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Shifting Contours of Bail Jurisprudence in Cases of Caste Atrocities in India

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ABSTRACT

The power of judicial discretion with regard to granting anticipatory bail under special legislations has always been a centre of legal discourse. It is a convenient approach to apply for bail in anticipation of arrest. But, when a special legislation prohibits the application of anticipatory bail, it creates a lot of controversy as it still remains the blurred area of the criminal justice system. However, transformative constitutionalism in India continues to attract judicial discourse in the face of different experiences of the marginalised and vulnerable sections of the society in fulfilling the constitutional ideals of right to life, liberty, equality and dignity. The scope of judicial interpretation has also been expanded in recent years on the applicability of anticipatory bail with regard to special legislation like the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter 1989 Act). Simultaneously, the legislative tendency to override judicial power has also been become a focal point of academic discourse. The debate of whether the judiciary can override any absolute prohibition on the application of anticipatory bail in cases involving caste atrocities and its justification for doing so has been attempted to be resolved. Therefore, in this debate, the pertinent concerns that attract critical evaluation are, inter alia: How was anticipatory bail introduced in India's criminal justice system? Why was granting anticipatory bail prohibited under the 1989 Act? Whether this prohibition infringes on any citizen's constitutional rights? What is the justiciability and recent judicial trends to address anticipatory bail under the 1989 Act? The present research paper is devoted to a critical analysis of the aforementioned aspects.

Keywords: *Judicial discretion, Criminal justice system; Transformative constitutionalism; Anticipatory bail; special legislation; absolute bar; caste atrocity etc.*

I. INTRODUCTION

The Jurisprudence of bail is an integral part of judicial process and plays a significant role in the administration of criminal justice system, which safeguards not only life but also liberty by commanding that liberty can be deprived only through the procedure established by law under Article 21 of the Constitution of India. [2] However, there has been a lot of pressure on the state

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[2] For general understanding of bail jurisprudence in India, see Saubhagya Dubey, Manuj Kumar (et. al.),

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to adopt laws that can deal with these complications as a result of the increase in crime complexity over the past three decades. The substantive provisions of the Indian Penal Code, 1860 as well as the procedures provided under the Code of Criminal Procedure, 1973 (hereinafter the 1973 Code) were evidently found wanting in many respects. Thus, certain special legislations came into existence which created new offences and provided for different procedures to be followed to try those offences. [3] These procedures were more stringent and they even tugged at the time tested principles of constitutional fairness. [4]

The Constitution of India is an outstanding social instrument that aims to transform a mediaeval, hierarchical society into a modern, egalitarian democracy. The provisions of the Constitution cannot be fully understood by pedantic, traditional legalism because they are too narrowly focused on the law. As a result, the goal of having a constitution is to transform society, and this goal is the fundamental tenet of transformative constitutionalism.[5] The ability of the Constitution to adapt and change in response to the shifting demands of the society is what is meant by the concept of transformative constitutionalism, which is a reality with regard to all constitutions and particularly so with relation to the Constitution of India.[6]

In this circumstance, regarding justiciability of specified procedure under special legislations, the Apex Court in *State of Maharashtra* v. *Vishwanath Maranna Shetty*,[7] stated that when a prosecution is for offence(s) under a special legislation and that legislation contains specific provisions for dealing with matters arising thereunder, the provisions cannot be ignored while dealing with such an application. Similarly, in the case of *Raju Premji* v. *Customs NER Shillong Unit*[8] the court held that where a legislation confers drastic powers and provides for stringent

"Revisiting the Efficacy of Bail Provisions in India: Empirical Exercise to Assess the Ground Realities of Bail Jurisprudence", 24 *Supremo Amicus* (2021) pp. 1115-1128; Lokendra Malik and Shailendra Kumar, "Personal Liberty Versus Societal Interest: The State of Bail Jurisprudence In India", in Lokendra Malik and Salman Khurshid (et. al.)*Taking Bail Seriously-The State of Bail Jurisprudence in India* (LexisNexis, Delhi, 2020) pp. 405-426; Hans Kumar, "A Critical Study of Bail Trends in India", 17(7) *PalArch Journal of Archaeology of Egypt* (2020) pp. 10494-10506; Vrinda Bhandari, "Inconsistent and Unclear: The Supreme Court of India on Bail", 6(3) *NUJS Law Review* (2013) pp. 549-558.

[3] FOR FURTHER DISCUSSION ON THE APPLICATION OF BAIL UNDER SPECIAL LAW, SEE SHYAM D. NANDAN AND DEEPA KANSRA, "BAIL UNDER SPECIAL LEGISLATIONS," IN MANOJ KUMARR SINHA AND ANURAG DEEP (EDS.) *BAIL: LAW AND PRACTICE IN INDIA* (2019) PP. 153-170 AT P. 166 ; SEE ALSO MALIKA SHAH AND VAIBHAV CHADHA "EVOLUTION OF LAW ON ANTICIPATORY BAIL IN INDIA," 12(1) *E-JOURNAL OF INTERNATIONAL RELATIONS* (2021) PP. 251-264.

[4] For judicial discourse on bail jurisprudence, see *Sushila Aggarwal* v. *State*, AIR 2020 SC 831*:* (2020) 5 SCC 1, *P. Chidambaram* v. *Directorate of Enforcement*, AIR 2020 SC 1699: (2020) 13 SCC 791; *State of Bihar* v. *Amit Kumar*, AIR 2017 SC 2487: (2017) 13 SCC 751; *Sanjay Chandra* v. *CBI*, AIR 2012 SC 830: (2012) 1 SCC 40; *Gudikanti Narasimhulu* v. *State*, AIR 1978 SC 429: (1978) 1 SCC 240.

