



BAIL SYSTEM IN INDIA: ANALYSING THE FUNCTIONING AND ITS IMPACT ON THE CRIMINAL JUSTICE SYSTEM

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ABSTRACT

This research paper explores the bail system, examining its historical evolution, legal framework, socioeconomic impact, changes in the judicial precedents of bail, and multifaceted challenges. "Bail is a security obtained from a person arrested regarding an offense to secure his presence during trial," the Supreme Court ruled in Sunil Fulchand Shah v. Union of India. Beginning with an overview with a summary of the idea of bail and its importance in maintaining the presumption of innocence and protecting individual freedoms. In the framework of bail decisions, elements like the type and seriousness of the offenses, flight hazards, and public safety issues are examined. The article discusses a few bail precedents set by the Hon'ble Court such as bail is a norm and jail is an exception. Talk about the phases of bail as well as the difficulties, frequency, pretrial detention, and which is most needed which is reform. This study provides insights into the operation of the bail system and its wider consequences for the legitimacy, efficiency, and fairness of the criminal justice system through a multifaceted approach.

Keywords: Bail, Article 21, Pretrial, Reform, Crime, Supreme Court.

INTRODUCTION

Former chief justice of India D. Y. Chandrachud said the trial judge prefers playing safe by not granting bail on vital crime issues when it is looked at with a degree of suspicion. They need a 'sense of robust common sense' to examine each case. People who ought to be granted bail in trial courts are not getting it; they are constantly forced to go to higher courts. Because they must go to the Supreme Court, some people who ought to be granted bail at the high court do not. The issue for people who are subject to arbitrary arrests is made worse by this delay. The

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Indian criminal justice system and the constitution of India provide fundamental rights to the individuals the advantages of the assumptions of innocent or not guilty of the charges till he/she determines blameworthy. Every citizen of India has a fundamental right guaranteed under Article 21 of the Indian Constitution. Article 21 mentions “No person shall be deprived of his life or personal liberty except the procedures established by law.” Clause 39 of Magna Carta stated that “No free man is to be arrested, or imprisoned, or deprived, or outlawed, or exiled, or in any other way ruined, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land.¹”

In the Case “Rajasthan v. Balchand alias Baliay”² The judicial principle that was laid down by the Supreme Court is “bail is the rule and jail is an exception” Further Justice Krishna Iyer while pronouncing the judgment relied upon various rights to the accused provided under Article 21. However, while granting bail the court goes through various factors such as the nature and seriousness of the offense, the essence of the evidence, circumstances, and public as well as state interest. Corpus Juris Secundum defines ‘bail to deliver an arrested person to his sureties, on their giving security for his appearance at the time and place designated, to submit to the jurisdiction and judgment of the court hearing the case.’

According to the Prison Statistics India 2022 report by the NCRB (National Crimes Record Bureau) undertrials constitute 75.8% of India’s prison population i.e. (4,34,302 out of 5,73,220). Uttar Pradesh, Bihar, Maharashtra, Madhya Pradesh, Punjab, and West Bengal had the highest percentages of prisoners undertrial, with 21.7%, 13.2%, 7.6%, 6.2%, 5.6%, and 5.4%, respectively. 65.2% of undertrial prisoners were either illiterate or had received education till class X, according to Prison Statistics India Report 2022, a 40.7% increase in the number of undertrials in India since 2017, when their population stood at 3,08,718³.

¹ ‘Magna Carta Project - 1215 Magna Carta - Clause 39’

<https://magnacarta.cmp.uea.ac.uk/read/magna_carta_1215/Clause_39> accessed 18 February 2025.

² *State of Rajasthan vs. Balchand*, [1977] SC, [1977] AIR 2447

³ ‘(NCRB) Prison Statistics India 2022’

<<https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyearwise2022/1701613297PSI2022ason01122023.pdf>> accessed 18 February 2025.

LEGAL POSITION OF BAIL IN INDIA

The Black dictionary defines bail as “procuring the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/himself to the jurisdiction and judgment of the court.”

