

# ● EXPLORATION OF NON-UNIFORM BAIL JURISPRUDENCE CONCERNING ORGANISED CRIMES IN INDIA



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## **Abstract**

*Organised crime encompasses illegal activities carried out by groups of individuals, whether operating on a transnational, national, or local scale, with a structured framework primarily motivated towards achieving financial profits. These unlawful activities often extend beyond geographical boundaries and socio-economic contexts, influencing financial systems on a global scale. The continuous exposure to such criminal activities often fosters the development of innovative methodologies by syndicates, making them more rampant.*

*This paper examines the implications of the evolving legal landscape surrounding organised crime in India. By delving into the core issues surrounding bail provisions and analyzing the practical ramifications of existing anomalies, this paper aims to contribute to a deeper understanding of the challenges and opportunities in effectively addressing organised crime in contemporary India by putting forward various suggestions in this regard.*

## **Key words-**

*organised crime, bail, anomalies, magnitude, illegal activities.*

## **I. ORGANISED CRIMES: AN INTRODUCTION**

Organised crime involves illegal activities carried out by structured groups aiming to make money through unlawful methods. These activities cover a broad range, from kidnapping and robbery to drug trafficking, cybercrimes and prostitution. These groups, often called syndicates or gangs, do not just stick to traditional crimes; but get involved in social, political, and economic areas of crime. Driven by the desire for profit and influence, these criminal organizations may even commit acts of war, treason, or terrorism. The effects of organised crime go beyond individual victims and affect society as a whole. These crimes put people's lives and freedoms at risk and are a menace to the economic well-being of the nation. Much of the money made from organised crime drains away national resources, worsening social inequalities and hindering development efforts.

Organised criminal activity is not limited to specific incidents; it leaves deep scars on communities and societies. It undermines trust in institutions, fosters fear and corruption, and weakens social bonds. Moreover, as organised crime infiltrates various

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sectors of society, it perpetuates violence and instability, hindering progress and making it harder to achieve peace and prosperity.

"National Crime Records Bureau" (NCRB)<sup>1</sup> published its report according to which there has been a notable increase of 24.4 per cent in cybercrime cases registered in 2022 than the previous year, and the crime rate in this category rising from 3.9 in 2021 to 4.8 in 2022. It is no surprise that the metropolitan areas have experienced the most notable surge, demonstrating a substantial increase of 42.7% in cybercrimes over the preceding year. Additionally, there has been an 11.1 per cent rise in economic offences, with a notable increase of 15.8% observed in the registration of economic offences specifically within 19 metropolitan cities. The report also highlights a total of 2,250 cases of human trafficking registered in 2022, reflecting a modest increase of 2.8 per cent compared to the figures recorded in 2021.

The global community has acknowledged the gravity of this threat, prompting action at an international level. The "United Nations Office on Drugs and Crime" has assumed the vital role of raising awareness about organised criminal activities and advocating for initiatives to collaborate and counter its influence. The UNODC states that "Organised crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through corruption of public officials and the use of intimidation, threats or force to protect its operations."<sup>2</sup>

While organised crime was once perceived primarily as a domestic issue, the growing recognition of its transnational dimensions prompted states to establish various multilateral frameworks to tackle these challenges. However, the cross-border nature of many crimes rendered existing agreements inadequate in addressing their full scope of impact. In response to this, the "United Nations Convention against Transnational Organised Crime" (UNTOC) was adopted in Palermo, Italy, on December 15, 2000. The Convention aims to foster cooperation in preventing and combatting transnational organised crime.

The Convention refrains from offering a strict definition of organised crime due to its dynamic nature. Still Article 5<sup>3</sup> provides clarifications regarding the obligation to criminalize the involvement in organised criminal groups. As per the Convention, an 'organised criminal group' is defined as a structured assembly of three or more individuals acting in concert over time to commit one or more serious crimes for financial or material gain. A 'serious crime' is described as conduct constituting an offence punishable by a significant deprivation of liberty. Meanwhile, a 'structured group' refers

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<sup>1</sup>Ministry of Home Affairs, Government of India, National Crime Records Bureau, CRIMES IN INDIA 2022(2022), (7 June 2024) <https://ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf>.

<sup>2</sup>United Nations Office on Drugs & Crime, Module 1: Definitions of Organised Crime,(7June 2024) <https://www.unodc.org/e4j/zh/organized-crime/module-1/key-issues/defining-organized-crime.html>.

<sup>3</sup>United Nations, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto,(7 June 2024)[https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED\\_NATIONS\\_CONVENTION\\_AGAINST\\_TRANSNATIONAL\\_ORGANISED\\_CRIME\\_AND\\_THE\\_PROTocolS\\_THERETO.pdf](https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANISED_CRIME_AND_THE_PROTocolS_THERETO.pdf).



to an assembly that is not spontaneously formed for immediate criminal activity and does not necessarily require formally defined roles or membership continuity. Despite these explanations, criticism has been directed at the Convention's definitions, with some arguing that they are overly vague and tend to focus more on the concept of gang criminality rather than capturing the broader spectrum of organised crime activities.

