tanha v. State (NCT of Delhi)[16] all concern the sufficiency of evidence for regular bail after arrest. None of them directly resolves whether Parliament may, consistently with Article 21, eliminate

[12] National Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1.
[13] Union of India v. K.A. Najeeb, (2021) 3 SCC 713.
[14] Vernon v. State of Maharashtra, 2023 SCC OnLine SC 885.
[15] Thwaha Fasal v. Union of India, (2021) 7 SCC 1.
[16] Asif Iqbal Tanha v. State (NCT of Delhi), 2021 SCC OnLine Del 3253.

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judicial discretion at the pre-arrest stage altogether, irrespective of whether the underlying accusation turns out to be well founded.

Third, the domestic constitutional literature and the international human rights literature on this question have developed largely in parallel rather than together. Comparative and international materials — the ICCPR, the jurisprudence of the European Court of Human Rights on Article 5 of the European Convention on Human Rights, and the reports of the UN Special Rapporteur on counter-terrorism and human rights — are rarely brought to bear directly on the interpretation of Section 43D(4), even though India's ICCPR obligations bind it independently of its domestic constitutional commitments.

Fourth, comparative work on counter-terrorism legislation in the United Kingdom, Canada, Australia and the United States tends to focus on the substantive reach of terrorism offences rather than on whether those jurisdictions preserve any equivalent of pre-arrest judicial protection. That comparison, once drawn, is instructive: none of the four jurisdictions surveyed in below adopts India's approach of foreclosing judicial discretion at the pre-arrest stage in absolute terms.

This article's contribution is to treat Section 43D(4) as a discrete constitutional problem, to read it through Articles 14, 19, 21 and 22 together rather than through Article 21 in isolation, to integrate the ICCPR and comparable international standards into that reading rather than treating them as an afterthought, and to propose an interpretive and legislative framework that takes seriously both Parliament's security objective and the judiciary's continuing responsibility, recognised since Kesavananda Bharati v. State of Kerala,[17] to keep executive power within constitutional bounds even in matters touching national security.

Research Questions

(1) what is the constitutional status of anticipatory bail, and has it moved beyond a statutory remedy into a safeguard informed by Article 21;

(2) What legislative history explains the enactment of Section 43D(4), and does that history justify its present, unqualified form;

(3) How have Indian courts interpreted Section 43D and its companion, Section 43D(5), and what tensions exist between the resulting lines of authority;

(4) whether Articles 14, 19, 21 and 22, applied together, permit an absolute statutory exclusion of pre-arrest judicial protection for an entire class of offences;

[17] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

(5) what do India's obligations under the ICCPR, and the comparative experience of other constitutional democracies, suggest about the outer limits of permissible restriction; and
(6) what interpretive or legislative reform would preserve the investigative purpose behind Section 43D(4) while restoring a measure of judicial oversight for exceptional cases.

Constitutional Safeguard And The Evolution of Anticipatory Bail

The Code of Criminal Procedure, 1898 contained no equivalent of Section 438; a person who apprehended arrest had no statutory mechanism to seek protection in advance, and the prevailing judicial view was that courts possessed no inherent power to grant bail before custody, since bail was understood to presuppose custody.[18] That gap produced a specific and recurring injustice in the decades after independence: individuals — frequently persons of some public standing, targeted by political or commercial rivals — could be arrested on manufactured accusations, held briefly, and released only after the reputational and professional damage had already been done, regardless of whether the charges eventually held up.[19]

The Forty-First Report of the Law Commission of India (1969) diagnosed this problem directly, observing that anticipatory bail was necessary chiefly because influential persons sometimes sought to implicate rivals in false cases in order to have them detained, even briefly, for the sake of disgrace or political advantage.[20] The Forty-Eighth Report (1972) refined the proposal, recommending that notice ordinarily be given to the Public Prosecutor and that courts retain discretion to impose conditions balancing investigative needs against individual liberty.[21] Parliament acted on both reports in Section 438 of the Code of Criminal Procedure, 1973, for the first time conferring on the High Courts and Courts of Session the power to direct that a person, if arrested, be released on bail.

Balchand Jain v. State of Madhya Pradesh supplied the first significant judicial review on the new provision. Justice P.N. Bhagwati observed that "anticipatory bail" is, strictly, a misnomer, since bail in the ordinary sense presupposes custody; what Section 438 authorises is a direction that becomes operative only upon a subsequent arrest.[22] The observation was conceptually important but did not, at that stage, tie Section 438 to Article 21: constitutional jurisprudence

[18] LAW COMM'N OF INDIA, 41ST REPORT
[19] LAW COMM'N OF INDIA, 41ST REPORT ¶¶ 39.9–39.10
[20] LAW COMM'N OF INDIA, 41ST REPORT ¶ 39.9
[21] LAW COMM'N OF INDIA, 48TH REPORT: SOME QUESTIONS UNDER THE CODE OF CRIMINAL PROCEDURE BILL, 1970 (1972)
[22] Balchand Jain v. State of Madhya Pradesh, (1976) 4 SCC 572

had not yet undergone the transformation that Maneka Gandhi would bring about the following year.

That transformation arrived in Gurbaksh Singh Sibbia. The Constitution Bench, presided over by Chief Justice Y.V. Chandrachud, rejected the Punjab and Haryana High Court's attempt to read restrictive, judge-made conditions into Section 438 — limiting its availability to "exceptional cases," for instance — that Parliament itself had not enacted.[23]The Court reasoned that denial of anticipatory bail directly affects personal liberty, and that courts should therefore lean against imposing restrictions Parliament chose to omit; the discretion under Section 438, the Court held, is to be exercised on the facts of each case rather than through rigid formulae.