[5] *State of Kerala* v. *N.M. Thomas*, AIR 1976 SC 490: (1976) 2 SCC 310.

[6] See *Navtej Singh Johar* v. *Union of India*, AIR 2018 SC 4321: (1976) 2 SCC 310; see also *Gujarat Urja Vikas Nigam Limited* v. *Amit Gupta*, (2021)7SCC209: MANU/SC/0157/2021; *Mangyang Lima* v. *State of Nagaland*, W.P.(C) No. 83(K) of 2018 (Gau): MANU/GH/0240/2019;*GVK Inds. Ltd*. v. *The Income Tax Officer*, (2011) 4 SCC 36: (2011) 3 SCR 366.

[7] AIR 2013 SC 158: (2012)10SCC561; see also, *Union of India* v. *Aharwa Deen* (2000) 9 SCC 382.

[8] (2009)16 SCC 496: 200 9(7) SCALE 568.

penal provisions including the matters relating to grant of bail, the conditions precedent therefore must be scrupulously complied with.[9]

Therefore, the provisions of the 1989 Act have put stringent conditions in the matter of grant of bail. Anticipatory bail is not even permitted under Section 438 of the 1973 Code *vide* sections 18 and 18A of the 1989 Act. However, where *prima facie* case is not made out, anticipatory bail can be granted in appropriate circumstances, with a cautious exercise of power. Hence, the said Sections 18 and 18A of the 1989 Act have no application where *prima facie* case is not made out by the complainant. As a result, the difficulty arises as to what extent the court can grant it in absence of *prima facie* case. Hence, in exceptional cases, the court can exercise the power under section 482 of the 1973 Code for quashing the cases to prevent misuse of provisions on settled parameters. [10] This ambiguity paved away the creation of Special Courts and the conferment of appellate jurisdiction on the High Court under sections 14 and 14A of the 1989 Act.

II. IDEA OF TRANSFORMATIVE CONSTITUTIONALISM IN PROTECTION AGAINST CASTE ATROCITIES

Since the adoption of the 1996 South African Constitution, the term "transformative" has entered into the vocabulary of constitutional debate. [11] In Indian context, the idea of transformative constitutionalism is essentially a pledge, promise and thirst to transform society in order to embrace the ideals of justice, liberty, equality, and fraternity as stated in the Preamble to the Constitution of India, both in letter and spirit. However, using a pragmatic lens that will aid in seeing the reality of the present day would help to better understand the term "transformative constitutionalism." As a single word, transformation stands in stark contrast to something that is static and stagnant; rather, it denotes change, alteration, and the capacity to metamorphose. [12]

The purpose of transformative constitutionalism has been aptly described in *Road Accident*

[9] See also *Muraleedharan* v. *State of Kerala*, 2001Cri LJ 2187, (2001) 4 SCC 638.
[10] *Prathvi Raj Chauhan* v. *Union of India*, AIR 2020 SC 1036: (2020) 4 SCC 727.
[11] Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal of Human Rights* pp. 146-188 (1998) at p. 1946; see also T. Roux, "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference? 20 *Stellenbosch Law Review* (2009) pp. 258-285.
[12] For conceptual understanding of Transformative Constitutionalism, see Indrani Kundu, "Constitutionalism to Transformative Constitutionalism: The Changing Role of the Judiciary", 11(2) *Indian Journal of Law And Justice* (2020) pp. 347-369; Priya Shekhawat, "Transformative Constitutionalism", 2(5) *International Journal of Law Management and Humanities* (2019) pp.1-5; Eric Kibet and Charles Fombad, "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa", 17(2) *African Human Rights Law Review* (2017) pp.340-366; Michaela Hailbronner, "Transformative Constitutionalism: Not Only in the Global South," 65(3) *The American Journal of Comparative Law* (2017) pp. 527-565.

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Fund. v. *Mdeyide*,[13] wherein the Constitutional Court of South Africa, speaking in the context of the transformative role of the Constitution of South Africa, had observed:

> Our Constitution has often been described as "transformative". One of the most important purposes of this transformation is to ensure that, by the realisation of fundamental socio-economic rights, people disadvantaged by their deprived social and economic circumstances become more capable of enjoying a life of dignity, freedom and equality that lies at the heart of our constitutional democracy.

In a recent project on transformative constitutionalism in Brazil, India and South Africa, the concept of transformative constitution was demonstrated in terms of "recognition of human rights, democracy and peaceful co-existence and development opportunities"[14] By transformative constitutionalism it is also understood that a long-term project of constitutional enactment, interpretation, and enforcement committed not in isolation, of course, but in a historical context of conducive political developments to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. It connotes an enterprise of inducing large-scale social change through non-violent political processes based on law.[15]

The Constitution of India is marked by a transformative vision of social justice. Its transformative potential lies in recognising its supremacy over all bodies of law and practices that claim the continuation of a past which militates against its vision of a just society. At the heart of transformative constitutionalism, is a recognition of change. What transformation in social relations did the Constitution seek to achieve? What vision of society does the Constitution envisage? The answer to these questions lies in the recognition of the individual as the basic unit of the constitution. This view demands that existing structures and laws be viewed from the prism of individual dignity. The individual, as the basic unit, is at the heart of the Constitution. All rights and guarantees of the constitution are operationalised and are aimed towards the self-realisation of the individual. This makes the anti-exclusion principle firmly rooted in the transformative vision of the constitution, and at the heart of judicial enquiry. Irrespective of the source from which a practice claims legitimacy, this principle enjoins the

[13] 2008 (1) SA 535 (CC): (2007) ZACC 7.
[14] Upendra Baxi, "Preliminary Notes on Transformative Constitutionalism", in Oscar Vilhena, Upendra Baxi and Frans Viljoen (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa,* (Pretoria University Law Press, 2013) pp. 19-47 at p. 22.
[15] M.P. Singh, "Interpreting and Shaping the Transformative Constitution of India" in The Constitution at 67 (ed.) (Supreme Court of India, New Delhi, 2017) pp. 73-108 at p. 74.

