

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary  
Peer Reviewed

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# LIBERTY TO THE ACCUSED, PRISON TO THE UNPROVEN: BAIL JURISPRUDENCE IN INDIA A CRITICAL ASSESSMENT

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## ABSTRACT

*The jurisprudence of bail in India lies on the border between state coercion and constitutional liberty and tiringly does not conform to the doctrinal axiom according to which bail is the rule and jail the exception because most of the prison population is under undertrial, presumed innocent. This analytical research examines the constitutional provisions stocked in Articles 14 and 21, the provisions of law listed in the Code of Criminal Procedure, 1973, and the restricted bail regulations imposed by dedicated laws like the NDPS act, UAPA and PMLA. The paper will argue that Indian bail policy has shifted away over the years since a paradigm based on the rights concept, to a discretionary, and at some ways punitive concept based on the pivotal judicial pronouncements through systematic doctrinal and analytical study of the Indian bail policy. It puts into the limelight the systemic failures which encompass the normalisation of pre-trial detention, socioeconomic inequalities, judicial variances, and delays in due process. The research finishes off by suggesting reforms that can bring about a bail system that is based on humanity, proportionality, and a consistency of adhering to constitutional values.*

**Keywords:** Bail, Undertrial Prisoners, Article 21, Personal Liberty, CrPC, Special Laws, Presumption of Innocence, Criminal Justice Reform.

## CHAPTER 1: OVERVIEW

The basic principle of a constitutional democracy is liberty that forms the main basis of the relationship between the state and the individual. The criminal justice system is the most stringent in terms of this freedom, especially in the intersection of arrest, setting of the bail and the subsequent adjudication procedure. Although criminal proceedings presuppose innocence, bail is a decisive element either to keep an accused person in custody as an undertrial prisoner

or receive permission to await the trial as a free citizen.<sup>1</sup> Bail determinations take on an essential role in India, whereby the courts are often burdened by lengthy delays, and thus the pre-trial detention is virtually propofoliated to a kind of punishment by itself in a quasi-punitive way.<sup>2</sup>

The Indian Supreme Court has been making it clear time and again that pre-conviction placement in jail should be extraordinary and that individual freedom should not be reduced arbitrarily. Justice V.R. Krishna Iyer stated that bail was the rule, and jail was an exception in *State of Rajasthan v. Balchand*.<sup>3</sup> In *Gudikanti Narasimhulu v. Public Prosecutor*, the Court highlighted that the question of bail is not procedural only but deeply connected with the values of human rights and ability to make one choice and to enjoy personal liberty described in Article 21 of the Constitution, which contributes to this constitutional ethos.<sup>4</sup> The Court also indicated that the act of inhibiting liberty should not be based on arbitrary freedom but should devise powerful judicial principles.<sup>5</sup>

However, in a contrast, the reality is empirically very distinct of the doctrinal expectations. According to latest Prison Statistics provided by the National Crime Records Bureau the number of undertrial prisoners in India makes more than three-quarters of the total jail population.<sup>6</sup> Most of these pre-trial incarcerations are minor orailable offenses held but released without bail because of economic deprivation, lack of a lawyer, or bureaucracy. These undertrials are usually a significantly high percentage of economically and socially disadvantaged populations.<sup>7</sup> What it indicates is a fundamental staggering inconsistency between conventional and real-world operations of the criminal justice system and its Constitutional requirements.

The fact that this phenomenon has persisted indicates a problem beneath the teaching, but not the doctrine. Judicial discretion that is used in cases dealing with bail without clear statutory

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<sup>1</sup> See *Woolmington v. Dir. of Pub. Prosecutions*, [1935] A.C. 462 (H.L.) (U.K.) (establishing presumption of innocence as a golden thread of criminal law); see also *Narendra Singh v. State of M.P.*, (2004) 10 SCC 699, 704 (India).

<sup>2</sup> See *Sanjay Chandra v. Cent. Bureau of Investigation*, (2012) 1 SCC 40, ¶ 21 (India).

<sup>3</sup> *State of Rajasthan v. Balchand*, (1977) 4 SCC 308, 309 (India).

<sup>4</sup> *Gudikanti Narasimhulu v. Pub. Prosecutor*, (1978) 1 SCC 240, 242–43 (India).

<sup>5</sup> *Id.* at 243.

<sup>6</sup> Nat'l Crime Records Bureau, **Prison Statistics India 2022**, at 50–52 (Ministry of Home Affairs, Gov't of India, 2023).