Later decisions consolidated this position. Pokar Ram v. State of Rajasthan distinguished the considerations governing pre-arrest protection from those governing ordinary bail,[24] while Salauddin Abdulsamad Shaikh v. State of Maharashtra introduced and Siddharam Satlingappa Mhetre subsequently criticised as inconsistent with Sibbia — a judicially imposed time limit on the operation of anticipatory bail orders.[25] The Constitution Bench in Sushila Aggarwal resolved that tension conclusively, holding that anticipatory bail does not automatically expire after a fixed period and may, absent specific grounds for cancellation, continue until the conclusion of trial.[26]

The cumulative effect of this line of authority is that although Section 438 remains, formally, a statutory provision, its content by the early twenty-first century had become inseparable from Article 21. Anticipatory bail functions, in the Supreme Court's own account, as a check on the misuse of arrest as an instrument of harassment — a function with obvious constitutional resonance, since Article 21 exists precisely to prevent liberty from being curtailed except through fair procedure. It is against this constitutionalised background — not merely against the bare text of Section 438 that Section 43D(4)'s exclusion of anticipatory bail in UAPA cases has to be understood, and it is that background which gives the exclusion its constitutional weight.

Article 21 and the Foundations of Pre-Arrest Protection

The text of Article 21 provides that no person shall be deprived of life or personal liberty "except according to procedure established by law." A.K. Gopalan v. State of Madras[27] read

[23] Sibbia, (1980) 2 SCC 565
[24] Pokar Ram v. State of Rajasthan, (1985) 2 SCC 597.
[25] Salauddin Abdulsamad Shaikh v. State of Maharashtra, (1996) 1 SCC 667; Siddharam Satlingappa Mhetre, (2011) 1 SCC 694.
[26] Sushila Aggarwal, (2020) 5 SCC 1.
[27] A.K. Gopalan v. State of Madras, AIR 1950 SC 27

that phrase narrowly, holding that any procedure enacted by a competent legislature satisfied Article 21 regardless of its fairness — an interpretation that, had it persisted, would have left legislative restrictions on bail essentially unreviewable. Maneka Gandhi displaced that reading, holding that "procedure established by law" must itself be just, fair and reasonable, and that Articles 14, 19 and 21 operate not as isolated guarantees but as an integrated protection of liberty the relationship later described as the "golden triangle."[28] The practical consequence is that a restriction on liberty cannot rest on statutory validity alone; it must additionally possess a legitimate object, bear a rational connection to that object, and employ means that are no more restrictive than necessary.

Applied to anticipatory bail, this means that even though Section 438 originates in statute, its interpretation cannot be divorced from the requirement that pre-trial deprivations of liberty be proportionate and non-arbitrary. Sibbia itself supplies the clearest statement of this point, observing that the "unnecessary" curtailment of a liberty-protecting provision is precisely the kind of legislative overreach Article 21 exists to prevent.[29] Article 22, which guarantees procedural protections once an arrest has occurred — grounds of arrest, access to counsel, production before a magistrate within twenty-four hours — reinforces the same constitutional premise: that the Constitution treats the event of arrest, not merely the fact of subsequent conviction, as constitutionally consequential.[30] Anticipatory bail extends that premise backward in time, allowing judicial scrutiny before the event of arrest rather than only after it. This has a direct bearing on how Section 43D(4) should be read. A provision withdrawing the statutory remedy under Section 438 does not, without more, withdraw the constitutional protection that remedy has come to embody. The distinction between statutory remedies and constitutional guarantees is not a semantic one: Parliament can abolish or modify a statutory cause of action, but it cannot, through ordinary legislation, extinguish the judiciary's constitutional jurisdiction under Articles 32, 136, 226 and 227 to prevent an unconstitutional exercise of executive power. That jurisdiction forms part of the basic structure recognised in Kesavananda Bharat[31] and is accordingly available even where a statute purports to close the ordinary door. Whether Section 43D(4) should be read as closing only the statutory door, leaving the constitutional one ajar, is the question taken up in below, after the legislative history that produced the provision is set out in Part VIII.

[28] Maneka Gandhi, (1978) 1 SCC 248.
[29] Sibbia, (1980) 2 SCC 565.
[30]INDIA CONST. art. 22
[31] Kesavananda Bharati, (1973) 4 SCC 225.

The Legislative Evolution of the UAPA: From National Integration to Counter-Terrorism Code

Understanding what Section 43D(4) is meant to achieve requires understanding what the UAPA originally was, because the two are not the same. The Act's origins lie in the constitutional anxieties of the early 1960s rather than in terrorism as it is understood today. Following the Sino-Indian conflict of 1962 and rising concern about organised secessionist movements, the Committee on National Integration and Regionalism concluded that the existing legal framework could not adequately restrain associations advocating the dismemberment of the Union.[32] Parliament responded first with the Constitution (Sixteenth Amendment) Act, 1963, which inserted "the sovereignty and integrity of India" into the grounds on which Article 19 permits reasonable restrictions on speech, assembly and association,[33] and then, in 1967, with the Unlawful Activities (Prevention) Act itself — legislation directed at declaring associations unlawful where they pursued secessionist objectives, subject to review by a tribunal.[34]

Notably, the 1967 statute contained no provisions on terrorist acts, terrorist financing, extended investigation periods, or restrictive bail; describing it as anti-terrorism legislation would misdescribe its original character.[35] Its transformation into a counter-terrorism code occurred later and in stages, driven substantially by the repeal of two temporary statutes. The Terrorist and Disruptive Activities (Prevention) Act, 1985 ("TADA") upheld, with reservations, by the Constitution Bench in Kartar Singh v. State of Punja[36] introduced prolonged detention, confessions made to police officers, reverse burdens of proof, and stringent bail conditions, and was allowed to lapse in 1995 amid documented concerns about low conviction rates and misuse[37] The Prevention of Terrorism Act, 2002 ("POTA") incorporated many of the same features and was repealed in 2004 after similar criticism.[38] Rather than abandon a permanent counter-terrorism framework altogether, Parliament chose to relocate much of POTA's substance into the existing UAPA.

