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# BAIL JURISPRUDENCE AND THE PRESUMPTION OF INNOCENCE: A COMPARATIVE STUDY OF INDIA, THE UNITED STATES AND ENGLAND AND WALES

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## Abstract

Bail plays an important role within the criminal justice system as it allows personal liberty to be upheld whilst proceeding with the criminal process. Whilst the presumption of innocence can be given to those who are accused of offences, they may be held in custody which can cause problems. This can have an impact on their employment, family life, financial situation and defence.

This paper looks at bail law within three countries. India, the United States and England and Wales. It looks at the law surrounding bail, and how courts aim to strike a balance between personal liberty and public safety. India will be looked at by focussing on the Bharatiya Nagarik Suraksha Sanhita, 2023 and important cases. The U.S. will look at how the Bail Reform Act of 1984 provides a framework. Finally, England and Wales will be looked at with reference to the Bail Act 1976 and European Convention on Human Rights.

This paper will also look at how bail ties in with the presumption of innocence, equality and personal liberty. It is argued that bail decisions should be made on a case by case basis, rather than an extra punishment. Although each country has different laws they all have to strike a balance between the rights of the accused and legitimate public interest.

## 1. Introduction

The criminal justice system is designed to protect society whilst protecting individual rights. When an individual has been accused of an offence there are legal processes that can be followed to investigate and prosecute. An important consideration is whether the accused should be detained during the trial or if they should be released with conditions.

Bail is used so that the accused can be released from prison whilst their case is being dealt with. Conditions will be set by the court, such as attending court when required, not to interfere with any witnesses and not commit any further offences. The purpose of bail is not to determine whether someone is guilty or innocent but to ensure that the accused will attend the legal processes and that the investigation and trial are not hindered.

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The presumption of innocence is very much related to bail. Individuals should not be presumed guilty just because they are accused. They must be proven guilty at a fair trial. This is recognised in international human rights law. For example, Article 14 (2) of the International Covenant on Civil and Political Rights and Article 6 (2) of the European Convention on Human Rights. [1]

However, not everyone will be released automatically. The seriousness of the alleged offence, the likelihood of the accused fleeing, influencing witnesses and committing further offences can be taken into consideration in court. Ensuring this is done fairly is important.

In India, the Supreme Court has acknowledged many times that bail relates to an individual's liberty. The well-known principle that 'bail is a rule and jail is an exception' has influenced bail law in India. [2] However, issues can arise such as long trials, overcrowding in prisons.

Legislation varies between countries. In India, bail is mainly governed by statute. Constitutional values and judicial interpretation play a part. In the United States there is a federal bail system governed by the Bail Reform Act 1984. However, each state has its own laws. In England and Wales there is a general statutory right to bail governed by the Bail Act 1976. There are some exceptions.

This paper will look at these 3 different jurisdictions to see how they deal with bail. It will also look at whether the legislation provides a fair balance between an individual's liberty, public protection and justice.

## 2. Literature Review

Bail is an area of law that has received much discussion throughout the literature. There are many ways bail can be looked at such as constitutionally, procedurally, economically and regarding human rights.

The Indian Supreme court have made a significant difference to the principles surrounding bail. They have stated that 'in general if should be given priority over pre-trial detention' [3]. In Gudikanti Narasimhulu v. Public Prosecutor they state that, 'bail is granted after considering the importance of individual liberty and justice'.[4]

Anup Surendranath and Gale Andrew have produced research that looks into the bail decisions

[1] International Covenant on Civil and Political Rights art. 14(2), Dec. 16, 1966, 999 U.N.T.S. 171; European Convention on Human Rights art. 6(2), Nov. 4, 1950, 213 U.N.T.S. 221.
[2] State of Rajasthan v. Balchand, (1977) 4 SCC 308 (India); Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40 (India).
[3] State of Rajasthan v. Balchand, (1977) 4 SCC 308 (India).
[4] Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240 (India).

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that are made by the courts in Delhi. They found there were issues with bail being inconsistently applied. They have also identified that some decisions do not clearly consider why bail is granted (to prevent risk whilst on trial) and what should be considered regarding the trial[5]. This is important as it shows that there are principles in place but they may not always be consistently applied. The Centre on the Death Penalty at National Law University Delhi have produced a report about the issues faced when making bail decisions. The report has highlighted that there is a need for more transparency and consistency within the courts[6].