<sup>7</sup> See *Hussainara Khatoon (I) v. State of Bihar*, (1980) 1 SCC 81, 84–85 (India).

directives often results in haphazard and uneven results in most cases.<sup>8</sup> Furthermore, the increase in the number of special statutes such as the Prevention of Money Laundering Act, 2002; the Narcotic Drugs and Psychotropic Substances Act, 1985; and the Unlawful Activities (Prevention) Act, 1967 have instituted tougher and exceptionally onerous regimes of bails which have normalised prolonged, pre-trial custody and supravitalized the presumption of innocence.<sup>9</sup> Further aggravated by the long-standing congestion of the jails and straddling hold-ups during investigations as well as trial procedures, these aspects create a network within which loss of freedom becomes commonplace instead of being an extraordinary experience.<sup>10</sup> Articles 14 and 21 of the Constitution point out that such a situation is a serious constitutional infraction. In *Maneka Gandhi v. Union of India*, the Supreme Court expanded the understanding of Article 21, by enriching it with the idea that any procedure determining the deprivation of personal liberty must be reasonable, fair, and just, contrary to capricious, irrational or oppressive.<sup>11</sup> As a result, the substantive due-process role provided in Article 21 is averted and the guarantee of equality before the law process provided in Article 14 is violated when the duration of the undertrial imprisonment is created and the bonds are automatically refused.<sup>12</sup>

In this essay, the author attempts to critically explore the hypocrisy that is embedded in Indian bail jurisprudence or a system that despite claiming to cherish liberty as enshrined in the Constitution in effect entraps many who are guilty without being proven guilty. It tries to examine how bail principles have emerged over time due to judicial pronouncements, how statutory frameworks and professional legislation affect personal freedom, and explores the structural and socioeconomic factors that skew the decisions made on the bail. In this discussion, the research aims at determining whether bail in India is a genuine tool of justice or has degenerated into a form of procedure that justifies pre-trial punishment.

## QUESTIONS FOR RESEARCH

- How has the Indian constitutional jurisprudence in regard to bail changed?
- What is the point on why the concept of bail not jail is different to the real bail?

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<sup>8</sup> See *Dataram Singh v. State of U.P.*, (2018) 3 SCC 22, ¶ 4 (India).

<sup>9</sup> See, e.g., *Narcotic Drugs & Psychotropic Substances Act*, No. 61 of 1985, § 37, India; *Unlawful Activities (Prevention) Act*, No. 37 of 1967, § 43D(5), India; *Prevention of Money Laundering Act*, No. 15 of 2003, § 45, India.

<sup>10</sup> See *In re Contagion of COVID-19 Virus in Prisons*, (2020) 5 SCC 313, ¶¶ 7–9 (India).

<sup>11</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 281 (India).

<sup>12</sup> See *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, 38 (India); *Maneka Gandhi*, (1978) 1 SCC at 281.

- How Do Special criminal laws change the bail framework?
- What are those reforms that should be made to balance bail law and constitutional principles of morality?

## GOALS

- To examine the underlying assumptions of the Indian Constitution on bail.
- To investigate a certain legislation and statutory provision in bail as provision in the Code of Criminal Procedure (CrPC).
- To evaluate judicial trends and disparities in the decisions relating to bail.
- To assess how the pre-trial detention is affected by the jury's practice of bail.
- To design a set of reforms to be applied to a system of bails that puts extra importance on the basic rights.

## TECHNIQUES

The investigative approach to the problem identified in this paper is both doctrinal and analytical based and the main documents, including statutes and court rulings, and secondary materials, including monographs, scholarly articles, law commissions, and data collected empirically, are taken into account. The critical work is based on the recent research on the continuity and development of Indian criminal law, as well as the current critical examination of the reforms in criminal justice regarding the constitution.

## CHAPTER 2: BAIL CONSTITUTIONAL FOUNDATION

### 2.1 - ARTICLE 21: THE RIGHT OF A PERSONAL LIBERTY AND BAIL

Still, no one is supposed to be denied life or personal liberty without a properly constituted legal procedure as provided in Article 21 of the Indian Constitution.<sup>13</sup> In *Maneka Gandhi v. Union of India*, the Supreme Court overthrew the established implications of a narrower sense of the term procedure established by law adding that any procedure that deprives an individual of liberty must be reasonable, fair and just and cannot be arbitrary, whimsical and oppressive.<sup>14</sup> Pre-trial detention highly affects the worth of individual liberty. The application of imprisoning an under-trial prisoner whose culpable is not yet established cannot be deemed as punitive

<sup>13</sup> INDIA CONST. art. 21.

<sup>14</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 281 (India).

action, as it is presumed that the individual is innocent before being found guilty,<sup>15</sup> thus the legitimacy of pre-conviction detention is only limited to certain regulatory purposes, including making sure that he or she attends the trial, does not create any form of interference to the legal system, and that his/her guilt does not harm the interests of others.<sup>16</sup> Any limitation of liberty extending beyond these small-scale defined reasons is an illegal criminalization of Article 21. In *Hussainara Khatoon v. State of Bihar*, the Supreme Court revealed the shocking fact that many detainees awaiting court were serving terms of incarceration that were far beyond the maximum duration, known to violate the offenses with which they were charged.<sup>17</sup>

The articulated decision of the Supreme Court in the identical case served to affirm that the statutory extended pre-trial detention of persons awaiting trial materially exceeds the maximum period of imprisonment provisionally established in relation to the alleged offence, and therefore declared the system of the said pre-trial detention as unconstitutional.