The 2004 amendment accordingly inserted Chapter IV (punishment for terrorist activities) and Chapter V (forfeiture of proceeds of terrorism), together with statutory definitions of "terrorist act" and "terrorist organisation" — the first point at which the UAPA became, in substance, an

[32]Rep. of the Comm. on Nat'l Integration and Regionalism (1962).
[33]The Constitution (Sixteenth Amendment) Act, 1963.
[34]Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (as originally enacted).
[35] Unlawful Activities (Prevention) Act, No. 37 of 1967, INDIA CODE (as originally enacted).
[36] Kartar Singh v. State of Punjab, (1994) 3 SCC 569.
[37] Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985 (lapsed 1995).
[38] Prevention of Terrorism Act, No. 15 of 2002 (repealed 2004).

anti-terrorism statute rather than legislation about unlawful associations.[39] The 2008 amendment, enacted in the aftermath of the Mumbai attacks of 26 November 2008, was procedurally the most significant of the four: it inserted Section 43D in its entirety, extending the permissible period of investigation to 180 days, excluding anticipatory bail under Section 43D(4), and introducing the "prima facie true" threshold for regular bail under Section 43D(5).[40] The 2012 amendment, responding to UN Security Council Resolution 1373 and Financial Action Task Force recommendations, broadened the statutory definitions of terrorist financing and property connected with terrorism.[41]The 2019 amendment authorised the designation of individuals — not merely organisations — as terrorists, a change that attracted substantial criticism on the ground that it permits a reputational and legal designation without prior criminal conviction.[42]

The pattern across these four amendments is one of steady, largely one-directional expansion of executive authority accompanied by a corresponding narrowing of judicial discretion and procedural safeguard. Each amendment addressed a genuine and, at the time, pressing security concern; none of them, individually, is difficult to justify on its own terms. But their cumulative effect is that a statute originally conceived to regulate the declaration of unlawful associations, with tribunal review built in from the outset, now authorises extended pre-charge detention, an evidentiary presumption against bail, and — through Section 43D(4) — the complete removal of pre-arrest judicial protection, all without any equivalent expansion of the procedural safeguards that accompanied the Act's more limited 1967 design. That asymmetry is the central fact this article asks courts and Parliament to confront: not whether terrorism justifies exceptional legislation, which it plainly does, but whether the safeguards inside that legislation have kept pace with the powers it now confers.

Section 43D(4): Text, Purpose

Section 43D(4) provides, in full:

"Nothing in section 438 of the Code shall apply in relation to any case involving the arrest of any person accused of having committed an offence punishable under this Act."[43]

Following the enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023, the provision operates with corresponding effect against Section 482 BNSS, the successor to Section 438

[39] Unlawful Activities (Prevention) Amendment Act, No. 29 of 2004.
[40] Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008.
[41] Unlawful Activities (Prevention) Amendment Act, No. 3 of 2013; U.N. S.C. Res. 1373 (Sept. 28, 2001).
[42] Unlawful Activities (Prevention) Amendment Act, No. 28 of 2019.
[43]Unlawful Activities (Prevention) Act § 43D(4).

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CrPC. The drafting is brief, but its consequences are not: unlike most restrictions on bail, which condition the exercise of judicial discretion on factors such as the gravity of the offence or the risk of absconding, Section 43D(4) removes the underlying statutory jurisdiction to entertain an anticipatory bail application at all. It draws no distinction between a principal conspirator and a peripheral participant, between an accusation resting on strong forensic evidence and one resting on a single uncorroborated statement, or between genuine terrorist conduct and conduct that might, on closer examination, fall outside the statutory definition altogether. The bar applies the moment an accusation is framed under the Act, before any court has had occasion to test whether the accusation is even capable of sustaining an offence under Chapters IV or VI. The legislative purpose is not difficult to identify. Parliament proceeded on the view that terrorism investigations are qualitatively different from ordinary criminal investigations that they typically involve organised networks, cross-border financing, digital evidence vulnerable to destruction, and conspiracies that unravel only through custodial interrogation and that advance notice of potential arrest, of the kind anticipatory bail provides, risks frustrating exactly the investigative steps that make such prosecutions possible.[44] That is a coherent and legitimate legislative judgment as far as it goes. The constitutional difficulty is not with the existence of the judgment but with its unconditional, undifferentiated application: the same reasoning is deployed to justify denying pre-arrest protection to a person credibly alleging political persecution as to a person against whom overwhelming evidence of an actual terrorist conspiracy exists, because the statute makes no provision for distinguishing between the two before arrest occurs.

Textually, Section 43D(4) reads as an absolute bar: it contains no qualifying language, no exception for manifest bad faith, and no mechanism by which a court might test, even preliminarily, whether the accusation is capable of disclosing an offence before declining jurisdiction. A purely literal reading therefore favours the view that Parliament intended complete exclusion. But Indian constitutional method does not stop at the literal text where a competing, constitutionally compliant reading is available; statutes are, wherever the language permits, to be read consistently with fundamental rights rather than in conflict with them. That interpretive principle is what separates the two positions examined below: one treating Section 43D(4) as displacing the statutory remedy alone, the other treating it as also displacing the underlying constitutional jurisdiction of the superior courts.

[44] Statement of Objects and Reasons, Unlawful Activities (Prevention) Amendment Bill, No. 105 of 2008.

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Judicial Interpretation: From Balchand Jain through Kartar Singh

The interpretive history that precedes Section 43D(4) itself supplies the analytical tools needed to resolve this question. Balchand Jain, discussed above, established the general proposition that special statutes may validly exclude Section 438 where Parliament expressly so provides — a proposition Section 43D(4) plainly satisfies on its face.[45]Sibbia established, with equal authority, that anticipatory bail protects personal liberty in a manner Article 21 recognises, and that courts should resist narrowing constructions not authorised by the statutory text.[46] Standing alone, neither decision resolves the tension between them; Balchand Jain supports Parliament's power to exclude, while Sibbia's constitutional framing cautions against reading that exclusion more broadly than its text requires.

Kartar Singh v. State of Punjab is the decision that comes closest to addressing the underlying question directly, though in the context of TADA rather than the UAPA. The Constitution Bench accepted that terrorism constitutes a distinct category of offence justifying exceptional investigative procedure, and it described anticipatory bail as a statutory remedy rather than an independent fundamental right — language that, read in isolation, would support treating its exclusion as constitutionally unremarkable.[47] But the Court did not go so far as to hold that constitutional review of the exercise of exceptional statutory power is itself excluded; its reasoning distinguishes between the statutory remedy Parliament may validly withdraw and the constitutional jurisdiction under Articles 32 and 226 that continues to supervise how executive power under the statute is actually used.[48] That distinction — between withdrawing a remedy and withdrawing review — is doctrinally significant, because it is precisely the distinction that determines whether Section 43D(4) can be read down rather than struck down.