To address specific facets of organised crimes the global community has implemented various strategies. "A notable instance is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (UNTOC), which was established in 1988. The manufacturing, trafficking, and circulation of illegal drugs globally are the efforts being taken under this treaty. UNTOC offers a thorough framework for international collaboration, encompassing measures to combat money laundering and enhance judicial cooperation for prosecuting individuals involved in criminal activities.

Basel Statement of Principles<sup>4</sup> also set out a significant step in combating organised criminal activity. The Basel Institute on Governance developed the principles for enhancing transparency and upholding integrity within the international financial landscape. Enacted in 1997, the Basel Statement underlines the importance of fostering collaboration between the public and private sectors while advocating for strict anti-money laundering measures and efficacious mechanisms to combat corruption. By setting forth these directives, the Basel Statement endeavours to stop the organised criminals in exploiting the international financial system and promote ethical conduct in financial transactions.

The FATF plays a pivotal role in fighting against instances of money laundering. Established as the foremost policymaker and regulator for combating money laundering on an international scale, FATF operates as a cooperative body comprising member jurisdictions from the world over. Founded in 1989, the FATF is recognized as the primary policymaker and overseer dedicated to countering money laundering globally. Operating as a collaborative entity consisting of member states worldwide, FATF is at the forefront of endeavours to formulate and enforce strategies aimed at combating both money laundering and terrorist financing. Its core responsibilities include establishing international standards, crafting policies, and assessing the adherence of member nations to regulatory standards through comprehensive evaluations.

## **II. EVOLUTION OF LEGAL FRAMEWORK ON ORGANISED CRIME IN INDIA**

In the annals of India's history, organised crime has persisted in diverse forms. Howbeit, until recently, there existed no comprehensive central legislation expressly aimed at combating this crime. Instead, it was addressed through scattered provisions within existing laws. The "Indian Penal Code, 1860" delineates offences such as criminal

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<sup>4</sup>Bank for International Settlements, Core Principles for Effective Banking Supervision (2012), (7 June 2024) <https://www.bis.org/publ/bcbs213.pdf>.

conspiracy<sup>5</sup>, kidnapping for ransom<sup>6</sup>, extortion<sup>7</sup>, robbery<sup>8</sup>, and dacoity<sup>9</sup>, which touches upon aspects of organised crime.

Additionally, the legal system has enacted various other specialized laws to combat distinct facets of organised crime. For instance, the "Narcotic Drugs and Psychotropic Substances Act, 1985, focuses on curbing illicit drug trafficking, whereas the "Immoral Traffic (Prevention) Act", 1956, is geared towards combatting human trafficking. However, the ill-gotten gains from these criminal activities hold little value unless laundered back into the legitimate economy. The process of transforming such 'dirty' money into 'clean' assets, known as money laundering, is targeted by the "Prevention of Money Laundering Act", 2002, rendering it a punishable offence.

Despite these legal measures, the scattered provisions were deemed insufficient in effectively combating organised crime. As syndicates and gangs expanded their operations, instances of smuggling, kidnapping, and terrorism surged, instilling a heightened sense of fear within society. In response, various states undertook initiatives to formulate their comprehensive legislation. Maharashtra took the lead in this endeavour by enacting the Maharashtra Control of Organised Crime Act (MCOCA) in 1999, aimed at combating organised crime and terrorism. This legislation, later extended to Delhi, served as a model for subsequent state enactments. The MCOCA defined "organised crime" (non-verbatim) as:

"2(1)(e). "any consistent legal activity by a person, individually or jointly, either as a part of organised criminal activity syndicate or representing such syndicate, either by using violence or threat to violence or intimidation or duress, or other illegal way, with the aim of earning monetary gains, or attaining undue economic or other advantage for oneself or any other individual or promoting insurgency"<sup>10</sup>

Inspired by Maharashtra's example, other states such as Gujarat<sup>11</sup> and Karnataka<sup>12</sup> have also enacted similar laws, with Rajasthan<sup>13</sup> and Haryana<sup>14</sup> proposing bills in 2023. These legislative endeavours adopted a largely standardized procedural framework for addressing organised crime.

In a recent development, organised crime is codified as a penal offence by the Bharatiya Nyaya Sanhita, 2023. While the definition closely resembles that of the MCOCA,<sup>15</sup> it differs in one aspect - it explicitly mentions offences in a list that may fall under the purview of "organised crime", making it more definitive and inclusive. It is defined non-verbatim as -

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<sup>5</sup>The Indian Penal Code, 1860, §§ 120A, 120B.