## 2.2 - THE PRESUMPTION OF INNOCENCE AS A HUMAN RIGHT

Although the presumption of innocence is not mentioned expressly in the Indian Constitution, it follows the principles of fair procedure, expressed in Articles 20, 21, and embodies therefore the universal conception of a human right.<sup>18</sup>

The Supreme Court has traditionally supported the concept of criminal justice by presumption of innocence. In *Narendra Singh v. State of M.P.*, the court affirmed that on the one hand each and every accused is considered to be innocent and that they should become the guiding consideration of judicial discretion on the issue of bail.<sup>19</sup> In *Dataram Singh v. State of Uttar Pradesh*, the court had decided that since there was still an assumption of innocence in a pending case the default position ought to rest in favor of bail.<sup>20</sup>

The erosion of the presumption of innocence that is occasioned by such imposition, through pre-trial detention, automatic or on discretion, equates to a contravention of the principles of

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<sup>15</sup> See *Woolmington v. Dir. of Pub. Prosecutions*, [1935] A.C. 462 (H.L.) (U.K.); *Narendra Singh v. State of M.P.*, (2004) 10 SCC 699, 704 (India).

<sup>16</sup> See *Sanjay Chandra v. Cent. Bureau of Investigation*, (2012) 1 SCC 40, ¶ 21 (India).

<sup>17</sup> *Hussainara Khatoon (I) v. State of Bihar*, (1980) 1 SCC 81, 84–85 (India).

<sup>18</sup> See *Noor Aga v. State of Punjab*, (2008) 16 SCC 417, ¶ 33 (India).

<sup>19</sup> *Narendra Singh*, (2004) 10 SCC at 704.

<sup>20</sup> *Dataram Singh v. State of U.P.*, (2018) 3 SCC 22, ¶ 2 (India).

justice and dignity that color Article 21 constitutionally.<sup>21</sup> In its turn, this implies that bail jurisprudence needs to serve as an essential protection to make sure that the presumption of innocence has an operative, and not just a nominal, meaning.

### **2.3 - ARTICLE 14 SUPPOSED EQUALITY AND NON-ARBITRARINESS.**

The Constitution in Art. 14, forbids arbitrary action by the state providing equality before the law and equal protection of the law.<sup>22</sup> The Supreme Court in the case *E.P. Royappa v. State of Tamil Nadu* stated that arbitrariness is opposite to equality and an arbitrary act is inherently unequal. Bail jurisprudence, which is marked by a large degree of judicial discretion, is highly affected by this theoretical connection between equality and arbitrariness.<sup>23</sup>

Discretionary as it is, the power to release or deny bail should not be arbitrarily determined. In *Dataram Singh*, the Court emphasized that, by adherence to the constitutional principles, the discretion on bail should be exercised reasonably, humanely and compassionately.<sup>24</sup> The guarantee in Article 14 is violated where accused persons in similar situations are treated differently without reasonable and logical purpose, or it is turned down under unclear conditions such as the severity of the crime committed, which is not related to the necessity.<sup>25</sup> Furthermore, socioeconomic differences in India show that bail predominately practices dissymmetry to the disadvantage of the under-privileged or marginalized who are unable to offer sureties or hire professional lawyers, hence undermining the offer of equal justice and depositing arbitrariness in the bail system. Hence, with regards to the constitutional perspective,<sup>26</sup> Article 14 requires that bail jurisprudence should be structured, logical and without class discrimination, such that the liberty should be an entitlement of everyone instead of an opportunity enjoyed by the rich.

## **CHAPTER 3: INDIAN STATUTORY LAW ON BAIL**

### **3.1 BAIL UNDER THE CODE OF CRIMINAL PROCEDURE IN 1973**

The Code of Criminal Procedure, 1973 (CrPC), the attempt to balance legitimate interests of criminal-justice administration and the fundamental right to personal liberty<sup>27</sup>, is the primary

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<sup>21</sup> See *Rakesh Kumar Paul v. State of Assam*, (2017) 15 SCC 67, ¶ 38 (India).

<sup>22</sup> **INDIA CONST.** art. 14.

<sup>23</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, 38 (India)

<sup>24</sup> *Dataram Singh*, (2018) 3 SCC at ¶ 4.

<sup>25</sup> See *Arnab Manoranjan Goswami v. State of Maharashtra*, (2021) 2 SCC 427, ¶ 68 (India).

<sup>26</sup> See *Moti Ram v. State of M.P.*, (1978) 4 SCC 47, 52–53 (India).

<sup>27</sup> Code of Criminal Procedure, No. 2 of 1974, India.

legislative source of regulation of the nature and extent of judicial discretion in the granting of bail in India, as it classifies criminal offences as bailable and non-bailable.