The result of reading Balchand Jain, Sibbia and Kartar Singh together is a two-part proposition rather than a single, uncomplicated rule: Parliament may validly exclude the ordinary statutory jurisdiction under Section 438 CrPC (now Section 482 BNSS) for offences under the UAPA, but that exclusion cannot, without more, be read to extinguish the constitutional obligation of the High Courts and the Supreme Court to intervene where executive action is shown to be arbitrary, mala fide, or unsupported by the statutory ingredients of the offence charged. Whether the courts have in fact preserved that residual constitutional jurisdiction in practice — as opposed to recognising it in principle — is examined below, in the analysis of Section

[45] Balchand Jain, (1976) 4 SCC 572.
[46] Sibbia, (1980) 2 SCC 565.
[47] Kartar Singh, (1994) 3 SCC 569.
[48] Kartar Singh, (1994) 3 SCC 569.

43D(4) against Articles 14, 19, 21 and 22.

Testing Section 43D(4) Against Articles 14, 19, 21 and 22

Article 14: Classification and the Problem of Undifferentiated Application.

Article 14 tolerates classification that rests on an intelligible differentia bearing a rational nexus to a legitimate legislative object.[49] Section 43D(4) creates a straightforward classification — persons accused under ordinary criminal law, who retain access to anticipatory bail, and persons accused under the UAPA, who do not — and the classification easily satisfies the intelligible differentia branch of the test, since the nature of the alleged offence is a familiar and legitimate basis for differentiated procedure. The harder question concerns rational nexus at the level of application rather than category. The State's justification — that terrorism investigations require custodial interrogation, that evidence is easily destroyed, and that conspiracies are difficult to unravel without the element of surprise that an unanticipated arrest provides — supplies a rational connection between the classification and the object for genuine terrorism cases. It supplies a much weaker connection for the subset of UAPA prosecutions later found, on closer examination, not to disclose any offence under Chapters IV or VI at all — a subset that recurring litigation shows is not negligible. A classification that is rational as applied to the class it is designed for but irrational as applied to a substantial number of cases wrongly swept into that class raises a live Article 14 concern, particularly where the statute provides no mechanism for separating the two before the deprivation of liberty occurs.

Article 19: Terrorism Law and Democratic Freedom.

A significant share of UAPA prosecutions arise from conduct connected to speech, publication, association or assembly — precisely the freedoms Article 19(1)(a) through (c) protect, subject to reasonable restriction in the interest of sovereignty, integrity, security of the State, and public order under Articles 19(2) through (4).[50] The constitutional legitimacy of the UAPA rests substantially on those permitted grounds of restriction. But the same overlap creates a distinctive risk: where the line between political dissent and terrorist conduct is contestable — as it frequently is in prosecutions arising from protest movements or ideological publication — an absolute bar on anticipatory bail removes the one procedural safeguard capable of testing that line before, rather than after, the reputational and personal cost of arrest has already been

[49] State of West Bengal v. Anwar Ali Sarkar, AIR 1952 SC 75.
[50] INDIA CONST. art. 19.

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incurred. The Delhi High Court's reasoning in Asif Iqbal Tanha v. State (NCT of Delhi)[51] and Devangana Kalita v. State (NCT of Delhi)[52] that ordinary public disorder or organisational activity connected to protest should not, without more, be treated as terrorism — reflects exactly this concern, even though the Supreme Court subsequently stayed certain of the High Court's observations without disturbing the underlying grant of bail.[53]

Article 21: Fair Procedure and the Presumption of Innocence.

Maneka Gandhi's requirement that any procedure depriving a person of liberty be fair, just and reasonable applies with particular force here, because Section 43D(4) does not merely regulate the exercise of judicial discretion — it removes the discretion entirely.[54] A procedure that forecloses judicial scrutiny before arrest, categorically and without exception, is difficult to characterise as "fair" in the sense Maneka Gandhi requires, particularly given that the underlying accusation has, by definition, not yet been tested by any court. The point is reinforced by Union of India v. K.A. Najeeb, which held that Article 21 survives the restrictive language of Section 43D(5) where prolonged incarceration without realistic prospect of trial becomes disproportionate, and that constitutional courts retain the authority to grant bail notwithstanding the statutory bar.[55] If Article 21 operates as a constitutional safety valve after arrest despite Section 43D(5)'s restrictive language, there is no obvious principled reason why an analogous safety valve should not exist before arrest despite Section 43D(4)'s equally restrictive language, unless the pre-arrest and post-arrest stages are treated as constitutionally distinct in a way the case law has not yet clearly articulated.

Article 22: The Constitutional Significance of Arrest.

Article 22's guarantees — communication of grounds, access to counsel, and production before a magistrate within twenty-four hours — apply once arrest has occurred, and Section 43D(4) does not disturb them.[56] But their existence confirms that the Constitution treats the event of arrest as independently significant, not merely as a procedural gateway to detention. Anticipatory bail is best understood as extending that same constitutional concern backward in time — as protection against the arrest itself, rather than protection limited to what happens

[51] Asif Iqbal Tanha, 2021 SCC OnLine Del 3253
[52] Devangana Kalita v. State (NCT of Delhi), 2021 SCC OnLine Del 3255
[53]State (NCT of Delhi) v. Devangana Kalita, Diary No. 14045/2021 (S.C.) (order partially staying observations without disturbing the grant of bail)
[54] Maneka Gandhi, (1978) 1 SCC 248.
[55] K.A. Najeeb, (2021) 3 SCC 713.
[56] INDIA CONST. art. 22.

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after the arrest has already taken place. Read this way, Article 22 does not directly answer the question Section 43D(4) poses, but it supports the broader proposition, developed throughout this Part, that the Constitution's concern with arrest is not exhausted once Article 22's post-arrest safeguards take effect.