<sup>6</sup>The Indian Penal Code, 1860, §364A.

<sup>7</sup>The Indian Penal Code, 1860, § 383.

<sup>8</sup>The Indian Penal Code, 1860, § 390.

<sup>9</sup>The Indian Penal Code, 1860, §391.

<sup>10</sup>The Maharashtra Control of Organised Crime Act, 1999, §2(1)(e).

<sup>11</sup>The Gujarat Control of Terrorism and Organised Crime Act, 2015.

<sup>12</sup>The Karnataka Control of Organised Crimes Act, 2000.

<sup>13</sup>The Rajasthan Control of Organised Crime Bill, 2023, Bill No. 11 of 2023 (India).

<sup>14</sup>The Haryana Control of Organised Crime Bill, 2023, Bill No. 07 of 2023 (India).

<sup>15</sup>The Maharashtra Control of Organised Crime Act, 1999.



111.(1) "Any continuous illegal activity which includes economic offences, robbery, extortion, vehicle theft, robbery, land grabbing, cyber-crimes, trafficking of persons, weapons or illicit goods or services, contract killing, drugs, human trafficking for prostitution or ransom, by any individual or a group of individuals acting in concert, singly or jointly, either as a part of an organised crime syndicate or on its behalf, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit"<sup>16</sup>.

Importantly, the purview of organised crimes as delineated by the BNS, states that certain offences are encompassed which are already subject to specialized legislation. Illustratively speaking, there are several statutes designed for countering economic offences such as, "The Prevention of Money Laundering Act, 2002, Foreign Exchange Regulation Act, 1973, Customs Act, 1962", and others. Similarly, for cybercrimes, specific provisions of the IT Act, 2000, are in force. The Immoral Trafficking Prevention Act addresses trafficking in persons, while trafficking in drugs is governed by the "Narcotic Drugs and Psychotropic Substances Act", and the Arms Act is the legal statute for weapon trafficking. Additionally, provisions within the BNS itself cover other specified offences like kidnapping, robbery, extortion, and so forth. In the case of "*State of Maharashtra v. Vishwanath Maranna Shetty*"<sup>17</sup>, it was elucidated that in case a prosecution pertains to criminal activities within a designated law with individual legal principles for addressing matters arising therefrom, such provisions must be duly considered and applied.

The impending enforcement date of this central legislation, scheduled for July 1, 2024, signifies a significant shift that will override various laws concerning the subject matter. Hence, a thorough evaluation of newly enacted provisions is essential for ensuring their uniform application and mitigating any likelihood of discrepancies resulting in their implementation.

### III. ANALYSIS OF BAIL JURISPRUDENCE UNDER ORGANISED CRIMES

#### (a) CONTOURS OF BAIL JURISPRUDENCE

Talking about Bail, typically, bail provisions are addressed within sections 436-439 in CrPC, 1973, encompassing "anticipatory bail and regular bail" within its ambit. With the growing number of intricate types of criminal activities, specialized legislations have been introduced to combat emerging forms of organised crime. These enactments not only establish stringent procedures for dealing with offenders but also diverge from conventional bail conditions, introducing additional requirements which can be traced back to the enactment of the "Terrorism and Disruptive Activities Act", 1987 (TADA)<sup>18</sup>,

<sup>16</sup>The Bharatiya Nyaya Sanhita, 2023, §111.

<sup>17</sup>(2005) 5 SCC 294 (India).

<sup>18</sup>The Terrorism and Disruptive Activities Act, 1987, §20.

"20(8). Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless, -

1. the Public Prosecutor has been given an opportunity to oppose the application for such release, and
2. where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

marking a significant departure from conventional bail norms. This was further affirmed by the 268th Law Commission Report<sup>19</sup>, which recommended that in certain terrorism-related offences, bail cannot be granted until the authority responsible for taking the decision is fully satisfied that the conditions under scrutiny are exceptional and thus, supports bail plea. The "Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS)"<sup>20</sup>, the Prevention of Money Laundering Act, 2002 (PMLA)<sup>21</sup>, the Companies Act, 2013<sup>22</sup> and a spectrum of other legislations incorporated the mentioned conditions as the legal framework. The 268th Law Commission Report<sup>23</sup> also advocated for a stringent approach to addressing all types of economic offences and suggested that the existing factors must be taken into consideration in totality with the nature, severity, effect, and magnitude of the crime on monetary and economic loss caused by it. The commission suggested that the decision must be based on all these nuances apart from the existing ones. This approach provides for the necessity for differentiated treatment of bail in economic offences, ensuring that the severity and impact of such crimes are duly considered in the judicial process.