There has been academic discussion surrounding anticipatory bail which has helped produce an understanding of individual liberty in India. Malika Galib Shah and Vaibhav Chadha have looked into the development of anticipatory bail. They have explained how the judiciary have interpreted anticipatory bail[7]. This has been useful in understanding how Indian law has tried to prevent unnecessary arrests. Within the United States there has been significant research looking into money bail and pre-trial detention. Megan T. Stevenson has looked into how those unable to pay bail can be negatively affected within their criminal cases. This research suggests that those unable to pay bail will be detained and therefore have a higher chance of being convicted and receiving longer sentences[8]. Will Dobbie and Crystal S. Yang have looked into the issues with trying to balance individual rights with public interests within the American pre-trial system[9].

Research has also been completed on England and Wales. Tom Smith has researched how pre-trial detention is used and what factors affect remand decisions[10]. He has also looked into how the law and practices have changed within England and Wales regarding pre-trial detention[11].

Overall the current literature has shown that bail is not just a procedural issue but has a direct impact on individual liberty, equality and fairness within the criminal process. This comparison will look at these issues within 3 legal systems.

[5] Anup Surendranath & Gale Andrew, Confused Purposes and Inconsistent Adjudication: An Assessment of Bail Decisions in Delhi's Courts, 19 ASIAN J. COMPAR. L. 294 (2024).
[6] CENTRE ON THE DEATH PENALTY, NATIONAL LAW UNIVERSITY DELHI, LEGAL ANALYSIS OF BAIL DECISION MAKING (2019).
[7] Malika Galib Shah & Vaibhav Chadha, Evolution of Law on Anticipatory Bail in India, 12 JANUS.NET 251 (2021).
[8] Megan T. Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, 34 J.L. ECON. & ORG. 511 (2018).
[9] Will Dobbie & Crystal S. Yang, The U.S. Pretrial System: Balancing Individual Rights and Public Interests, 35 J. ECON. PERSP. 49 (2021).
[10] Tom Smith, 'Rushing Remand'? Pretrial Detention and Bail Decision Making in England and Wales, 60 HOWARD J. CRIME & JUST. 46 (2021).
[11] Tom Smith, The Practice of Pre-trial Detention in England & Wales – Changing Law and Changing Culture, 28 EUR. J. ON CRIM. POL'Y & RSCH. 435 (2022).

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## 3. Constitutional and Statutory Framework

### *3.1 India*

Personal Liberty is protected under article 21 of the Indian Constitution. It says that "no person shall be deprived of his life or personal liberty except in accordance with procedure established by law." Although there is no express mention of the right to bail, the Courts have interpreted the definition of personal liberty widely.

The Supreme Court has stated that in the case of Maneka Gandhi v. Union of India that "procedure established by law" must be "fair, just and reasonable"[12].The principle that bail is the norm and jail is the exception was recognised in State of Rajasthan v. Balchand[13]. Furthermore, the Supreme Court have recognised in Gudikanti Narasimhulu that factors such as the circumstances of the accused, the nature of the allegation and the interests of justice must be taken into consideration[14]. In Sanjay Chandra v. Central Bureau of Investigation, the Supreme Court recognised that detention prior to conviction must not turn into punishment. The purpose of bail is to guarantee that the accused will appear at trial[15], The Supreme Court recognised the importance of the presumption of innocence and personal liberty in Dataram Singh v. State of Uttar Pradesh[16]. Similarly, in Satender Kumar Antil v. Central Bureau of Investigation it was recognised that there is a need to avoid unnecessary arrests and that improvements can be made to the approach of the courts in relation to bail[17].