A further Article 14 difficulty concerns the relationship between Section 43D(4) and Section 43D(5). Because the two provisions operate consecutively — the first foreclosing pre-arrest scrutiny, the second restricting post-arrest release — an accused person under the UAPA faces an almost uninterrupted chain of restriction from the moment an accusation is framed until, at the earliest, the framing of charges. No comparable chain exists for any other category of offence in Indian criminal law, including offences of demonstrably greater immediate danger to public safety, such as certain offences under the Explosive Substances Act or the Arms Act, which remain governed by ordinary bail principles. That comparison does not by itself establish an Article 14 violation — Parliament is entitled to treat terrorism as sui generis, but it does sharpen the question of whether the classification, applied without any internal gradation, remains proportionate to its object once the two provisions are read together rather than separately.

Proportionality.

Applying the four-part proportionality inquiry, the legitimate aim — preventing terrorism — is not contested. The suitability of excluding anticipatory bail to that aim is also reasonably clear: removing advance notice of potential arrest plausibly assists custodial interrogation and reduces opportunities for evidence destruction. The analysis becomes considerably more contested at the necessity stage, which asks whether Parliament could have achieved the same investigative objective through a less restrictive means — for example, conditional anticipatory bail with reporting obligations, judicial screening limited to whether the statutory ingredients of the offence are even disclosed, or a narrow exception for demonstrable mala fides. Because Section 43D(4) admits no such graduated alternative, and because the statute itself supplies no explanation for why a categorical bar, rather than a calibrated one, was necessary, the provision is difficult to defend at the necessity stage without further legislative or judicial refinement. The final, balancing stage weighs the security benefit of the categorical bar against its cost to individuals wrongly implicated — a cost that, as the jurisprudence discussed below documents through Thwaha Fasal and Vernon, is not merely theoretical.

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From Watali to Vernon: The Post-Arrest Jurisprudence and What It Implies for Section 43D(4)

Although the decisions surveyed in this Part concern Section 43D(5) rather than Section 43D(4), they matter for the present inquiry because they reveal, empirically, how often UAPA accusations turn out on closer judicial examination not to disclose the offence originally alleged — a pattern directly relevant to whether an absolute, unreviewable pre-arrest bar is proportionate.

National Investigation Agency v. Zahoor Ahmad Shah Watali set the modern baseline. The Supreme Court held that a court considering bail under Section 43D(5) should not conduct a "mini-trial" or meticulously evaluate the reliability of the prosecution's evidence; it need only determine whether the material, taken at face value, discloses reasonable grounds for believing the accusation is prima facie true.[57] The decision substantially strengthened the prosecution's position at the bail stage and attracted sustained academic criticism for effectively affording prosecutorial assertions a presumption of correctness.[58] Union of India v. K.A. Najeeb qualified but did not overrule Watali, holding that Article 21 permits — indeed, in appropriate cases requires — release where trial is unlikely to conclude within a reasonable time, regardless of Section 43D(5)'s restrictive language.[59] The two decisions are best read as operating in different registers: Watali governs the exercise of ordinary statutory bail jurisdiction, while Najeeb recognises that Article 21 supplies an independent constitutional check where the statutory framework, applied mechanically, would produce a disproportionate result.

Subsequent decisions refined Watali without displacing it. Thwaha Fasal v. Union of India held that mere possession of literature associated with a banned organisation, or ideological sympathy without more, cannot by itself satisfy the statutory ingredients of a UAPA offence, and that courts must first determine whether those ingredients are disclosed before applying the "prima facie true" standard at all.[60] Vernon v. State of Maharashtra went further, holding that hearsay material, participation in academic seminars, or documents recovered from a co-accused cannot, without direct evidentiary connection to the individual concerned, satisfy Section 43D(5).[61] The Delhi High Court's decisions in Asif Iqbal Tanha[62] and Devangana Kalita[63], concerning prosecutions arising from the 2020 Delhi riots, likewise insisted that

[57]Watali, (2019) 5 SCC 1.
[58] Abhinav Sekhri, When Najeeb Meets Watali: On the Statutory Restrictions on Grant of Bail Under UAPA, PROOF OF GUILT (2021) (commentary discussing the practical effect of Watali on UAPA bail applications)
[59] K.A. Najeeb, (2021) 3 SCC 713.
[60] Thwaha Fasal, (2021) 7 SCC 1.
[61] Vernon, 2023 SCC OnLine SC 885.
[62] Asif Iqbal Tanha, 2021 SCC OnLine Del 3253.
[63] Devangana Kalita, 2021 SCC OnLine Del 3255.

public disorder or organisational participation in protest activity is not, without more, terrorism, and that the statutory ingredients specific to Chapters IV and VI must be independently established rather than presumed from the mere invocation of the Act. Although the Supreme Court subsequently stayed certain of the High Court's observations without disturbing the actual grant of bail, the underlying concern those decisions articulate — that anti-terrorism legislation risks conflating legitimate dissent with terrorist conduct absent careful statutory scrutiny — has not been repudiated.[64]

The cumulative pattern across these decisions is instructive. Each of them arose only because the accused had already been arrested, held for a substantial period, and eventually secured judicial examination of whether the accusation actually satisfied the statutory definition of the offence. In each case, that examination revealed that it did not, or at least that the evidentiary basis was markedly weaker than the initial accusation suggested. Because Section 43D(4) forecloses any equivalent examination before arrest, the practical effect of the provision, on this evidence, is not merely to delay judicial scrutiny — it is to guarantee that the constitutionally significant harm of arrest is inflicted first and tested only afterward, in cases where a pre-arrest inquiry, had one been available, might well have prevented the arrest altogether. This is precisely the kind of empirical pattern that a proportionality inquiry is designed to surface, and it strengthens rather than weakens the case that Section 43D(4)'s categorical form is difficult to justify at the necessity stage of that inquiry.

Anticipatory Bail Recent Landmark: Sharad Sehgal v. State of U.P. The respondent in this appeal, against whom twenty-two separate first information reports stood registered for offences including cheating and forgery, had been granted anticipatory bail by the Allahabad High Court.[65] The Supreme Court set aside that order, holding that an accused's criminal antecedents may, by themselves, furnish sufficient ground to refuse anticipatory bail, and characterising the grant of pre-arrest protection on so extensive a record of accusation as regrettable.[66] The decision does not disturb the constitutional architecture Sibbia and Sushila Aggarwal built; it operates within it. Those Constitution Bench decisions establish that Section 438 confers broad discretion and that courts should not read in restrictive conditions Parliament did not enact; Sharad Sehgal addresses a different question — not whether antecedents may be considered, which was never in doubt, but how much weight a demonstrably poor record can

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[64]Devangana Kalita, 2021 SCC OnLine Del 3255.