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Court to deny protection to practices that detract from the constitutional vision of an equal citizenship.[16]

Article 17 of the Constitution of India is a reflection of the transformative ideal of the constitution, which gives expression to the aspirations of socially disempowered individuals and communities, and provides a moral framework for radical social transformation.[17] Article 17, along with other constitutional provisions,[18] must be seen as the recognition and endorsement of a hope for a better future for marginalised communities and individuals, who have had their destinies crushed by a feudal and caste-based social order.[19]

Despite the introduction of numerous steps to ameliorate their socio-economic situation, the Scheduled Castes and Scheduled Tribes continued to be a vulnerable group. Equal chance to improve and develop one's human potential as well as the social, economic, and legal interests of every individual are also included within the definition of equality, that is why the process of transformational constitutionalism is dedicated to this goal.[20] The Parliament of India endorsed that many offences, indignities, humiliations, and harassments against the Scheduled Castes and Scheduled Tribes were ongoing.[21] The Parliament was alarmed by the numerous instances of violence and crimes that deprived members of the Scheduled Castes and Scheduled Tribes of their lives and property. The 1989 Act was passed by the Parliament in response to the disturbing trend of increasing atrocities against the Scheduled Castes and Scheduled Tribes. This Act aims to stop the commission of crimes involving atrocities against Scheduled Castes and Scheduled Tribes. Nevertheless, over more than three decades of working of the 1989 Act it was realised that the impugned Act it had not been able to stop the rise in atrocities against Scheduled Castes and the Scheduled Tribes as the Act did not specifically provide for a definition of atrocity. Hence, the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015, which drastically revised the 1989 Act, placed an absolute

[16] *Indian Young Lawyers Association* v. *State of Kerala*, 2018 (13) SCALE 75: 2018 (8) SCJ 609.
[17] Article 17 reads: "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.
[18] See Articles 15(2) and 23, The Constitution of India.
[19] See *supra* note 15.
[20] The South African Constitutional Court has recently delivered several judgments on equality in which it has indicated that equality must be understood substantively rather than formally. The fact that substantive equality is the starting point in developing an equality jurisprudence in South Africa reflects the Court's commitment to a transformative project and to the creation of an indigenous jurisprudence of transformation. A commitment to substantive equality involves examining the context of an alleged rights violation and its relationship to systemic forms of domination within a society. See Cathi Albertyn and Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality", 14 *South African Journal on Human Rights*(1998) pp. 248-276 at p. 248.
[21] See K. B. Saxena, "Legislature Proposes, Judiciary Disposes: Supreme Court's Ruling on the Atrocities Act", 48(2) *Social Change* (2018) pp. 275-282 at p. 275; see also Smriti Sharma, "Caste-Based Crimes and Economic Status: Evidence from India", 43(1) *Journal of Comparative Economics* (2015) pp. 204-226.

restriction on granting anticipatory bail for committing atrocities against "Scheduled Castes and Scheduled Tribes". In this backdrop, it is imperative to discuss application of anticipatory bail in cases of caste atrocities in India and the judicial response thereto.

III. INTRODUCTION OF ANTICIPATORY BAIL IN INDIA

The 1989 Act enlarges the scope of criminal liability by including several acts or omissions of atrocities which were not covered by the Indian Penal Code,1960 or the Protection of Civil Rights Act, 1955. The 1989 Act prohibits the grant of Anticipatory Bail to the accused and the 1958 Probation of Offenders Act was also made inapplicable to the 1989 Act.

The term "anticipatory bail" is a convenient mode of conveying that it is to apply for bail in anticipation of arrest.[22] The Law Commission of India, in its 41st Report, suggested introducing a provision in the 1973 Code enabling the High Court and the Court of Session to grant "anticipatory bail". The suggestion made by the Law Commission was, in principle, accepted by the Central Government which introduced Clause 447 in the Draft Bill of the Criminal Procedure Code, 1970 with a view to conferring an express power on the High Court and the Court of Session to grant anticipatory bail. Clause 447 of the Draft Bill of 1970 was enacted with certain modifications and became Section 438 of the 1973 Code. Hence, the Law Commission of India observed:

> The necessity of granting anticipatory bail arises mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them retained in jail custody for some period. Apart from false castes where there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while in bail there seems no justification to require him first to submit to custody, remain in prison for some days and then apply for bail.[23]

Thus, The power of granting "anticipatory bail" is somewhat extraordinary in character and it is only in exceptional cirumstaces where it appears that a person might be falsely implicated, or

[22] For concept of anticipatory bail in detail, see Shruti Sahni, "Law of Anticipatory Bail in India with Special Reference to the Issue of Territorial Jurisdiction", 1(43) *Specialusis Ugdymas* (2022) pp. 6329-6338; Manali Singh, "Anticipatory Bail and the Criminal Justice System in India," 3(1) *Indian Journal of Law and Legal Research* (2021) pp. 895-902; Pradeep Singh, "Anticipatory Bail and Criminal Justice System in India", 1(4) *International Journal of Business and Social Science Research* (2020) pp. 1 - 9; F. E. Devine, "Anticipatory Bail: An Indian Civil Liberties Innovation," 14 (1&2) *International Journal of Comparative and Applied Criminal Justice* (1990) pp. 107-114.