The current statute is primarily governed by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). This has replaced the Code of Criminal Procedure, 1973. This came into force on 1 July 2024. Chapter XXXV of the BNSS outlines provisions relating to bail and bonds. This includes sections 478 to 496[18]. Section 478 relates to bail in bailable offences. In general, a person accused of an offence will be entitled to bail. However, the provisions recognise that not everyone has the same financial situation. If the accused cannot provide a bail bond within one week of arrest, they are deemed to be a person of limited means[19]. Section 479 relates to the maximum time that an undertrial prisoner can be detained. In general, if an accused person has been detained for half of the maximum term of imprisonment prescribed for the offence, they can be released on bail. However, if it is their first offence then they can be released 1/3

[12] Maneka Gandhi v. Union of India, (1978) 1 SCC 248 (India).
[13] Balchand, supra note 3.
[14] Gudikanti Narasimhulu, supra note 4.
[15] Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40 (India).
[16] Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22 (India).
[17] Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51 (India).
[18] Bharatiya Nagarik Suraksha Sanhita, 2023, ch. XXXV, §§ 478–496, No. 46, Acts of Parliament, 2023 (India).
[19] Bharatiya Nagarik Suraksha Sanhita, 2023, § 478, No. 46, Acts of Parliament, 2023 (India).

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of the maximum term. There are some exceptions and limitations to this rule. This includes offences that carry a punishment of death or life imprisonment[20]. Section 480 relates to bail for non-bailable offences. These offences are at the discretion of the Court and must follow the conditions set out in the law. The seriousness of the offence, any evidence available and other considerations may be taken into consideration.

Section 482 relates to anticipatory bail. If someone has reason to believe that they may be arrested for a non-bailable offence then they can seek directions from the appropriate court to be released on bail. The principles behind anticipatory bail were outlined by the Supreme Court in Gurbaksh Singh Sibbia v. State of Punjab. However, this was later considered by a larger bench in Sushila Aggarwal v. State (NCT of Delhi)[21]. Section 483 gives the High Court and Court of Session special powers. This allows higher courts to grant bail and set suitable conditions.

The BNSS sets out different rules for different types of offences. Bailable offences, non-bailable offences, anticipatory bail and undertrial prisoners each have their own rules. Special laws may also introduce further limitations. For example, Section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 introduces a special limitation on granting bail. This shows that the general principles of bail may not apply in the same way under special legislation.

### *3.2 United States*

The US uses a federal and state based approach to bail. The Eighth Amendment to the United States Constitution provides that excessive bail shall not be demanded. This seeks to provide protection from excessive bail charges but does not give an absolute right to release[22].

The federal system is mainly governed by the Bail Reform Act 1984, found in sections 3141-3150 of Title 18 United States Code. Most importantly section 3142 explains how the court decides whether to release or detain an accused prior to trial.[23] Section 3142(b) provides that the accused should be released "on his own recognisance or on an unsecured appearance bond" unless this would not reasonably assure their attendance in court or the safety of others and the community. If the accused cannot be released without conditions section 3142(c) provides that the court can place conditions on the accused whilst they are on bail. Conditions may include

[20] Bharatiya Nagarik Suraksha Sanhita, 2023, § 479, No. 46, Acts of Parliament, 2023 (India).
[21] Bharatiya Nagarik Suraksha Sanhita, 2023, §§ 482–483, No. 46, Acts of Parliament, 2023 (India); Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 (India); Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 SCC 1 (India).
[22] U.S. CONST. amend. VIII; Stack v. Boyle, 342 U.S. 1 (1951).
[23] Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3150 (2024).

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restriction on movement, regular attendance and restrictions on associating with certain people. An important point about the federal law is that the court should place the least restrictive conditions to reasonably assure attendance of the accused and safety of the community. It also prevents the court from imposing financial conditions that would cause detention before trial[24]. Where conditions of bail cannot reasonably assure attendance and safety, section 3142(e) provides for the accused to be detained. Section 3142(f) provides for a hearing to determine whether the accused should be detained. If the accused is being detained due to being a risk to the community, the statute clearly states that there must be clear and convincing evidence to show that conditions will not reasonably assure safety. In Stack v Boyle the United States Supreme Court stated that bail should not be set higher than is reasonably necessary to ensure attendance[25]. In United States v Salerno the Supreme Court recognised that preventive detention was constitutionally acceptable under the Bail Reform Act 1984. It recognised that detention can be allowed in limited situations if statutory conditions and procedures are met. The Court also recognised that freedom should be the norm.[26]

Section 3142(j) specifically states that the provisions in this section do not affect the presumption of innocence. This recognises that detention of an accused does not mean they have been found guilty[27]. The Bail Reform Act only applies to federal cases. Each state has its own bail laws and the method used may vary. Therefore the federal system should not be seen as a model for all criminal cases in the United States.