It is a right of the accused of bailable offences provided by section 436 CrPC,<sup>28</sup> where such an offender would have to be released on bail by the police or the court failing which it would constitute an unlawful defeat of liberty.<sup>29</sup>

In case a case is distinguished before a magistrate, the bail on non-bailable offences is regulated in Section 437.<sup>30</sup> Unlike Section 436, the proviso reveals humanitarian inclination in the statutory framework in that the bail under this provision is discretionary, thus limited especially in cases where the sentence of the offence is life imprisonment or death penalty, or that there are significant reasons to believe that the accused is guilty.<sup>31</sup>

In Section 438 the matter of anticipatory bail is introduced which will enable the High Courts and Courts of Session to grant bail before an arrest,<sup>32</sup> this will protect the community against arbitrary or willful arrests, and also guarantee them freedom before they are detained.<sup>33</sup>

Under section 439, the High Courts and the Courts of Session have a special power to grant bail on non-bailable offences and impose conditions appropriate.<sup>34</sup> 439 gives these courts more discretion, than the magistrate; they can give bail in cases involving severe offenses, and they can suspend or vary bail conditions.<sup>35</sup>

Combined together, these lines show that there is a legislative effort to balance the interests of society and personal freedoms. Nonetheless, the CrPC does not provide detailed legal criteria on how the bail discretion should be used. The subjective and, in some respects, inattentive application of bail decisions is due to a lack of organised norms, as, in consequence, they are determined more by the views of the individual judges than by any clear-cut standards, based on this statutory silence.<sup>36</sup>

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<sup>28</sup> *Id.* § 436.

<sup>29</sup> *See* Rasiklal v. Kishore Khanchand Wadhvani, (2009) 4 SCC 446, ¶ 9 (India).

<sup>30</sup> CrPC § 437.

<sup>31</sup> *Id.* § 437(1)(i).

<sup>32</sup> *Id.* § 438.

<sup>33</sup> Law Comm'n of India, **41st Report on the Code of Criminal Procedure, 1898**, ¶ 39.9 (1969).

<sup>34</sup> CrPC § 439.

<sup>35</sup> *See* Prahlad Singh Bhati v. NCT of Delhi, (2001) 4 SCC 280, ¶ 8 (India).

<sup>36</sup> *See* Dataram Singh v. State of U.P., (2018) 3 SCC 22, ¶ 4 (India).

### 3.2 INDIVIDUAL FREEDOM AND PREEMPTIVE BAIL

The anticipatory bail in Section 438 of the Indian criminal law is one of the most important statutory provisions on protecting the individual freedom. A Supreme Court Constitutional Bench decision was given on the case, *Gurbaksh Singh Sibbia v. State of Punjab* that Article 21 of the Constitution should be considered when interpreting Section 438 which is a procedural provision concerned with personal liberty.<sup>37</sup> The Court refused to support either strict or limited interpretations and stressed that anticipatory bail was a vital part of the law system and it was not an extraordinary measure.<sup>38</sup>

In *Sibbia*, the Court also made it clear that discretion should be used in good sense and that no fixed rules can be put down on the granting of an anticipatory bail that will lead to exclusion of the main aim of the provision<sup>39</sup>.

The imposition of time restrictions on anticipatory bail was a notable example of some of the restrictive trends in later case law. But in the case of *Sushila Aggarwal v State (NCT of Delhi)*,<sup>40</sup> the Constitutional Bench, State (NCT of Delhi) settled this matter emphatically, with the view that anticipatory bail could not be arbitrarily restricted as urged by Article 21 of the Constitution it was important to remember that personal liberty was the paramount consideration.<sup>41</sup>

Based on this, judicial interpretation considers Section 438 as a key constitutional protective choice against arrest power-abuse and reiterates the fact that freedom must be secured in the initial phases of the criminal case.

### 3.3 REVERSE BURDENS AND SPECIAL STATUTES

The application of strict and exclusive regimes of bail over several special criminal laws has drastically changed the bail jurisprudence in India despite the generally liberal nature of the CrPC. These laws often cause reverse burdens and even greater demands thus diminishing the discretion of the judicial process and overly favouring imprisonment.

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<sup>37</sup> *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565, 581 (India).

<sup>38</sup> *Id.* at 586

<sup>39</sup> *Id.* at 585.

<sup>40</sup> *Sushila Aggarwal v. State (NCT of Delhi)*, (2020) 5 SCC 1, ¶ 92 (India).

<sup>41</sup> *Id.* ¶ 47.

Indicatively, section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) stated that Bail of the offence concerning commercial quantity of the drug could only be conferred under circumstances where the court believed that the accused had no criminal intent, and that criminal could not repeat the crime during his or her bail term.<sup>42</sup>

Similarly, the Unlawful Activities (Prevention) Act, 1967 (UAPA) in Section 43D(5) prohibits the issuance of bail in the event that the court holds that the charges brought against the accused are prima facie valid after scrutiny of the charge sheet or case diary.<sup>43</sup>

*National Investigation Agency v Zahoor Ahmad Shah Watali*. The Supreme Court construed this literally, according to *Zahoor Ahmad Shah Watali*, the judges are under obligation to accept the case presented by the prosecution at the surface, and not to carry out an in-depth overview of the evidence at the bail level.<sup>44</sup>

This interpretation has made the provision of bail under UAPA a very difficult exercise even in the scenario of prolonged detention.