[65] Sharad Sehgal v. State of U.P., Criminal Appeal arising out of SLP (Crl.) No. 5309 of 2026, 2026 SCC OnLine SC 740

[66] Sharad Sehgal v. State of U.P., Criminal Appeal arising out of SLP (Crl.) No. 5309 of 2026, 2026 SCC OnLine SC 740(decided Apr. 27, 2026).

carry standing alone. The decision recalibrates the exercise of Sibbia-style discretion rather than narrowing its constitutional foundation, and it is instructive for this article precisely because of its individualised method: the Court reached its conclusion only after examining the respondent's specific record, not through a category-wide legislative bar of the kind Section 43D(4) imposes. The contrast sharpens the argument developed above — ordinary criminal law achieves calibration of this kind through case-specific judicial assessment, while Section 43D(4) forecloses any assessment at all, irrespective of whether the individual accused resembles the respondent in Sharad Sehgal or bears no resemblance to that fact pattern whatsoever. Sushila Aggarwal itself remains the controlling authority on the scope and duration of anticipatory bail and continues to be applied without qualification through 2026; Sharad Sehgal supplies the most recent illustration of how that discretion operates on an adverse fact pattern, not a revision of the underlying rule.

UAPA Recent Judgment Syed Iftikhar Andrabi v. National Investigation Agency, Jammu. The appellant had spent nearly six years in custody in a prosecution combining narcotics and UAPA charges, with several hundred prosecution witnesses still to be examined and no realistic prospect of imminent trial completion.[67] The Division Bench granted bail, holding that the three-Judge Bench decision in K.A. Najeeb remains binding precedent that later, smaller Benches may not dilute without either following it or referring the conflict to a larger Bench, and reiterating that the restrictive threshold in Section 43D(5) recedes where trial delay becomes disproportionate to the sentence in prospect.[68] The decision is significant here on three counts. First, it resolves — at least provisionally — the tension at the heart of this article's inquiry between Watali's evidentiary deference and Najeeb's liberty-protective exception, treating the latter as a binding constitutional floor rather than a discretionary softening confined to exceptional cases. Second, the Bench's reliance on national conviction-rate data for UAPA prosecutions, deployed to demonstrate the systemic difficulty of securing convictions and the consequent risk that pre-trial detention becomes punitive in substance, lends empirical support to the proportionality analysis in Part XI(E), which argued that Section 43D(4)'s necessity is difficult to sustain in the aggregate even where it may be justified in an individual case. Third, and most directly relevant to this article's central thesis, the decision confirms that the judiciary now treats Article 21 as capable of overriding an express statutory

[67] Syed Iftikhar Andrabi v. National Investigation Agency, Jammu, 2026 SCC OnLine SC 881 (2026 INSC 503) (decided May 18, 2026).

[68] Id.; see also Union of India v. K.A. Najeeb, (2021) 3 SCC 713; cf. Gurwinder Singh v. State of Punjab, (2024) 5 SCC 403; Gulfisha Fatima v. State (NCT of Delhi), 2026 SCC OnLine SC 10 (declining to apply a comparable trial-delay standard on its facts).

bail bar in appropriate cases, notwithstanding text at least as restrictive on its face as Section 43D(4). If Article 21 can require release after arrest despite Section 43D(5)'s wording, the same reasoning supports reading an analogous constitutional safety-valve into the operation of Section 43D(4) before arrest, through the residual writ jurisdiction discussed above, rather than confining it to the post-arrest context alone.

A closely related decision from the same period — the Supreme Court's refusal, in January 2026, to grant bail to two accused in the Delhi riots "larger conspiracy" case — illustrates the outer limit of this reasoning: the Court there declined to find that the accused had crossed the threshold of delay required to trigger the Najeeb exception, holding that Section 43D(5) remains subordinate to Article 21 in principle but is not displaced automatically merely because a trial has been protracted.[69] Read alongside Andrabi, the current position is that Najeeb supplies a real, binding constitutional constraint on Section 43D(5) rather than a formality, but one that still requires the accused to establish, on the specific facts, that continued detention has become disproportionate rather than merely lengthy. That fact-sensitive, case-by-case character is exactly what Section 43D(4) forecloses at the pre-arrest stage, since no comparable inquiry is available before an arrest has even occurred.

International Human Rights Standards

India's obligations here are not confined to its domestic constitutional text. As a State Party to the ICCPR, India has undertaken specific commitments directly relevant to the operation of Section 43D(4). Article 9(1) prohibits arbitrary arrest or detention; Article 9(3) provides that detention pending trial "shall not be the general rule"; Article 9(4) guarantees the right of any detained person to have the lawfulness of detention decided by a court without delay; and Article 14(2) restates the presumption of innocence.[70] The Universal Declaration of Human Rights supplies the same normative baseline in non-binding form, with Article 9 prohibiting arbitrary arrest and Article 11(1) affirming the presumption of innocence.[71]Read together, these instruments establish liberty, not detention, as the international legal default — a default from which departure requires justification specific to the individual case rather than a general legislative presumption applicable to an entire category of accusation.

The UN Human Rights Committee's General Comment No. 35 on Article 9 of the ICCPR gives

[69]Gulfisha Fatima v. State (NCT of Delhi), 2026 SCC OnLine SC 10 (decided Jan. 5, 2026) (denying bail to Umar Khalid and Sharjeel Imam in the Delhi riots "larger conspiracy" case).
[70] ICCPR arts. 9, 14(2)
[71] Universal Declaration of Human Rights arts. 9, 11(1), G.A. Res. 217 (III) A, U.N. Doc. A/810 (Dec. 10, 1948).