The dual conditions of bail, consistent across these provisions are as follows:

1. Under the bail conditions there is an opportunity for the Prosecutor to file an "opposition", and
2. When the "Opposition" is filed by the public prosecutor the court will examine whether he is guilty of the offence and if bail is granted then he should not be committing any crime. Upon being satisfied the court takes the decision in this direction.

The state laws and the specialised legislative policies concerning organised criminal activity encompass the two conditions mentioned above. Ergo, bail conditions outlined in various state laws, such as those governing MCOCA<sup>24</sup> and the Gujarat Act,<sup>25</sup> mirror those established in specialized enactments. "These legal frameworks makes it imperative for the accused to bear the burden of proving their innocence for securing their bail. Also, the accused is liable to make the court have faith in them that they will not commit any crime if bail is granted."<sup>26</sup> Notably, these conditions are applied cumulatively rather than separately. Therefore, fulfilment of both conditions simultaneously is necessary for obtaining bail.

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<sup>19</sup>Law Commission of India, Report No. 268, Amendments to Criminal Procedure Code, 1973 - Provisions Relating to Bail (2017).

<sup>20</sup>The Narcotic Drugs and Psychotropic Substances Act, 1985, §37.

<sup>21</sup>The Prevention of Money Laundering Act, 2002, §45.

<sup>22</sup>The Companies Act, 2013, §212(6)(ii).

<sup>23</sup>Law Commission of India, *supra* note 19.

<sup>24</sup>The Maharashtra Control of Organised Crime Act, 1999, §21(4).

<sup>25</sup>The Gujarat Control of Terrorism and Organised Crime Act, 2015, § 20(4).

<sup>26</sup>"The Prevention of Money Laundering Act, 2002, § 45"; "The Narcotic Drugs and Psychotropic Substances Act", 1985, § 37(1)(b); The Companies Act, 2013, § 212(6); The TADA, 1987, § 20(8); The MCOCA, 1999, § 21(4); The Gujarat Control of Terrorism and Organised Crime Act, 2015, § 20(4); The Drugs and Cosmetics Act, 1940, § 36AC; "The Unlawful Activities (Prevention) Act", 1967; The Uttar Pradesh Gangsters and Anti-Social (Prevention) Act, 1986, § 19(4).



Several legal precedents also establish additional conditions that need to be considered when addressing cases that include economic offences apart from the existing legal provisions. One notable decision is *Y.S. Jagan Mohan Reddy v. CBI*,<sup>27</sup> wherein the SC observed that, in granting bail, the judiciary will consider various factors. Thus, encompassing a strength of supporting evidence, the potential severity of the punishment of the offence, the character of the individual who is the accused, and situations that were unique to the accused. These factors significantly covered evidence tampering, ensuring that the accused must be present during the trial, and manipulating or hampering of the witness. It included the larger interests of the state or the public. The provisions provide for considering comparable situations or similar factors.

It is worth to note at this juncture that bail provisions have remained consistent across both state enactments and specialized legislations be it MCOCA, the NDPS Act or the PMLA. This uniform approach to these bail provisions indeed mitigates any confusion regarding the applicability of relevant provisions which in turn gets strengthened by the perusal of the CrPC that also reveals that bail provisions outlined in specialised legislations supersede those of the CrPC<sup>28</sup>. In the case of *Gautam Kundu v. Manoj Kumar*<sup>29</sup>, this position was reaffirmed by the Apex Court. When examining the purpose behind the PMLA and the relevant section of the CrPC, it was determined that if there's a conflict, the rules outlined in the PMLA will take precedence over those in the CrPC.

Withal, it is also important to highlight that since PMLA lacks provisions concerning anticipatory bail, the constitutional courts have wrestled with the issue of whether the twin conditions as enshrined in the PMLA apply to anticipatory bail. This issue was decided affirmatively in *Vijay Madanlal*<sup>30</sup>, according to it the conditions of Section 45 are uniformly applicable to both anticipatory bail and bail orders, which differ only in the stage of issuance of bail. This perspective was further upheld by the apex court in the recent case of *Directorate of Enforcement v. M. Gopal Reddy*.<sup>31</sup> The cautionary stance articulated in the *P. Chidambaram*<sup>32</sup> case was also reaffirmed in this decision, emphasizing the requirement for judicious discretion within "Section 438 of the CrPC" due to the societal impact of economic offences.

### **(b) DEPARTURING FROM "PRESUMPTION OF INNOCENCE"**

The "presumption of innocence", a fundamental tenet in criminal justice systems worldwide, stands as a cornerstone principle dictating that individuals accused of crimes are considered innocent until proven guilty beyond a reasonable doubt by the

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<sup>27</sup>(2013) 7 SCC 439 (India).

<sup>28</sup>The Code of Criminal Procedure, 1973, § 5.

"5. Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

<sup>29</sup>*Gautam Kundu v. Manoj Kumar*, Assistant Director, Directorate of Enforcement, Govt. of India, MANU/SC/1453/2015 (India).