### *3.3 England and Wales*

The primary legislation in England and Wales regarding bail is the Bail Act 1976. This provides a right to bail for those accused of criminal offences (Section 4)[28].

However, there are circumstances set out in Schedule 1 of the Act where bail may be refused. These include if there are 'substantial grounds' for believing that the accused will fail to surrender, commit further offence whilst on bail or interfere with witness or obstruct the course of justice. Other factors that may be considered by the court include the nature and seriousness of the offence, character and past history of the accused, their links with a particular community and the strength of the evidence. Bail can also be granted with conditions attached. Conditions may include where the accused must live, go to a police station, cannot travel or have contact

24. 18 U.S.C. § 3142(c)(1)(B), (c)(2) (2024).
[25] Stack v. Boyle, 342 U.S. 1 (1951).
[26] United States v. Salerno, 481 U.S. 739 (1987).
[27] 18 U.S.C. § 3142(j) (2024).
[28] Bail Act 1976, § 4 & sched. 1, c. 63 (UK).

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with certain people. Principles of human rights also affect bail decisions in England and Wales. Article 5(3) of the European Convention on Human Rights states that anyone arrested or detained on suspicion of having committed an offence must be brought promptly before a judge or other authorised officer. They shall be tried within a reasonable time or released pending trial but under guarantees to appear.

Article 6(2) provides the presumption of innocence. The Human Rights Act 1998 makes Convention rights applicable in England and Wales[29]. The law aims to provide protection for individual's freedom however, there are circumstances where the court may refuse to grant bail if the statutory reasons are met. Research has shown that pre-trial detention is still an important aspect of the criminal justice system in England and Wales[30].

### *3.4 Comparative Analysis*

The three jurisdictions recognise the importance of personal liberty and the need to ensure that accused persons attend court. However, their legal approaches are different.

| **Aspect** | **India** | **United States** | **England and Wales** |
|---|---|---|---|
| Main legislation | BNSS, 2023 | Bail Reform Act, 1984 (federal) | Bail Act, 1976 |
| Constitutional or human rights basis | Article 21 of the Constitution | Eighth Amendment and due process protections | Articles 5 and 6 of the ECHR |
| General approach | Bail is generally preferred, subject to statutory restrictions | Release is preferred where conditions can reasonably manage the risks | General statutory right to bail, subject to exceptions |
| Preventive detention | Permitted under ordinary and special statutory provisions | Permitted under the federal Bail Reform Act in specified cases | Remand in custody permitted on statutory grounds |
| Financial conditions | Bail bonds and sureties may be required | Federal law restricts financial conditions that result in detention | Conditions may be imposed where legally justified |

India therefore has a well-developed system in relation to this area, by way of case law on the right to personal liberty contained within article 21. Preventive detention is specifically

[29] European Convention on Human Rights arts. 5(3), 6(2), Nov. 4, 1950, 213 U.N.T.S. 221; Human Rights Act 1998, c. 42 (UK).
[30] Smith, supra note 10; Smith, supra note 11.

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provided for in the Federal System of the United States and the courts have to take into account if conditions can be put in place to mitigate the risk factors outlined in the statute. In England and Wales there is a general statutory right to bail with specific exceptions.

Despite these differences it is accepted by all three systems that pre-trial detention should not be used as a punishment, however it is important to ensure that legal safeguards are being used in the same way.

## 4. Theoretical Framework

### *4.1 Presumption of Innocence*

The presumption of innocence is a fundamental principle of criminal law. It means that the accused should be assumed innocent until proven guilty by law. The burden of proof lies on the prosecution.

This relates to bail as the accused could be held in custody for many months or years. This can leave a feeling that the accused has been punished due to not being given enough reason to detain them.

Although this means that the courts cannot deny bail, they have to make sure that there are relevant legal reasons to do so.

### *4.2 Personal Liberty*

Another key principle is the personal liberty argument. Article 21 of the Indian Constitution protects the right to life and personal liberty. The Fifth and Fourteenth Amendments to the Constitution protect a person's constitutional rights in the USA relating to the right to due process. The Eighth Amendment protects against oppressive bail. In England and Wales it is protected by Article 5 of the European Convention on Human Rights.