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that default operational content. The Committee has explained that detention authorised by domestic law is not, for that reason alone, non-arbitrary; arbitrariness under the Covenant includes elements of inappropriateness, injustice, unpredictability, and disproportionality, and it requires an individualised assessment of necessity and reasonableness in each case rather than reliance on a categorical statutory presumption.[72] The Committee has further indicated that pre-trial detention should be exceptional and that States should employ less restrictive alternatives wherever feasible — guidance that maps closely onto the necessity stage of the proportionality inquiry conducted in above, and that a purely categorical bar of the kind Section 43D(4) enacts sits uneasily alongside.

The Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has, across successive mandate holders, articulated a consistent set of requirements for counter-terrorism legislation: precise and narrow statutory definitions of terrorism sufficient to satisfy legality and foreseeability; continuous and effective judicial oversight of arrest and detention, not merely of guilt or innocence at trial; protection against indefinite or unreviewed pre-trial detention; and express safeguarding of the freedoms of expression, association and assembly against expansive or opportunistic application of counter-terrorism statutes.[73] The Working Group on Arbitrary Detention has, in parallel, treated the absence of prompt and effective judicial review of the legality of detention — as opposed to review confined to whether detention should eventually be continued — as itself capable of rendering detention arbitrary within the meaning of international law.[74] None of these bodies suggests that States may not legislate specially for terrorism; the consistent theme, rather, is that whatever special legislation a State adopts must remain open to individualised judicial testing, and that the seriousness of an allegation is not by itself a substitute for that testing.

ICCPR does not require India to make anticipatory bail, as a specific procedural device, available to any class of accused person. What it requires is a result — that no person be subjected to arbitrary detention, and that detention, once effected, be susceptible to prompt judicial testing of its lawfulness, rather than any particular mechanism for achieving that result. This matters because it forecloses one possible objection to the argument advanced in this article: namely, that international law is being invoked to import a specifically Indian statutory

[72] U.N. Human Rights Comm., General Comment No. 35, supra note 11,

[73] Special Rapporteur on the Promotion and Prot. of Human Rights and Fundamental Freedoms while Countering Terrorism, Rep., U.N. Doc. A/HRC/13/42 (Feb. 19, 2010); accord Special Rapporteur on the Promotion and Prot. of Human Rights and Fundamental Freedoms while Countering Terrorism, Compilation of Good Practices, U.N. Doc. A/HRC/16/51 (Dec. 22, 2010).

[74] U.N. Working Grp. on Arbitrary Detention, Rep., U.N. Doc. A/HRC/57/25 (2024).

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remedy into a treaty text that says nothing about it. That objection misconceives the argument. The claim is not that the ICCPR guarantees anticipatory bail; it is that the ICCPR guarantees individualised judicial scrutiny of the necessity and proportionality of a deprivation of liberty, and that Section 43D(4), by foreclosing any such scrutiny before arrest and for an entire statutory category without exception, risks producing exactly the kind of result — detention that is lawful under domestic statute but arbitrary under the Covenant's autonomous meaning of that term, as General Comment No. 35 makes clear — that Article 9 exists to prevent.

It bears emphasis that none of this requires reading international law as prohibiting exceptional counter-terrorism procedure, nor does it require treating anticipatory bail as a right guaranteed by the ICCPR in so many words — it is not. What the standards surveyed in this Part require is considerably narrower and more precisely targeted: that any exclusion of judicial protection be capable of individualised justification, and that it not operate, in every case and without exception, as a substitute for judicial scrutiny altogether. Section 43D(4), in its present unqualified form, does not clear that threshold. UN Security Council Resolution 1373 and the subsequent resolutions extending it require States to strengthen their counter-terrorism legal frameworks, but they do so, in explicit terms, "in accordance with international human rights law" rather than as an alternative to it[75] — a qualification the drafting history of Section 43D(4) does not appear to have engaged with directly.

Comparative Constitutional Practice

Democratic jurisdictions confronting comparable terrorist threats have consistently preserved some form of judicial supervision over arrest and pre-charge detention, even where they have expanded executive investigative power substantially. In the United Kingdom, the Terrorism Act 2000 permits extended pre-charge detention, but that detention remains subject to judicial authorisation at defined intervals and to the framework of the Human Rights Act 1998, which imports Article 5 of the European Convention directly into domestic law.[76] Canada's Anti-terrorism Act operates within the Canadian Charter of Rights and Freedoms, under which preventive and investigative powers remain subject to judicial review for reasonableness and proportionality.[77] In the United States, preventive detention connected to terrorism investigations remains subject to due process and to the constitutional writ of habeas corpus, which the courts have applied even in national security contexts. Australian counter-terrorism

[75] U.N. S.C. Res. 1373, pmbl. (Sept. 28, 2001); U.N. S.C. Res. 2178 (Sept. 24, 2014).
[76] Terrorism Act 2000, c. 11 (U.K.); Human Rights Act 1998, c. 42 (U.K.).
[77] Anti-terrorism Act, S.C. 2001, c. 41 (Can.); Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982.

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legislation similarly preserves judicial oversight of control orders and preventive detention, subject to periodic review.

None of these jurisdictions maintains an anticipatory-bail-equivalent mechanism in precisely the form Section 438 CrPC provides; the comparison is therefore not one of identical remedies. What the comparison does show is that each jurisdiction preserves some form of continuous judicial supervision over the exercise of exceptional arrest and detention power, rather than a categorical, one-time legislative exclusion applicable from the moment an accusation is made. India's approach under Section 43D(4) — a bar operating at the earliest possible stage, without provision for judicial testing of even the threshold question whether the statutory ingredients of the offence are disclosed — is, on this comparison, an outlier among constitutional democracies engaged in broadly similar counter-terrorism efforts. That is not, by itself, a reason to hold the provision unconstitutional; comparative practice is persuasive rather than binding, and Parliament remains entitled to strike its own balance. But it is a relevant data point in assessing whether less restrictive alternatives, of the kind the necessity stage of proportionality review requires courts to consider, were genuinely unavailable to Parliament when it enacted Section 43D(4) in 2008.