<sup>30</sup>*Vijay Madanlal Choudhary v. Union of India*, Writ Petition (Criminal) No. 532 of 2021 (India).

<sup>31</sup>Criminal Appeal No. 534 of 2023 (India).

<sup>32</sup>*P. Chidambaram v. CBI*, 2019 SCC Online SC 1380 (India).

State. This bedrock principle not only serves as a fundamental safeguard against wrongful convictions but also upholds the ethos of fairness and justice in legal proceedings. Embedded within the fabric of legal systems, the "presumption of innocence" is enshrined not only in national frameworks but in international treaties and conventions as well. Articles 11(1) of the "Universal Declaration of Human Rights" (UDHR)<sup>33</sup> and 14(2) of the "International Covenant on Civil and Political Rights" (ICCPR)<sup>34</sup> explicitly recognize the "presumption of innocence" as a fundamental right. Additionally, international bodies like the "Financial Action Task Force" (FATF) acknowledge the importance of upholding the presumption of innocence until proven guilty, reflecting a global commitment to safeguarding this fundamental principle.

In the Indian legal framework, the principle of "presumption of innocence" holds a prominent position, receiving explicit acknowledgement not only within Article 21 of the Constitution but also deeply entrenched within Article 20(3). This presumption is safeguarded through the inclusion of the right against self-incrimination within Article 20(3). It is quite recent that the "innocence of the accused" has been presumed until proven guilty owing to its validity under the Right to Life and Personal Liberty, Article 21. Through the judgments in cases like *Manu Sharma*<sup>35</sup>, *Sahara*<sup>36</sup>, and *Nikesh Shah*<sup>37</sup>, "presumption of innocence" was recognised solidifying its status as an integral component of the constitutional framework and ensuring its protection as a fundamental right under Article 21, i.e., Right to Life and Personal Liberty. Historically, the Indian judiciary has only gradually come to recognize and underscore the paramount importance of this foundational principle. Its status as a fundamental right of the accused stemming from Article 21 remained unsettled for a considerable amount of time. In the *Gurbaksh Sibbia v. State of Punjab*<sup>38</sup> case, the Apex Court highlighted the salutary nature of this principle within our criminal jurisprudence but refrained from acknowledging it as directly emanating from Article 21. As affirmed in the *Narendra Kumar v. State of M.E.*<sup>39</sup> case and other subsequent cases to the legal statutes before it recognised the "presumption of innocence" as a human right backing it as a fundamental right. This observation was further upheld in landmark decisions like *Ranjitsing Sharma*<sup>40</sup>, which upheld its validity as a human right.

The legal precedence established through several landmark judgments as stated by far is interwoven into various aspects of criminal proceedings, including the determination of bail conditions. Traditionally, bail provisions, as outlined within Sections 436-439 of the CrPC have been guided by the presumption of innocence. Furthermore, the stated principle is also exemplified similarly in Sections 480-483 of the BNSS, thereby reinforcing the presumption of innocence within the bail jurisprudence.

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<sup>33</sup>Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 10, 1948).

<sup>34</sup>International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 16, 1966).

<sup>35</sup>Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), AIR 2010 SC 2352 (India).

<sup>36</sup>Sahara India Real Estate Corporation Limited & Ors. v. SEBI, Civil Appeal No. 9813 of 2011 (India).

<sup>37</sup>Nikesh Tarachand Shah v. Union of India & Anr., (2018) 11 SCC 1 (India).

<sup>38</sup>AIR 1980 SC 1632 (India).

<sup>39</sup>(2004) 10 SCC 699 (India).

<sup>40</sup>Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra & Anr., (2005) 5 SCC 294 (India).





A significant departure from the presumption of innocence is observed in specialized legislation targeting specific forms of organised and more sophisticated criminal activities, such as money laundering, trafficking in drugs, persons and weapons and others. The departure complicates the legal process as the accused has to prove their innocence in order to get the bail plea approved by the concerned court. This in other words is "reversing the presumption of innocence" as the court presumes that the accused is guilty of the crime he/she has been charged for.

Notably, Section 45 of the PMLA exemplifies this departure, where stringent bail conditions reflect a reversed presumption of innocence. This becomes particularly contentious in light of the standards set internationally. For example, the FATF, a prominent international body tasked with legislating against money laundering, underscores the importance of upholding the presumption of innocence until proven guilty as one of its core objectives. This highlights the complexity and divergence in approaches to addressing the provisions at the national and international levels.