Similarly, to NDPS Act, the Prevention of Money Laundering Act, 2002 (PMLA) initially provided two requirements in the form of Section 45. The Supreme Court found such requirements unconstitutional in the case of *Nikesh Tarachand Shah v. Union of India* with the ground that they were violating the Articles 14 and 21<sup>45</sup>. They were anyway reinstated with changes in the legislation and were then considered legal by the Court in *Vijay Madanlal Choudhary v. Union of India*.<sup>46</sup>

These special statutes create an effect of reversing the presumption of innocence by making the accused to establish innocence at the threshold level to create a culture of pre-trial detention that may be several months in duration, therefore giving rise to grave constitutional issues with proportionality, liberty and fairness<sup>47</sup>.

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<sup>42</sup> Narcotic Drugs & Psychotropic Substances Act, No. 61 of 1985, § 37, India.

<sup>43</sup> Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5), India.

<sup>44</sup> Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali, (2019) 5 SCC 1, ¶ 23 (India).

<sup>45</sup> Nikesh Tarachand Shah v. Union of India, (2018) 11 SCC 1, ¶ 46 (India).

<sup>46</sup> Vijay Madanlal Choudhary v. Union of India, (2022) 10 SCC 353, ¶ 303 (India).

<sup>47</sup> See Union of India v. K.A. Najeeb, (2021) 3 SCC 713, ¶ 16 (India).

## CHAPTER 4: THE BAIL LAW JUDICIAL DEVELOPMENT

Bail jurisprudence has been put together more or less through judicial interpretation in India. The Supreme Court has gradually come to view bail as an inseparable aspect of personal freedom under Article 21, as it has strived, with differing degrees of success, to turn bail into a privilege and make it a right.

### 4.1. THE INFLUENTIAL LIBERALS OF THE EARLY YEARS.

Justice V.R. Krishna Iyer in a string of ground breaking judgments of the late 1970s, stated the foundation of a liberal bail doctrine in India. In *State of Rajasthan v Balchand* the Supreme Court claimed that the bail is the rule and jail is the exception, whereby it argued that pre-trial detention was to be fulfilled in extraordinary situations only.<sup>48</sup> The Court pointed out deprivation of liberty had to be based on strong grounds which are consistent with constitutional norms and warned against the regular refusal of the bail.<sup>49</sup>

In *Gudikanti Narasimhulu v. Public Prosecutor*, Justice Krishna Iyer broadened the doctrine and defined the issue of bail as one that balances the three principles of liberty, justice, security of the people and the weight of the state treasury.<sup>50</sup> He believed that decisions to determine bail are to be guided by human rights and determination to provide release or deny is expected to be a wise compromise between the right of the accused to a freedom and the interest of the society.<sup>51</sup> The ruling, therefore, imparted a certain humanitarian and rights-based bias to bail jurisprudence.

In *Sanjay Chandra v Central Bureau of Investigation*, the Court, repeating the liberal approach, cautioned that the seriousness of the offence though considerably high cannot be used as the only factor to deny bail.<sup>52</sup> It has reiterated that the main purpose behind bail is the guaranteeing of the accused appearing in court during trial and that the said imprisonment should not play the role of punishment.<sup>53</sup> The Court further emphasized that incarceration should coincidental with conviction is to be highly restricted as deprivation of liberty prior to conviction is against the presumption of innocence.<sup>54</sup>

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<sup>48</sup> *State of Rajasthan v. Balchand*, (1977) 4 SCC 308, 309 (India).

<sup>49</sup> *Id.*

<sup>50</sup> *Gudikanti Narasimhulu v. Pub. Prosecutor*, (1978) 1 SCC 240, 242 (India).

<sup>51</sup> *Id.* at 243

<sup>52</sup> *Sanjay Chandra v. Cent. Bureau of Investigation*, (2012) 1 SCC 40, ¶ 21 (India).

<sup>53</sup> *Id.* ¶ 22.

<sup>54</sup> *Id.* ¶ 24.