[23] Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. See Law Commission of India, *Forty-First Report* (Ministry of Law, Government of India, New Delhi, 1969) at p. 321.

a frivolous and malicious case might be launched against him, or "there are reasonable grounds for holding that a person accused of an offence is not likely to abscond, or otherwise misuse his liberty while on bail that such power is to be exercised.[24] Nevertheless, Section 438 was incorporated, in the 1973 Code which provides for grant of bail to persons apprehending arrest. It provides, *inter alia*, that when a person has reason to apprehend that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or to a Court of Sessions for a direction that in the event of such arrest, he shall be released on bail.[25]

The difference between anticipatory bail and ordinary bail lies on their mode of operation. An ordinary order of bail is granted after arrest, which means release of the accused from the custody of the police, whereas anticipatory bail is granted in anticipation of arrest and therefore it is effective at the very moment of arrest. An order of anticipatory bail constitutes an insurance against police custody following upon arrest for offence or offences in respect of which the order is issued. In other words, unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued, he shall be released on bail.[26]

It has been seen that most special legislations rely on the provisions of the 1973 Code i.e. Section 438, when it comes to granting anticipatory bail. The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) the Prevention of Money Laundering Act, 2002 (PML Act) etc. are typical examples as such. The question that arose before the three judge bench of the Calcutta high court in *Teru Majhi* v. *State of West Bengal*[27] was whether the special court constituted under the NDPS Act would have the power to grant pre-arrest bail under Section 438 of the 1973 Code. Although there was no difference of opinion regarding the entitlement of an accused under the NDPS Act to be granted anticipatory bail, the view of the prosecution was that such a power only vested in the High Court. This view was based on the contention that the special court under the NDPS Act was merely deemed to be a Sessions Court for the purposes of trial of offences under the NDPS Act and being a court of first production, it did not have the power to grant anticipatory bail under the NDPS Act.

The High Court held that the special court was not the court of first production and after

[24] See *Balchand Jain* v. *State of Madhya Pradesh*, (1976) 4 SCC 572: (1977) 2 SCR 52.
[25] For more detail on power to order anticipatory bail, see *Shri Gurbaksh Singh Sibbia* v. *State of Punjab*, AIR 1980 SC 1632: (1980) 2 SCC 565;see also *Joginder Kumar* v. *State of Uttar Pradesh*, AIR 1994 SC 1349: (1994) 4 SCC 260.
[26] See *Gurbaksh Singh Sibbia* v. *State of Punjab*, AIR1980SC1632: (1980) 2 SCC 565.
[27] (2014) SCC Online Cal 7684: SRCR No 1 of 2013 (Cal).

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interpreting the provisions of section 36C of the NDPS Act, it came to the conclusion that no provision of the 1973 Code was excluded for the purposes of the said section unless there was a specific exclusion in the NDPS Act. Not finding such an express exclusion anywhere in the statute, it held that the special court under the NDPS Act could grant anticipatory bail as per section 438 of the 1973 Code. Similarly, Maharashtra Control of Organized Crime Act, 1999[28] also completely exclude the operation of Section 438 of the 1973 Code and does not permit the granting of anticipatory bail in cases involving offences laid down in the statute.

IV. JUDICIAL DISCOURSE ON ANTICIPATORY BAIL UNDER THE 1989 ACT

Section 438 the 1973 Code is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. The provision contained in Section 438 of the 1973 Code must be saved in order to meet the challenge of Article 21 of the Constitution of India, the procedure established by law for depriving liberty of a person.[29] In contrast, Section 18 of the 1989 Act provides for bar against grant of anticipatory bail. It states:

> Nothing in Section 438 of the Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence under this Act.

Section 18 of the 1989 Act barred jurisdiction of the competent courts so far as application of Section 438 of the 1973 Code to persons committing an offence under 1989 Act is concerned. Considering the *vires* of Section 18 of the 1989 Act, barring application of Section 438 of the 1973 Code to the offences under the 1989 Act, the Supreme Court in *State of Madhya Pradesh* v. *Ram Krishna Balothia*,[30] held that the provision of Section 18 of the 1989 Act *intra vires* and further observed that the offences enumerated in Section 3 of the 1989 Act are committed to humiliate and subjugate the members of the Scheduled Castes and the Scheduled Tribes communities, and these offences constitute a separate class and cannot be compared with offences provided in the Indian Penal Code. However, a duty is cast on the court to verify the averments in the complaint and to find out whether an offence under Section 3(1) of the 1989 Act has been *prima facie* made out. In other words, if there is a specific averment in the complaint, namely, insult or intimidation with intent to humiliate by calling with caste name,

[28] See Section 21 (3).
[29] Ibid.
[30] AIR 1995 SC 1198: AIR 1995 SC 1198.

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the accused persons are not entitled to anticipatory bail.[31]

Hence, Section 18 of the 1989 Act imposes a bar so far as the grant of anticipatory bail, if the offence is one under the 1989 Act. If a person is accused having committed murder, dacoity, rape, etc. heinous crimes, he can pray for anticipatory bail under Section 438 of the 1973 Code on the ground that he is innocent and has been falsely involved. But, here it may be noted that, if a person alleged to have committed an offence under the 1989 Act, cannot pray for an anticipatory bail because of the bar of Section 18 of the 1989 Act, and he would get arrested. This is the reason for the authorities to guard against any misuse of the provisions of the 1989 Act.[32] However, the expression "an accusation of having committed an offence under this Act" of Section 18 of the 1989 Act does not mean that mere registration of the case under the 1989 Act would *ipso facto* attract the prohibition contained in Section 18 of the 1989 Act, as observed by Orissa High Court in *Ramesh Prasad Bhanja* v. *State of Orissa*.[33] Thus, commenting upon applicability of Section 18 of the 1989 Act, the Court held:

> Merely because a case is mechanically registered under the 1989 Act, the provision of Section 438 of the Criminal Procedure Code cannot be said to be inapplicable in each and every case. If the allegations make out a prima facie case under Section 3 or for that matter Sections 4 and 5 of the [1989] Act, the jurisdiction to entertain an application under Section 438 [of the 1973 Code] is definitely ousted. Where however, the allegations do not make out any prima facie case punishable under any of the provisions of the Act, the bar under Section 18 of the [1989] Act is inapplicable and the provision of Section 438 of the … [1973] Code can be availed of.[34]

The scope of Section 18 of the 1989 Act read with Section 438 of the 1973 Code is such that it creates a specific bar in the grant of anticipatory bail. In *Hema Mishra* v. *State of Uttar Pradesh*,[35] it has been expressly laid down that inspite of the statutory bar against grant of anticipatory bail, a Constitutional Court is not debarred from exercising its jurisdiction to grant relief. In this case the Supreme Court considered the issue of anticipatory bail where such provision does not apply. Reference was made to the view in *Lal Kamlendra Pratap Singh* v. *State of Uttar Pradesh*,[36] to the effect that interim bail can be granted even in such cases without

[31] See *Vilas Pandurang Pawar* v. *State of Maharashtra*, AIR 2012 SC 3316: (2012) 8 SCC 795.
[32] See *Dhiren Prafulbhai Shah* v. *State of Gujarat*, 2016 Cri LJ 2217: (2016) 4 GLR 2785.
[33] 1996 Cri LJ 2743: MANU/OR/0303/1996.
[34] Ibid. see also *R. K. Sangwan* v. *State*, 2009 (112) DRJ 473 (DB): Crl.Ref. 01/2008 (Del).
[35] AIR 2014 SC 1066: (2014) 4 SCC 453.
[36] 2009 (4) SCALE 77: (2009) 4 SCC 437.

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accused being actually arrested. Reference was also made to *Kartar Singh* v. *State of Punjab*,[37] to the effect that jurisdiction under Article 226 is not barred even in such cases.

In *State of Madhya Pradesh* v. *Ram Kishan Balothia*,[38] the Supreme Court was of the view that the provision of Section 438 0f the 1973 Code did not apply to any case involving arrest of any person accused of having committed offences under section 3 of the said Act. Additionally, in *Kapil Durgwani* v. *State of Madhya Pradesh*,[39] it was stated that the scope of section 18 of the 1989 Act read with section 438 of the 1973 Code, is such that it creates a specific bar to the grant of anticipatory bail. When an offence is registered against a person under the provisions of the 1989 Act, no court shall entertain an application for anticipatory bail, unless it *prima facie* finds that such offence is not made out.

The Supreme Court in *Vilas Pandurang Pawar* v. *State of Maharashtra*,[40] observed that, when an offence is registered against a person under the provisions of the 1989 Act, no Court shall entertain an application for anticipatory bail, unless it *prima facie* finds that such an offence is not committed. However, it may be noted that, while considering the application for bail, scope for appreciation of evidence and other material on record is very limited. The Court is not supposed to indulge in critical scrutiny of the evidence on record. Thus, when a provision has been enacted under a special legislation to protect the persons belonging to the Scheduled Castes and the Scheduled Tribes and a bar has been imposed in granting bail under Section 438 of the 1973 Code, the provision in the special legislation cannot be easily set aside by elaborate discussion on the evidence.[41]

V. IMPACT OF ABSOLUTE PROHIBITION OF ANTICIPATORY BAIL ON ENFORCEMENT OF FUNDAMENTAL RIGHTS

Now, the question arises whether the denial of this right to apply for anticipatory bail in respect of offences committed under the 1989 Act, can be considered as violative of Articles 14 and 21 of the Constitution of India. The constitutional validity of section 18 of the 1989 Act was upheld in *State of Madhya Pradesh* v. *Ram Krishna Balothia*[42] and the provision was held to be not violative of Article 14 and Article 21. The exclusionary provision pertaining to bail under 1989 Act has to be understood in light of two factors, namely: (i) the purpose of the anti-discrimination law, and (ii) the usage of penal law to enforce the constitutional objectives of

[37] (1994) 2 SCR 375: (1994) 3 SCC 569.
[38] *Supra* note 29.
[39] 2010 (5) MPHT 42: ILR (2010) MP 2003.
[40] AIR 2012 SC 3316: (2012) 8 SCC 795.
[41] See *Shakuntla Devi* v. *Baljinder Singh*, (2014) 15 SCC 521: 2013 (3) Bom CR (Cri) 184.
[42] *Supra* note 29.

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tolerance and non-discrimination.[43] In the year 2016, amendments introduced to the 1989 Act reflect upon the intention of the Parliament to further strengthen the law in light of the prevailing social conditions.[44] The exclusion of section 438 of the 1973 Code by virtue of section 18 of the 1989 Act has been a well substantiated arrangement in furtherance of both statutory and constitutional imperatives. The Supreme Court in *Manju* Devi v. *Onkarjit Singh Ahlualia*[45] observed that exclusion of section 438 of the 1973 Code in connection with offences under the 1989 Act has to be viewed in the context of several factors such as the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail.