The Apex Court, considering the objectives of specialized legislations, has validated this deviation from the "presumption of innocence". For instance, the court reviewed the constitutional validity of some of the provisions in TADA in "*Kartar Singh v. State of Punjab*"<sup>41</sup> case. The rationale for this review is the analogous nature of the provisions. The court upheld the law but struck down some of its provisions, particularly those related to presumptions of guilt and extended periods of detention without bail. The ruling aimed to maintain an equilibrium between the requirement of protecting national security and the rights and liberties of individuals. Another pivotal case on this matter is "*Ranjitsing Sharma*"<sup>42</sup>, wherein the Court decided the implications of "Section 21(4) of the Maharashtra Control of Organised Crime Act (MCOCA)", which outlines the twin conditions for granting bail. While upholding the provision, the Court emphasized a careful examination of the proofs on record. The judgement can be cited as follows:

"The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the Court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and on order granting bail much before commencement of trial."

The satisfaction that the accused is not guilty must rely on reasonable facts and evidence. This was emphasized in the "*Chenna Boyanna Krishna Yadav v. State of Maharashtra*"<sup>43</sup> court ruling. The verdict entailed that mere surface evidence cannot determine the accused to be guilty but there should be substantial causes to prove that an accused has not committed the crime for which he/she is facing the trial or charges.

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<sup>41</sup>(1994) 3 SCC 569 (India).

<sup>42</sup>*Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*, *supranote* 40.

<sup>43</sup>(2007) 1 SCC 242 (India).

These judicial pronouncements delicately strike a balance between preserving the fundamental and human rights of the individual by considering the legal validity of the "presumption of innocence" and the aim to combat organised crimes. Thus, showcasing a balance between the rights of the individual and the security of the state or public. However, the inconsistent jurisprudence surrounding bail conditions across legislation, particularly in specialized legislation, highlights the challenges in balancing the imperatives of justice, security, and human rights. The concern extends beyond bail conditions; it encompasses the assignment of the burden of proof. This ruling not only determines which party bears the initial burden of presenting evidence but also shapes the legal perspective of an accused individual. Whether someone is presumed innocent from the outset or deemed guilty profoundly impacts the confidence of the accused, undoubtedly undermining their sense of assurance. The lack of consistency in bail conditions within a single provision not only breeds confusion for the accused but also undermines justice, equity, and fairness.

### © NAVIGATING CONTROVERSIES AND DISPUTES FOR GRANTING BAIL

It is worth mentioning that the constitutionality of "Section 45 of the Prevention of Money Laundering Act" (PMLA) which outlines the twin conditions for bail, has long been a subject of contention. In 2018, through its ruling in the *Nikesh Tarachand*<sup>44</sup>, the Supreme Court invalidated this provision, considering it arbitrary and in contravention of the two articles within the Constitution of India that, guarantee equality before the law and the right to life and liberty that is, articles 14 and 21, respectively. The judgement ensured that individuals who are facing trial under the PMLA do not become victims of arbitrariness and unfair treatment. Thus, keeping the two fundamental rights as the pivot point the court invalidated section 45 of PMLA.

Subsequently, through the Finance Act of 2018<sup>45</sup>, the section was amended, replacing the phrase "*punishable for a term of imprisonment of more than three years under Part A of the Schedule*" with "*under the Act*", effectively reviving the provision. Despite the amendment, there remains ambiguity regarding the interpretation and implementation of the bail conditions outlined in the provision. This uncertainty has led to divergent rulings by High Courts across the country, resulting in inconsistent application of bail provisions in cases related to money laundering. While several High Courts opined that mere substitution of words in the section would not revive the twin bail conditions<sup>46</sup>, others interpreted the amendment as reinstating the bail conditions<sup>47</sup>.

A three-judge bench consisting of Justices A.M. Khanwilkar, Dinesh Maheshwari, and C.T. Ravikumar in *Vijay Madanlal*<sup>48</sup> case reasserted the constitutional legitimacy of Section 45. The bench relied their verdict on the seriousness and impact of money

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<sup>44</sup>*Nikesh Tarachand Shah v. Union of India & Anr.*, supra note 37.

<sup>45</sup>The Finance Act, 2018, No. 13 of 2018 (India).

<sup>46</sup>*Sameer Bhujbal v. Assistant Director, BA No. 286 of 2018 (India)*; *Upendra Rai v. Directorate of Enforcement, 2019 SCC Online Del 9086 (India)*; *Ahilya Devi v. State of Bihar, Criminal Miscellaneous No. 41413 of 2019 (India)*; *Dr. Vinod Bhandari v. Assistant Director, 2018 SCC Online MP 1559 (India)*; *Shivinder Mohan Singh v. Directorate of Enforcement, 2020 SCC Online Del 766 (India)*.

<sup>47</sup>*Arun Mukherjee v. Enforcement Directorate, 2018 SCC Online Cal 15230 (India)*.