## 4.2 BAIL IN THE MANDATE OF THE CONSTITUTION

The Supreme Court also transformed the issue of bail to be viewed as a discretion of a case, into being a necessity under the constitution codified under Articles 14 and 21. In *Dataram Singh v State of Uttar Pradesh*, the Court once again held State of Uttar Pradesh 1 that it is the rule to grant bail and an exception to refuse.<sup>55</sup> It also brought out the fact that all accused are innocent until they are proven guilty, and that presumption should be used in bailing them out.<sup>56</sup> The Court also observed, that considering the basic promise of personal freedom discretion should be deliberate, humane and compassionate when handling a bail case.<sup>57</sup>

*Arnab Manoranjan Goswami v. State of Maharashtra* to a great extent, strengthened this constitutional viewpoint.<sup>58</sup> The Court noted that courts are called upon to be watchdogs of the quay vitae to protect fundamental rights and strongly denounced the misuse of state power to suppress individual freedom.<sup>59</sup> It was on the basis of the judgment that in cases where state arbitrariness threatens liberty, bail is of particular importance, and constitutional courts could not be mere bystanders of abuses. The decision reiterated that bail is a key component of constitutional governance since the judiciary specifically related it to the responsibility of safeguarding liberty.<sup>60</sup>

## 4.3- COVID -19 AND THE UNDER-TRIAL CRISIS

The COVID industry had a sharp look at the constitutional problem of undertrial imprisonment. The Supreme Court of Canada had taken sui motu notice in Contagion of COVID-19 Virus in Prisons that the danger due to the extended stay of untrials prisoners in overcrowded jails as a threat to their right to life under Article 21.<sup>61</sup> To alleviate overcrowding in the prisons, the Court ordered the States and Union Territories to form High-powered committees that will look into the release of prisoners on parole or under interim bail.<sup>62</sup>

By positioning decongestion as a question about public health and human dignity and not prison administration, the intervention emphasized the constitutional aspects of bail in extreme

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<sup>55</sup> *Dataram Singh v. State of U.P.*, (2018) 3 SCC 22, ¶ 2 (India)

<sup>56</sup> *Id.* ¶ 3.

<sup>57</sup> *Id.* ¶ 4.

<sup>58</sup> *Arnab Manoranjan Goswami v. State of Maharashtra*, (2021) 2 SCC 427 (India).

<sup>59</sup> *Id.* ¶ 68.

<sup>60</sup> *Id.* ¶¶ 69–70.

<sup>61</sup> *In re Contagion of COVID-19 Virus in Prisons*, (2020) 5 SCC 313, ¶ 7 (India).

<sup>62</sup> *Id.* ¶ 11.

conditions 1.<sup>63</sup> Therefore, the pandemic boosted the knowledge that bail should not only be viewed as an instrument of life and dignity protection in times of systemic crises but a procedural protection as well.

#### 4.4 - LATEST DEVELOPMENT 4.4

The case of *Satender Kumar Antil v. Central Bureau of Investigation* is a modern phenomenon in the law of bail. In the present case, the Supreme Court made careful scrutiny on the issue of arrest and bail procedures that frequent and unreasonable arrests are leading to jails congestion.<sup>64</sup> The Court decided that the arrests are not compulsory and should be supported by the necessity standard of necessity.<sup>65</sup>

In order to make bail a normative, which is not unusual, the Court has given elaborate guidelines to classify the offending and give procedural measures to grant bail.<sup>66</sup> It focused on the fact that mechanical arrest and lack of bail breach the presumption of innocence and betrays the Article 21 mission.<sup>67</sup> This case is aimed at justifying the bail procedures and making them consistent with constitutional principles of freedom and proportionality.

#### 4.5 BARS OF THE CONSTITUTION WHICH HAVE BEEN STATUTORY BARS

The Court demonstrated in the case of *Union of India v. K.A. Najeeb* prevailing constitutional principles on the issue of bails.<sup>68</sup> It was believed that statutory restrictions are not capable of exceeding the constitutional powers of the courts to protect individual liberty against a rigid bail bar in Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967.<sup>69</sup> The prisoner thus held in custody over five years awaiting the time when trial should take place was, on the reason that the long imprisonment and excessive delay undermined Article 21, allowed on bail.<sup>70</sup>

By reiterating the fact that constitutional courts have the prerogative of granting bail where the fundamental right of an individual is placed in danger, despite the existence of restrictive

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<sup>63</sup> *Id.* ¶¶ 8–9.

<sup>64</sup> *Satender Kumar Antil v. Cent. Bureau of Investigation*, (2022) 10 SCC 51 (India)

<sup>65</sup> *Id.* ¶ 64.

<sup>66</sup> *Id.* ¶¶ 70–76.

<sup>67</sup> *Id.* ¶ 67.

<sup>68</sup> *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 (India).

<sup>69</sup> *Id.* ¶ 15.

<sup>70</sup> *Id.* ¶ 17.

special regulations, the decision was a turning point towards restoring the balance between the fact of state security and the freedom of a person<sup>71</sup>.

## **CHAPTER 5: THE CRITICAL EXAMINATION OF FIGHTING VS. BEING INCARCERATED**

The criminal justice system and the daily realities of India paint a stark fundament of contradiction despite the many occasions in which the constitutional courts have manifested a liberty-focused approach to bail. Bail is regularly an optional benefit of socioeconomic standing, statutory necessity as well as bureaucratic procrastination rather than being a matter of course in which an underlying presumption of innocence is already in place. The theological and structural weaknesses that give life to the dichotomy of freedom of the accused, imprisonment of the unproven is critically explored in this chapter.