However, it is of paramount consideration that the freedom of the individual is as necessary for the survival of the society as it is for the egoistic purposes of the individual. A person, who is seeking anticipatory bail, is still a free man and entitled to the presumption of innocence. In other words, he is willing to submit to restraints on his freedom, by the acceptance of conditions which the court may think fit to impose, in consideration of the assurance that if arrested, he shall be released on bail. Moreover, prohibition on grant of anticipatory bail under Section 18 of the 1989 Act when such prohibitions were not applicable to other offences punishable in like manners was discriminatory and against the principle of fair, just and reasonable procedure.[46]

It is undoubtedly true that Section 438 of the 1973 Code, which is available to an accused in respect of offences under the Indian Penal Code, is not available in respect of offences under the 1989 Act, because the offences enumerated under the 1989 Act fall into a separate and special class. Thus, the exclusion of Section 438 of the 1973 Code in connection with offences under the 1989 Act has to be viewed in the context of the prevailing social conditions which give rise to such offences, and the apprehension that perpetrators of such atrocities are likely to threaten and intimidate their victims and prevent or obstruct them in the prosecution of these offenders, if the offenders are allowed to avail of anticipatory bail. Statement of objects and reasons accompanying the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Bill, 1989, when it was introduced in Parliament of India, it sets out the circumstances surrounding the enactment of the 1989 Act and points to the evil which the statute sought to

[43] See *Rajulapati Ankababu* v. *State of Andhra Pradesh*, 2017(3) L.S. 316 : Criminal Petition No. 7468 of 2017 (Hyd).
[44] See *Suman Thakur* v. *State of Bihar*, Criminal Appeal (SJ) No.591 of 2016: 2016(4) PLJR 300).
[45] AIR 2017 SC 1583: (2017) 13 SCC 75.
[46] See *Nikesh Tarachand Shah* v. *Union of India*, AIR 2017 SC 5500: (2018) 11 SCC 1; see also *Maneka Gandhi* v. *Union of India*, *supra* note 49.

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remedy. The Statement of objects and reasons, *inter alia*, stated:

> When they [the Scheduled Castes and the Scheduled Tribes] assert their rights and resist practices of untouchability against them or demand statutory minimum wages or refuse to do any bonded and forced labour, the vested interests try to cow them down and terrorise them. When the Scheduled Castes and the Scheduled Tribes try to preserve their self-respect or honour of their women, they become irritants for the dominant and the mighty. Occupation and cultivation of even the government allotted land by the Scheduled Castes and Scheduled Tribes is resented and more often these people become victims of attacks by the vested interests. Of late, there has been an increase in the disturbing trend of commission of certain atrocities like making the Scheduled Castes persons eat inedible substances like human excreta and attacks on and mass killings of helpless Scheduled Castes and Scheduled Tribes and rape of women belonging to the Scheduled Castes and the Scheduled Tribes…A special legislation to check and deter crimes against them committed by non-Scheduled Castes and non-Scheduled Tribes has, therefore, become necessary.

The above statement graphically describes the social conditions which motivated the 1989 Act. It is indicated in the above statement of objects and reasons that when members of the Scheduled Castes and Scheduled Tribes assert their rights and demand statutory protection, vested interests try to cow them down and terrorise them. In these circumstances, if anticipatory bail is not made available to persons who commit such offences, such a denial cannot be considered as unreasonable or violative of Article 14 of the Constitution of India, as these offences form distinct class by themselves and cannot be compared with other offences.

But, at the same time, it is also relevant to mention here that, the Supreme Court, as the ultimate interpreter of the Constitution, has to uphold the constitutional rights and values. Articles 14, 19 and 21 represent the foundational values which form the basis of the rule of law.[47] Contents of the said rights have to be interpreted in a manner which enables the citizens to enjoy the said rights. Right to equality and life and liberty have to be protected against any unreasonable procedure, even if it is enacted by the legislature. The substantive as well as procedural laws must conform to Articles 14 and 21 of the Constitution. Any abrogation of the said rights has to be nullified by the Supreme Court by appropriate orders or directions. Power of the legislature

[47] See Upendra Baxi, "Rule of Law in India", 4(6) *Sur - Revista Internacional de Derechos Humanos*, pp.7-27 at p. 15.

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has to be exercised consistent with the fundamental rights. Enforcement of a legislation has also to be consistent with the fundamental rights. Undoubtedly, the Supreme Court has jurisdiction to enforce the fundamental rights of life and liberty against any executive or legislative action, because, the expression "procedure established by law" under Article 21 of the Constitution of India[48] implies just, fair and reasonable procedure.[49]

VI. JUSTICIABILTY OF ANTICIPATORY BAIL UNDER THE 1989 ACT

Now, it may further be examined, whether Section 18 of the 1989 Act violates, in any manner, Article 21 of the Constitution which protects the life and personal liberty of every person in this country. Thus, it may be noted that, the jurisdiction of the Supreme Court to issue appropriate orders or directions for enforcement of fundamental rights is a basic feature of the Constitution. However, in *Rajesh Kumar* v. *State,*[50] the Supreme Court, for the first time, after the decision in *Maneka Gandhi*,[51] which marks a watershed in the development of constitutional law in our country, took the view that Article 21 affords protection not only against the executive action but also against the legislation which deprives a person of his life and personal liberty unless the law for deprivation is reasonable, just and fair, and it was held that the concept of reasonableness runs like a golden thread through the entire fabric of the Constitution and it is not enough for the law to provide some semblance of a procedure. The procedure for depriving a person of his life and personal liberty must be eminently just, reasonable and fair and if challenged before the Court it is for the Court to determine whether such procedure is reasonable, just and fair and if the Court finds that it is not so, the Court will strike down the same. In this context, the Supreme Court in *State of Madhya Pradesh* v. *Ram Kishna Balothia*,[52] held:

> Article 21 enshrines the right to live with human dignity, a precious right to which every human-being is entitled; those who have been, for centuries, denied this right, more so. We find it difficult to accept the contention that Section 438 of the Criminal Procedure Code is an integral part of Article 21.