<sup>48</sup>*Vijay Madanlal Choudhary v. Union of India, supra note 30*



laundering crimes. The observations in *Y.S. Jagan Mohan Reddy*<sup>49</sup> case led to this stringent decision according to which the Court emphasized the necessity for a distinct approach to bail proceedings in the context of economic offences, as they constitute a distinct class, given their profound influence on the nation's economy as a whole. Moreover, it was noted that the stringent provision of Section 45 would extend beyond the realm of regular bail to encompass anticipatory bail proceedings as well. Hence, the dual bail circumstances would apply even when the accused individual seeks "anticipatory bail under Section 438" of the Criminal Procedure Code, 1972 (CrPC).

Previously, the dual conditions were meant for Special Courts in the context of Section 44 of the PMLA. It was uncertain whether they could apply to the High Courts under Section 439 of the CrPC which was declined later due to their status as Constitutional Courts. Recently, this position was clarified in the case of *Tarun Kumar v. Assistant Director Directorate of Enforcement*<sup>50</sup>, wherein the Supreme Court has affirmed that the twin conditions will apply even in the context of bail petitions under Section 439 CrPC.

Subsequently, a review petition of *Vijay Madanlal*<sup>51</sup> was lodged, wherein the Supreme Court affirmed that the "twin conditions" for release as stipulated in the revised Section 45(1) of the PMLA are constitutionally valid. The Hon'ble Court elucidated that while the conditions given under Section 45 of the PMLA are quite strict, they do not completely restrict the opportunity to seek bail. Rather, the discretion to grant bail resides with the judiciary, guided meticulously by the legal principles enshrined within the aforementioned section of the Act.

Withal, this verdict has garnered several criticisms on multiple fronts, with certain aspects currently undergoing review. The matter concerning the legal validity of section 45 is sub judice and pending for further examination by the court.

It is paramount to accentuate that the Supreme Court has admirably championed the rights of the accused, affirming the presumption of innocence as a fundamental right<sup>52</sup> and upholding the principle of 'bail, not jail'<sup>53</sup>. Yet, this ruling stands in stark contrast to prior judgments, which not only bolster the powers of the Enforcement Directorate but also subject the accused to the discretionary powers of the judiciary.

In the bail applications filed under Section 45 of the PMLA, judges find themselves in the intricate position of not only appraising pre-trial evidence to ascertain guilt-where the burden rests solely upon the accused-but also tasked with preventing the commission of further offences while on bail. Such anticipatory assessment of the accused's future conduct, coupled with the determination of bail eligibility, appears arbitrary and lacks a discernible rational basis. Ergo, bail in PMLA cases becomes a luxury accessible

<sup>49</sup>*Y.S. Jagan Mohan Reddy v. CBI*, supra note 27.

<sup>50</sup>2023 OnLine SC 1486 (India).

<sup>51</sup>*Vijay Madanlal Choudhary v. Union of India*, supra note 30.

<sup>52</sup>*Gurbaksh Sibbia v. State of Punjab*, supra note 38.

<sup>53</sup>"*Moti Ram v. State of MP*, 1978 AIR 1954, 1979 SCR(1) 335 (India); *State of Rajasthan, Jaipur v. Balchand*, MANU/SC/0152/1977 (India); *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 118 (India); *Arnab Manoranjan Goswami v. State of Maharashtra and Ors.*, MANU/SC/0902/2020 (India); *Satendra Kumar Antil v. Central Bureau of Investigation*, Miscellaneous App No. 1849 of 2021 in SPL (CRL) No. 5191 of 2021 (India)."

primarily to those with the means to procure high-quality legal representation, further accentuating disparities within the legal system.

Currently, with the recent introduction of new criminal laws, the broad definition of organised crime under the BNS, which encompasses various offences within its scope has been incorporated as an offence under Section 111 of the BNS and the bail procedure in such cases is to be governed by Sections 480 and 483 of the Bharatiya Nyaya Suraksha Sanhita, 2023 (BNSS), which bear resemblance to Sections 437 and 439 of the CrPC 1972. The deliberate inclusion of organised criminal activity within the BNS framework underscores the legislative intention for bail conditions pertinent to such offences. This is particularly notable given the set of similar provisions under state enactments such as MCOCA, which mandated the inclusion of "twin conditions" as fundamental prerequisites. Ergo, it is explicit that bail conditions delineated in the BNSS are in contrast with those specified under special legislations.

Moreover, if a specialized legislation exists for a crime included in this definition, such as trafficking in drugs and persons, bail proceedings will fall under provisions of that specialized legislation<sup>54</sup> that are based on a reversed presumption of innocence. Conversely, for offences not covered by specialized legislation, the bail of the accused shall be resolutely granted under BNSS, this is based on the assumption that the accused is innocent till not proven guilty. Ergo, this discrepancy in bail provision can potentially result in the dismissal of the plea and compromise of the fair trial rights the individual. This scenario undermines fundamental rights and necessitates careful consideration to ensure equitable legal proceedings. This inconsistency not only weakens the uniformity of the legal system but also poses challenges in ensuring fair and equitable treatment for individuals accused of offences under both statutes.