### **5.1 THE BAIL PRACTICE PARADOX**

The availability of bail is highly unequal, even with liberal decisions made in the court. The requirements of posting the sureties financially and of local sureties, and procedural difficulties, pose a serious hindrance to economically disadvantaged individuals who are socially marginalized to begin with<sup>72</sup>. In *Moti Ram v. State of Madhya Pradesh*, the Supreme Court stressed that the bail cannot be made a luxury of the rich and a punishment of the poor person as the courts must take a practical, humane approach and take into consideration the social economic background of the accused person.<sup>73</sup>

However, worse still, structural bias continues to exist over forty years on. Based on the available empirical research and statistical data in the prison setting, there is a large percentage of the under trial prisoners who are also not being detained due to the denied bail through a court of law but rather due to their inability to meet highly rigorous bail requirements.<sup>74</sup> This gap shows the distance between the social economic impediments to the bail practice and the doctrinal adherence to equality and thus eroding the egalitarian promise of Articles 14 and 21 of the Constitution in a society where liberty is essentially commodified.

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<sup>71</sup> *Id.* ¶ 16.

<sup>72</sup> See Law Comm'n of India, **268th Report on Bail Reforms**, ¶¶ 3.1–3.4 (2017).

<sup>73</sup> *Moti Ram v. State of M.P.*, (1978) 4 SCC 47, 52 (India).

<sup>74</sup> Nat'l Crime Records Bureau, **Prison Statistics India 2022**, at 50–52 (Ministry of Home Affairs, Gov't of India, 2023).

## 5.2 UNRESTRICTED DISCRETION

The lack of clear legal provisions to guide judge discretion is the primary weakness of Indian bail jurisprudence. Despite all that the expression of Section 437 and 439 of the Code of Criminal Procedure, 1973 provides to judges extremely broad discretion, it does not establish all the conditions necessary to grant or deny bail,<sup>75</sup> the judgement on the latter issue often being based on such scarcely definite factors as the seriousness or gravity of the crime, and does not involve a definitive determination of whether or not it is necessary to keep someone in prison to fulfill the purposes of justice.<sup>76</sup>

In *Dataram Singh v. State of Uttar Pradesh*, the Supreme Court cautioned bias in bail discretion should be regulated by the very principles of liberty and justice and not arbitrarily.<sup>77</sup> In reality, though, judges tend to impose unequal verdicts on similarly situated defendants, basing their decisions on personal considerations.<sup>78</sup> In *E.P. Royappa v. State of Tamil Nadu*, even this vagary not only undermines the legal certainty but also would be against the implied word of non-arbitrariness in the constitutional Article 14.<sup>79</sup>

## 5.3 THE NORMALIZED DETENTION AND SPECIAL LAWS

The balance between the freedom and the authority of the state has changed radically with the establishment of the severe bail regimes that are imposed by the special criminal laws. The default that results in detention is supported by such provisions like Section 37 of the NDPS Act, section 43 D (5) of the UAPA, and section 45 of the PMLA that create virtually impossible pre-requisites to bail.<sup>80</sup>

The meaning given to Section 43D(5) of the UAPA by the Supreme Court in the case of *National Investigation Agency v. Zahoor Ahmad Shah Watali*.<sup>81</sup> One example of such shift and its consequences is Zahoor Ahmad Shah Watali, an illustration of which is that, provided such charges seem to be prima facie true, the Court has no option but to accept the case presented by the prosecution at the bail stage without even inquiring about the probative value of the

<sup>75</sup>Code of Criminal Procedure, No. 2 of 1974, §§ 437–439, India.

<sup>76</sup> See *Prahlad Singh Bhati v. NCT of Delhi*, (2001) 4 SCC 280, ¶ 8 (India).

<sup>77</sup> *Dataram Singh v. State of U.P.*, (2018) 3 SCC 22, ¶ 4 (India).

<sup>78</sup> See *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, ¶ 112 (India).

<sup>79</sup> *E.P. Royappa v. State of Tamil Nadu*, (1974) 4 SCC 3, 38 (India).

<sup>80</sup> Narcotic Drugs & Psychotropic Substances Act, No. 61 of 1985, § 37, India; Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5), India; Prevention of Money Laundering Act, No. 15 of 2003, § 45, India.