However, considering historical background relating to the practice of "Untouchability" and the social attitudes which lead to the commission of such offences against Scheduled Castes and

[48] Article 21 Reads: No person shall be deprived of his life or personal liberty except according to procedure established by law.
[49] See *Maneka Gandhi* v. *Union of India*, *supra* note 49.
[50] (2011) 13 SCC 706: 2011 (11) SCALE 182.
[51] AIR 1978 SC 597: (1978) 1 SCC 248.
[52] AIR 1995 SC 1198: (1995) 3 SCC 221. See also *Jai Singh* v. *Union of India*, AIR 1993 Raj 177: 1993 Cri LJ 2705.

the Scheduled Tribes, there would be justification for an apprehension that if the benefit of anticipatory bail is made available to the persons who are alleged to have committed such offences of atrocities under the 1989 Act, there is every likelihood of their misusing their liberty while on anticipatory bail to terrorise the victims and to prevent a proper investigation. It is in this context that Section 18 has been incorporated in the1989 Act.

In *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*,[53] the Supreme Court also laid down parameters for exercising discretionary power of the Court to grant anticipatory bail having regard to the fundamental right of liberty under Article 21 of the Constitution of India and the needs of the society where such liberty may be required to be taken away. However, on exclusion of provision for anticipatory bail under Section 18 of the 1989 Act, a different approach is taken by the Supreme Court in *Subhash Kashinath Mahajan* v. S*tate of Maharashtra*.[54] In this landmark case the Supreme Court held that bar against anticipatory bail would not apply when no *prima facie* case was made out or the case is patently false or *mala fide*. This may have to be determined by the Court concerned in facts and circumstances of each case in exercise of its judicial discretion. In doing so, the present Court was reiterating a well established principle of law that protection of innocent persona against abuse of law was part of inherent jurisdiction of the Court, which was nevertheless a part of access to justice and protection of liberty against any oppressive action of *mala fide* arrest. Consequently, the Supreme Court recognising no absolute bar against grant of anticipatory bail in cases under the 1989 Act if no *prima facie* case is made out or where on judicial scrutiny the complaint is found to be prima facie mala fide, observed thus:

> Innocent citizens are termed as accused, which was not intended by the legislature. The legislature never intended to use the Atrocities Act as an instrument to blackmail or to wreak personal vengeance. The Act was also not intended to deter public servants from performing their bona fide duties. Thus, unless exclusion of anticipatory bail is limited to genuine cases and inapplicable to cases where there was no prima facie case was made out, there would be no protection available to innocent citizens. Thus, limiting the exclusion of anticipatory bail in such cases was essential for protection of fundamental right of life and liberty Under Article 21 of the Constitution.[55]

[53] AIR 2011 SC 312: (2011) 1 SCC 694.
[54] AIR 2018 SC 1498: (2018) 6 SCC 454.
[55] Ibid.

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Hence, in *Mahajan* case [56] the Supreme Court has taken into consideration the principles of Universal Declaration of Human Rights, 1948 namely: (i) everyone has the right to life, liberty and security of person;[57](ii) no one shall be subjected to arbitrary arrest, detention or exile;[58] (iii) everyone is entitled in full equality to a fair and public hearing by an independent tribunal which is impartial as well, in the determination of his rights and duties and of any criminal charge against him[59] and considered the following factors and parameters while dealing with the anticipatory bail, namely: (i) the nature and gravity of the accusation and the exact role of the accused must be properly comprehended before the arrest is made; (ii) the antecedents of the applicant including the facts as to whether the accused has previously convicted by a court in respect of any cognisable offence; (iii) the possibility of the applicant to flee from justice; (iv) the possibility of the accused's likelihood to repeat similar or other offences; (v) where the accusations have been made only with the intention of causing humiliation or injury to the applicant by arresting him or her; (vi) impact of granting anticipatory bail particularly in cases of large scale affecting a very large number of people; (vii) the courts must evaluate the entire available material against the Accused very carefully. In such a case, the court must also clearly comprehend the exact role of the accused. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with caution and greater care; because over implication is a matter of common knowledge and concern; (viii) while considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of humiliation, harassment and unjustified detention of the accused; (ix) the court to consider reasonable apprehension of threat to the complainant or of tampering of the witness; (x) frivolity in prosecution should always be considered with utmost interest and it is only the element of genuineness that shall have to be considered in the matter of granting bail and judging the genuineness of the prosecution.

VII. Conflict between legislature and judiciary on application of anticipatory bail under the 1989 Act

The principle of transformative constitutionalism also places upon the judicial arm of the State a duty to ensure and uphold the supremacy of the Constitution, while at the same time ensuring that a sense of transformation is ushered constantly and endlessly in the society by interpreting

[56] Ibid.
[57] 1948 Universal Declaration of Human Rights, Article 3.
[58] Ibid, Article 9.
[59] Ibid, Article 10. As to its legal effect, see *M.* v. *United Nations and Belgium* (1972) 45 Inter LR 446.

and enforcing the Constitution as well as other provisions of law in consonance with the avowed object. The idea is to steer the country and its institutions in a democratic egalitarian direction where there is increased protection of fundamental rights and other freedoms. It is in this way that transformative constitutionalism attains the status of an ideal model imbibing the philosophy and morals of constitutionalism and fostering greater respect for human rights.[60]

It is thus obvious that in cases under the 1989 Act, exclusion of right of anticipatory bail is applicable only if the case is shown to *bona fide* and that *prima facie* it falls under the 1989 Act and not otherwise. Nevertheless, section 18 of the 1989 Act does not apply where there is no *prima facie* case or to cases of patent false implication or when the allegation is motivated for extraneous reasons. But, immediately after this judgment there was a hue and cry with reference to the dilution of the 1989 Act. Ultimately the parliament amended the 1989 Act with insertion of a new provision, namely Section 18A.[61] Section 18A (2) now stands thus:

> The provisions of section 438 of the Code shall not apply to a case under this Act, notwithstanding any judgment or order or direction of any Court.