In light of this inconsistency, it becomes imperative to consider several intricate scenarios regarding the potential disparities arising from the bail provisions under the BNSS and the specialised legislation, notably PMLA<sup>55</sup>.

In this context, let us presume that bail, initially granted to the individual facing the charges within the context of a scheduled offence remains in effect. Additionally, there are no instances of the accused being rearrested after the initiation of proceedings of the money laundering from which follows that the Special Court has acknowledged the case under Section 44 of the PMLA.

Firstly, let us envision a hypothetical scenario in which more than one individual is facing prosecution for organised crime as a syndicate under the BNS. Bail is granted to them under the provisions stipulated by the BNSS. Subsequently, as the legal proceedings progress, the trial for money laundering commences. In this particular

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<sup>54</sup>The Bharatiya Nyaya Suraksha Sanhita, 2023, § 5.

"5. Nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

<sup>55</sup>Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office, SLP (Crl.) No. 969/2024 (India).

"Prima facie, it appears to us that once cognizance of a complaint filed under Section 44 is taken by the Special Court under the Prevention of Money Laundering Act, 2002 (for short "the PMLA Act"), the power to arrest vesting under Section 19 of the PMLA Act cannot be exercised."



instance, it is crucial to note that the individuals accused of organised crime will continue to enjoy the bail that was initially granted to them under the BNSS provisions, persisting throughout the trial for money laundering.

Moving forward, consider a lone individual committing a scheduled offence, thereby failing to meet the criteria for classification under organised crime as outlined by the BNS. Resultantly, the accused can be subjected to the laws under BNS but can be granted bail as per the BNSS. Should the trial for money laundering be initiated thereafter, the bail initially granted under BNSS provisions shall remain in effect throughout the subsequent legal proceedings.

In such a situation if an individual is accused under any of the specialised provisions then they will be granted bail under one of those provisions whether the "twin conditions" of bail prevail in those provisions or not. The subsequent trial for money laundering will not alter the bail initially granted to the accused under the specialized legislation.

Lastly, consider a scenario where the individual prosecuted for a crime listed in BNS differs from the individual who is prosecuted for a crime listed in PMLA. This situation might arise if one (or several) individual(s) commits a crime listed in BNS, while another is implicated only for laundering the proceeds of that crime. As a result, distinct bail conditions will apply to these individuals, even if the consequences stemming from the crime listed in the BNS are far more severe. For example, if an individual commits murder during a dacoity, the ramifications of the criminal activity listed in BNS are inherently more substantial as compared to those under the purview of PMLA. However, the individual involved in laundering the proceeds of the dacoity will face additional twin conditions under Section 45 of the PMLA wherein securing bail becomes comparatively challenging due to this shift in presumption. Hence, to uphold the principle of "rule of law" and protect fundamental rights, it becomes imperative for lawmakers to confront these disparities and endeavour to make the provisions more uniform.

#### **IV. CONCLUSION AND SUGGESTIONS**

The in-depth examination of inconsistencies in bail provisions between the BNSS and special legislations indicates that these disparities not only pertain to the specific rationale of bail but also challenge the foundational principle of "presumption of innocence", effectively diverting the onus of proof to the accused. Previously these provisions remained unchallenged and relatively uniform, as both state enactments and specialized legislations upheld "twin conditions" of bail. However, with lawmakers now incorporating organised crimes within the ambit of central legislation, there appears to be a tacit acknowledgement that the bail conditions are deemed unnecessary for such offences.

Complicating matters further is the intertwined nature of both laws, which often leads to instances in which courts have to determine which bail provision applies. The reversal of the onus of proving one's innocence poses practical challenges for the accused, who may lack the resources to adequately defend themselves, thus impeding their right to a "fair trial". Therefore, efforts should be made to streamline bail provisions to ensure consistency and fairness in their application, thereby safeguarding the rights of accused individuals from being unduly impacted by procedural irregularities. By promoting uniformity and clarity in these provisions, the legal system can uphold the principles of

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justice and protect the rights of individuals facing criminal prosecution. The analysis presented in the research paper highlights the problematic reversal of the legal framework that considered the accused innocent until proven guilty. At its core, this fundamental principle transcends mere theoretical debates and overarches the other rights of the accused, thus strongly proposing aligning the conditions outlined in special legislations with the new BNSS along with the judicial precedents shaping bail jurisprudence. It is paramount that the presumption of innocence underpins the bail proceedings, particularly concerning economic offences-as endorsed globally and thus the same can be achieved either by making legislative amendments to reinstate the presumption of innocence or by declaring provisions contrary to this principle as unconstitutional.