<sup>81</sup> *Nat'l Investigation Agency v. Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 (India).

evidence at hand.<sup>82</sup>

The policies undermine the presumption of innocence and legitimize extended pre-trial custody as a standard criminal-justice practice and do so to such an extent that preventive detention emerges as a similar policy, which is subject to serious objections under the constitutional language in articles 14 and 21.<sup>83</sup>

#### 5.4 DELAY AS PENALTIES

The process of delay as the punishment in itself is, perhaps the most disturbing by-product of the strict bail laws. A case may take years to go through a system that is over-stretched with judicial backlogs and lack of investigating capacity.<sup>84</sup> As a result, when an accused is denied bail under specific conditions, the accused will spend more time in jail than the anticipated time serve by conviction or even acquittals.<sup>85</sup>

In *Sanjay Chandra v. Central Bureau of Investigation*, the Supreme Court, specifically, central bureau of investigation pre-trial detention as a punitive measure is forbidden, but it is only meant to ensure that the accused person shows up at the trial; as such, long undertrial detention is a system reality.<sup>86</sup> *Hussainara Khatoon v. State of Bihar*, this quandary has already been recognised by the Court many times, but structural reform on a large scale has eluded it.<sup>87</sup>

Constitutionally, such a kind of imprisonment contravenes the requirement by Article 21 of just fair and reasonable procedure, as well as, the right to trial promptly.<sup>88</sup> The very process of criminalisation itself becomes a punishment where freedom is withheld by the delay of the institution instead of the verdict of guilt and thus the principles of due process are compromised.

#### 5.5 BAIL AS A COERCIVE INSTRUMENT

The possibility of the bail to serve as a coercive tool is another unpleasant aspect of its usage. The institutional power or political forces often use the arrest and the denial of bail of a

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<sup>82</sup> *Id.* ¶ 23.

<sup>83</sup> *See* Union of India v. K.A. Najeeb, (2021) 3 SCC 713, ¶ 15 (India).

<sup>84</sup> *See* Law Comm'n of India, **245th Report on Arrears and Backlog** (2014).

<sup>85</sup> *See* Rakesh Kumar Paul v. State of Assam, (2017) 15 SCC 67, ¶ 38 (India).

<sup>86</sup> *Sanjay Chandra v. Cent. Bureau of Investigation*, (2012) 1 SCC 40, ¶ 21 (India).

<sup>87</sup> *Hussainara Khatoon (I) v. State of Bihar*, (1980) 1 SCC 81, 84–86 (India).

<sup>88</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 281 (India).

particular person at times as a tool of retaliation, coercion, or confession extraction.<sup>89</sup>

In *Arnab Manoranjan Goswami vs. State of Maharashtra*, without the state government, the Supreme Court warned about these abuses of state power and the judicial system had to be careful so as not to mobilise the crime system to repress freedom of speech or intimidate individuals.<sup>90</sup>

The enforcement of bail on the condition of obedience to the pressure of the investigation and not on unbiased legal principles is what harms not only the right to free speech but also the principle of equality, allowing the misuse of this right, which is inconsistent with constitutional morality.<sup>91</sup>

## CHAPTER 6: CONCLUSION, RESULTS AND RECOMMENDATION

### CONCLUSION

There is confusion between the logic of liberty and the Indian bail law practices. The inertia of the system, regulatory constraints and the existence of socioeconomic disparities have minimized the idea of bail as an exercise of discretion over its mandatory right, despite the enthusiasm of the courts in their right acknowledgments in the constitution. As a result, the trial as such is punitive and the innocent are incarcerated in the criminal process. Without the promise of Article 21 being realised, the concept of bail will not be realised unless it is reevaluated as a constitutional right and not a procedural compromise.

### FINDINGS

- DoctrinePractice Gap: There is a lack of judicial ethos of bails not jail as routinely as denials of bails.
- Socioeconomic Bias: Under-trial incarceration affects the poor disproportionately.
- Domination over Special Laws: Preferences: NDPS, UAPA and PMLA establish walls placed almost on the actors of biasing the bail.
- Slow trials transform pre-trial imprisonment into an implied penalty, which amounts to injustice through delay.
- Ad hoc Discretion: The result of this is arbitrariness due to the absence of standards.

<sup>89</sup> See *Joginder Kumar v. State of U.P.*, (1994) 4 SCC 260, 267 (India).

<sup>90</sup> *Arnab Manoranjan Goswami v. State of Maharashtra*, (2021) 2 SCC 427, ¶ 68 (India).

<sup>91</sup> See *Nandini Satpathy v. P.L. Dani*, (1978) 2 SCC 424, 438 (India).

## IDEAS

- Statutory Bails Guidelines: It has to: fix clear standards in the CrPC in order to control judicial discretion.
- Presumption of Release: Release must be the rule except where absolutely necessary, with the exception being that of incarceration.
- Revive the presumption of innocence and ease harsh bail conditions via the change of special laws.
- Non-Monetary Conditions: Post the personal relationships and obliging reports to replace the financial guarantees.
- Speedy Trial enforcement is time constraint on the trial in cases involving extended state of incarceration.
- Boost Legal Aid: Access to high quality counsel during bail.
- Raising awareness to the ideals of constitutional liberty in the eyes of the law and within the self of the judiciary should become part of judicial education.
- Data and Accountability: Under-trial populations should be assessed by the High Courts on a regular basis.

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