Gaps in the Existing Framework

Five deficiencies in the current statutory and jurisprudential framework follow directly from the analysis above. First, Section 43D(4) contains no exception, however narrow, for cases of demonstrable mala fides or manifest absence of statutory ingredients — a gap that places the entire burden of constitutional reconciliation on the judiciary, exercised, if at all, only through the residual writ jurisdiction discussed above, and only after arrest has already occurred. Second, the meaning of "prima facie true" under the companion provision, Section 43D(5), remains unevenly applied across High Courts notwithstanding Watali, producing inconsistent outcomes for similarly situated accused persons. Third, the UAPA contains no statutory mechanism for periodic judicial review of continued detention keyed to investigative progress — a safeguard K.A. Najeeb has had to supply through constitutional interpretation rather than one Parliament built into the statute itself. Fourth, the Act supplies no statutory definition distinguishing terrorist conduct from ordinary public disorder or protected political activity with sufficient precision to prevent the kind of over-inclusion Thwaha Fasal, Vernon, Asif Iqbal Tanha and Devangana Kalita were each required to correct after the fact. Fifth, the statute contains no express proportionality requirement directing courts to weigh the necessity of custodial interrogation, the strength of available evidence, and the anticipated duration of investigation before a deprivation of liberty becomes final — a requirement that would give statutory footing to reasoning the courts have so far had to construct doctrinally, case by case. None of these gaps calls into question Parliament's authority to legislate specially for terrorism. What they demonstrate, collectively, is that the procedural safeguards inside the UAPA have not kept pace with the powers the statute confers, and that the judiciary has, since K.A. Najeeb in particular, been left to supply through constitutional interpretation what the statute itself does not provide.

First, the interpretive baseline. Section 43D(4) should be construed as excluding the statutory jurisdiction under Section 482 BNSS (formerly Section 438 CrPC) while leaving intact the constitutional jurisdiction of the High Courts under Articles 226 and 227 and of the Supreme Court under Articles 32 and 136. This reading does not require rewriting the statute; it follows directly from the distinction between statutory remedies and constitutional guarantees that Kartar Singh itself recognises, and it is the reading most consistent with the basic structure principle that ordinary legislation cannot extinguish the judiciary's constitutional review function.[78]

Second, a narrowly defined statutory exception. Parliament could amend Section 43D(4) to permit constitutional courts — not the trial court, and not as a matter of routine practice — to grant limited pre-arrest protection where the material, even if accepted in its entirety, does not disclose an offence under Chapters IV or VI; where the prosecution is shown to be motivated by demonstrable mala fides; or where continued denial of pre-arrest protection would result in a manifest violation of Article 14 or Article 21. The burden of establishing any of these grounds would remain on the applicant, preserving the investigative advantage Parliament sought in 2008 for the overwhelming majority of genuine cases.

Third, statutory codification of proportionality. Parliament should require courts, at whatever stage judicial review does occur, to weigh the gravity of the allegation, the strength of available evidence, the necessity of custodial interrogation specifically, the risk of absconding or evidence destruction, and the anticipated duration of investigation and trial — converting into statutory text the balancing exercise courts have so far had to perform without express legislative guidance.

Fourth, institutional accountability. Given the exceptional consequences of invoking Chapters IV and VI, Parliament should consider requiring senior-level prosecutorial sanction before charges are filed under those chapters, coupled with a periodic obligation on investigating

[78]Kesavananda Bharati, (1973) 4 SCC 225.

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agencies to justify continued reliance on UAPA provisions where investigation fails, over time, to substantiate the original accusation.

These four elements are, individually, modest. Together, they would preserve the operational advantage Section 43D(4) was designed to secure — freedom from advance notice in genuine terrorism investigations — while restoring the individualised judicial scrutiny that Articles 14 and 21, and India's obligations under the ICCPR, require for any deprivation of liberty. None of them would require Parliament to make anticipatory bail generally available under the UAPA; each is calibrated, deliberately, to the narrow category of case in which the current statute's absence of safeguard produces demonstrable injustice.

Conclusion

This article set out to answer a single question: can the absolute statutory exclusion of anticipatory bail under Section 43D(4) of the UAPA be constitutionally sustained in light of Articles 14, 19, 21 and 22 of the Constitution and India's obligations under international human rights law? The answer developed across the preceding Parts is qualified rather than categorical. Parliament's competence to enact exceptional procedure for terrorism-related offences is not in doubt, and the legitimate investigative concerns that produced Section 43D(4) in 2008 — organised networks, digital evidence, the risk that advance notice will frustrate custodial interrogation — remain real. But legislative competence is not, by itself, constitutional immunity. The historical development traced above shows that anticipatory bail moved, well before 2008, from a bare statutory convenience into a safeguard understood to give effect to Article 21; the legislative history traced above shows that the UAPA's transformation into a comprehensive counter-terrorism code occurred through incremental amendment rather than a single considered redesign of its procedural safeguards; and the case-by-case pattern traced above through Thwaha Fasal, Vernon, Asif Iqbal Tanha, Devangana Kalita shows, empirically, that accusations invoking the Act do not always survive the scrutiny they eventually receive, scrutiny that Section 43D(4) presently defers until after arrest has already occurred.

Read together with the international standards and constitutional position is that Section 43D(4) excludes only the statutory remedy under Section 482 BNSS, and does not — because no ordinary legislation validly can — extinguish the constitutional jurisdiction of the High Courts and the Supreme Court to intervene in the narrow category of case where arrest is shown to be arbitrary, mala fide, or unsupported by the statutory ingredients of the offence charged. That reading asks nothing of Parliament that it has not already conceded in principle through K.A.

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Najeeb's recognition that Article 21 survives Section 43D(5)'s restrictive language after arrest; it asks only that the same principle apply, in appropriately narrow form, before arrest as well. The four-part framework proposed above translates that principle into practical reform, preserving the operational core of Section 43D(4) for the overwhelming majority of cases it was designed to address, while ensuring that the minority of cases in which the statute is invoked wrongly are not, for that reason alone, placed permanently beyond the reach of judicial correction. Neither national security nor personal liberty is served by a legal framework that treats the two as mutually exclusive. The Constitution of India — like the international instruments to which India is a party — does not ask courts to choose between them. It asks them to ensure that the protection of one is never purchased at the price of the other.