Detention will often have many effects on the individual, including losing their job, separating them from their family and causing financial problems. They will also have less access to legal aid.

This should be considered by the court and if detention is really necessary.

### *4.3 Equality and Economic Access to Bail*

One of the main issues within the bail jurisprudence is that some will be able to pay bail whilst others won't. Those with sufficient money will be released, whilst others with low financial means will be detained.

This leads to concerns around equality. The fact should not matter if an accused is able to pay

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bail.

This has been looked at in academic research regarding the American bail system. A study by Megan T. Stevenson shows that there are severe consequences for accused who are detained pre-trial due to their inability to pay bail[31].

In India the difficulties faced by the accused with little money have been acknowledged. This is shown through section 478 of the BNSS which provides for those unable to provide sureties. These provisions are important as show that someone should not be detained purely due to their financial difficulties.

### *4.4 Proportionality and Judicial Discretion*

When deciding on granting bail courts have to consider various factors. These include the personal liberty of the accused and the public interest.

Proportionality must be applied so that any infringement on personal liberty will be no more than is necessary to achieve the legitimate aim. For example, if the accused can regularly report to the police to ensure their availability they may not need to be detained.

Discretion must be used however, it must be clear why certain decisions are being made. The court must give reasons for granting/withholding bail and why certain conditions are necessary.

### *4.5 Preventive Justice and Public Safety*

There is also a preventative element to bail law. If there is a real risk the accused may flee, intimidate witness, tamper with evidence or commit further offences then they will not be granted bail.

This is not a punitive measure but a way to manage risks. The issue comes with trying to decide if there is a risk of the accused doing something. It is important the courts do not make any assumptions or generalisations. Decisions should be made on the facts of the case.

In the United States federal system there is a detailed statutory test (Section 3142 Title 18)[32]. In India and England and Wales similar issues occur but with different statutory tests.

### *4.6 Application of the Theoretical Framework*

Overall these basic principles highlight how a fair bail system must be in place which protects individual's liberties but still recognises the importance of protecting legitimate public interests. The presumption of innocence means the courts must try to avoid detaining individuals as

[31] Stevenson, supra note 8.
[32] 18 U.S.C. § 3142(e)–(g) (2024).

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punishment. Personal liberty means that any conditions placed on individuals should be justified. Equality means that individuals should not be unfairly disadvantaged due to their financial situation.

However, the courts must also have the ability to protect witnesses, prevent tampering with investigations and guarantee attendance at trial. This does not necessarily conflict with individual's rights and a fair bail system should try to protect both by applying reasonable conditions and careful judicial decisions.

In comparison it can be seen that there is also an issue with how bail is applied. Having statutory provisions in place is not enough, there must be clear reasoning behind decisions, timely hearings and consideration of individual circumstances to make sure the bail law is effective.

## 5. Conclusion

An important factor to consider when looking at Bail is how it links the legal process to the protection of liberty. Those accused of an offence are presumed innocent so they should not be detained prior to being convicted.

Looking at the three countries (India, USA and England & Wales), we can see that each country has created their own system. India uses the BNSS and uses constitutional interpretation of Article 21. The federal system in the United States uses the Bail Reform Act of 1984. This includes the right to bail with conditions and the possibility of preventative detention in certain circumstances. The Bail Act 1976 gives everyone the right to bail but there are statutory exceptions and human rights to consider.

Although this varies between countries, it is still important to consider the balance between the accused's liberty and the protection of society.

India has produced some key rulings in relation to bail. It includes provisions in the BNSS for those unable to pay for bail and the maximum amount of time someone can be held as an undertrial. These provisions will only work if they are properly enforced.

Looking at this comparison it can be seen that there can be a disparity in bail as those who cannot afford to pay may be left in custody. This should be considered when deciding whether to grant bail as you should look at the real risk and whether this can be addressed with less strict conditions. A fair bail system needs to be applied to each individual. It needs to be decided clearly by the judiciary. The presumption of innocence needs to be respected. The aim of granting bail is not to favour the accused but to ensure that any criminal proceedings are fair. It is important that bail is granted to protect the liberty of those who haven't been found guilty. This balance is why bail is an important part of our democratic criminal justice system.

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## Footnotes

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