Sections 18 and 18A of the 1989 Act prohibit grant of anticipatory bail. However, an interesting situation emerges, if the provisions of the 1989 Act are compared as against certain other special laws where similar restrictions are put on consideration of matter for grant of anticipatory bail. Section 17(4) of the 1985 Terrorist and Disruptive Activities (Prevention) Act[62] (hereinafter the 1985 Act) stated "...nothing in Section 438 of the [1973] Code shall apply in relation to any case involving the arrest of any person on an accusation of having committed an offence punishable under the provisions of this Act..." Section 17(5) of the 1985 Act put further restriction on a person Accused of an offence punishable under the 1985 Act being released on regular bail and one of the conditions was: "Where the Public Prosecutor opposes the application for grant of bail, the court had to be satisfied that there were reasonable grounds for believing that the Accused was not guilty of such offence and that he was not likely to commit any such offence while on bail." Nevertheless, the provisions of the Unlawful Activities (Prevention) Act, 1967 namely under Section 43D (4) and 43D (5) are similar to the aforesaid Sections 17(4) and 17(5) of the 1985 Act. Similarly the provisions of Maharashtra Control of

[60] *Safiya Sultana* v. *State of Uttar Pradesh*, AIR 2021 All 56: (2021) ILR 1 All 564.

[61] Inserted by the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2018 with effect from 20th August, 2018 Vide Notification No. SO4027 (E) Dated 20th August, 2018.

[62] Terrorist and Disruptive Activities (Prevention) commonly known as TADA, was an Indian anti-terrorism law which was in force between 1985 and 1995 (modified in 1987) under the background of the Punjab insurgency and was applied to whole of India. It came into effect on 23 May 1985. It was renewed in 1989, 1991 and 1993 before being allowed to lapse in 1995 due to increasing unpopularity after widespread allegations of abuse. Act The TADA Act was repealed in 21st September, 2004 by the 2004 Prevention of Terrorism (Repeal) Act.

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Organised Crime Act, 1999 namely, Sections 21(3) and 21(4) are also identical in terms. Thus the impact of release of a person accused of having committed the concerned offences under these special enactments was dealt with by the legislature not only at the stage of consideration of the matter for anticipatory bail but even after the arrest at the stage of grant of regular bail as well. However, the provisions of the NDPS Act are distinct in that the restriction under Section 37 is at a stage where the matter is considered for grant of regular bail. No such restriction is thought of and put in place at the stage of consideration of matter for grant of anticipatory bail. On the other hand, the provisions of the 1989 Act are completely opposite and the restriction in Section 18 of the 1989 Act is only at the stage of consideration of matter for anticipatory bail and no such restriction is available while the matter is to be considered for grant of regular bail. Hypothetically, it is possible to say that an application under Section 438 of the 1973 Code may be rejected by the trial court because of express restrictions in Section 18 of the Act but the very same court can grant bail under the provisions of Section 437 of the Code of Criminal Procedure, immediately after the arrest.

A constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself to have its space. It is abhorrent to any kind of regressive approach. The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts.[63]

VIII. CONCLUSION

It is obvious to state that the Constitution is not a mere parchment; it derives its strength from the ideals and values enshrined in it. However, it is only when we adhere to constitutionalism as the supreme creed and faith and develop a constitutional culture to protect the fundamental rights of an individual that we can preserve and strengthen the values of the Constitution.[64]Similarly, a constitutional court cannot remain entrenched in a precedent, for the controversy relates to the lives of human beings who transcendentally grow. It can be announced with certitude that transformative constitutionalism asserts itself every moment and asserts itself

[63] *Joseph Shine* v. *Union of India*, AIR 2018 SC 4898: (2019) 3 SCC 39.
[64] See *Navtej Singh Johar* v. *Union of India*, AIR2018SC4321: (1976) 2 SCC 310; see also *Bato Star Fishing (Pvt) Ltd*. v. *Minister of Environmental Affairs and Tourism*, (2004) ZACC 15: MANU/SACC/0007/2004.

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The whole thing can be viewed from another perspective. What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts.[65] The Constitution expects and obliges the state to take special, legislative and administrative measures to remove their age old shackles and disabilities and bring them at par with the rest of the society through such measures. This definitely is the most outstanding aspect of the transformative character of the Constitution.

Thus, there seems to be no logical rationale behind this situation of putting a fetter on grant of anticipatory bail whereas there is no such prohibition in any way for grant of regular bail. However, it is a well settled principle of law that when a statutory provision is clear and not ambiguous, the court should not interpret it in such a manner that it loses its original meaning. But, in the *Mahajan case* [66], instead of literal interpretation of the law, the Supreme Court preferred purposive interpretation of the 1989 Act. The purposive construction of a provision means a construction which fulfils the legislative purpose of the Act. While constructing the provisions of the 1989 Act, its natural, plain and grammatical meaning is to be looked for. In constructing a provision, first the ordinary meaning of the words of the statute must be examined. If the plain and grammatical meaning leads to two or more constructions, that is, if it leads to ambiguity, only then does the question of purpose of statute come into play. Even so, purposive construction should be within limits, and not be extended to such a level that it crosses the line between construction and legislation. Again, in *Prathvi Raj Chauhan* case [67] the Apex Court again deliberated on the validity of the Sections 18A and 18A(i) of the 1989 Act. Hence, for public interest, it is the high time for the Apex Court to decide in the larger bench whether Section 18A of 1989 Act was arbitrary, unjust, irrational and violative of Article 21 of Constitution of India.

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[65] *Joseph Shine* v. *Union of India*, AIR 2018 SC 4898: (2019) 3 SCC 39.
[66] See *supra* note 53.
[67] *Prathvi Raj Chauhan* v. *Union of India*, AIR 2020 SC 1036: (2020) 4 SCC 727.

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