The term Bail also has been defined in THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 (hereinafter the BNSS ACT, 2023) under section 2 (b) "Bail" means the release of a person accused of or suspected of commission of an offense from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond. Bail provisions are primarily governed by the Sanhita, 2023 which lays down the conditions and procedures for granting bail and has been defined under sections 478 to 496 of Sanhita, 2023 which are classified on the nature and parameters of the offenses.

Bailable- Presumed as less heinous, and punishment for the same is less severe, and in this case, the accused has a better chance of getting bail. Non-Bailable- it includes serious offenses, and the accused cannot claim bail as a right but can approach the court for the same. The Supreme Court of India construed Article 21 which provides the right to life and personal liberty, to include to bail. But it is not absolute and can be curtailed in the national interest. But one cannot curtail the right to liberty of a person unreasonably and hence, only by the procedure established by law this right can be curtailed. In the case of *Vaman Narain Ghiya Vs State of Rajasthan*⁴, it was stated that there should be a balance between the personal liberty of the accused and the investigation of the police. The suspect is not kept in legal custody to give punishment when he is not established guilty.

HISTORY

Bail is derived from the old French word ‘Baillier.’ Its real meaning is to give and deliver. It traced back as early as 399 BC when Plato first tried to create a bond to free Socrates. In India, bail may be traced back to ancient Hindu jurisprudence which requires disposal of disputes by the administration of justice. The idea of bail was somewhat common in ancient India as well because Kautilya's Arthashastra also said that it was preferable to avoid pre-trial custody. The Mughal Empire established a more organized judicial system where the advisor played a role in advising the emperor in legal matters, Qazi-ul-Quzat was the most senior judicial officer, he

⁴ *Vaman Narain Ghiya v State of Rajasthan* [2009] SC [2008] AIR 1362

was chosen by the emperor, procure justice and bail called 'Zamanat' during the medieval era.⁵. Modern bail chiefly originated from all the medieval laws.

During British rule in India, the deliberate control of the East Indian Company over the Nizamat Adalats and Faujdari Courts paved the way for the implementation of English criminal law in the Indian judicial system. The criminal courts used two forms of bail known as 'Zamanat' and 'Muchalka' which was practiced till the time statutory law was introduced by the British in the 19th century. Presently, the BNSS, 2023 (earlier Cr. CP,1973) serves as the primary legal framework for India's bail provisions. Most heinous felonies are exempt from the requirement of bail under the judicial system such as murder, rape, and terrorism which is against the national interest. The 'Personal bond' was first introduced in 1973, which permits the release of suspects on the execution of their bond without any kind of security or sureties. The default bail was introduced in the Code of Criminal Procedure in 2005.

INTERNATIONAL BAIL

Internationally, bail upholds the presumption of innocence and protects individual liberty and rights, as accentuated the human rights and dignity on universal instruments like International Covenant. Article 9(3) of the International Covenant on Civil and Political Rights, 1996 (hereinafter ICCPR) Person arrested and detained on a non-bailable offense shall be brought expeditiously before a Judge to exercise judicial discretion and entitled to trial within the stipulated time. However, release can be conditioned on guarantees to appear in court or comply with judgments, balancing individual liberty with the justice system's needs. Resemblance, Article 10(2) (a) of ICCPR states that accused persons should be segregated from convicted persons and treated according to their unconvicted persons, except in exceptional cases. Article 14 (2) cardinally provides for the presumption of innocence until proven guilty as an axiomatic principle of law.

JUDICIAL PRECEDENT OF BAIL

An analysis of the landmark cases demonstrates how India's unjust bail system has adversely impacted time to time:

⁵ Ayush Verma, 'Bail under the Indian Legal System' (*iPleaders*, 19 October 2020) <<https://blog.ipleaders.in/bail-indian-legal-system/>> accessed 18 February 2025.

In the case *State of Rajasthan vs. Balchand*⁶, the defendant was found guilty before the trial Court. Thereafter, the High Court acquitted that the evidence presented by the prosecution was insufficient to prove his guilt beyond reasonable doubt. The High Court acquitted him when filed an appeal. Under Article 136 the High Court appealed under Special leave petition to the Supreme Court. The accused directly surrendered to the Court, then he filed for bail. Justice Krishna Iyer while pronouncing the judgment against the unjust bail management system. However, while granting bail the court goes through various factors such as the nature and seriousness of the offense, the essence of the evidence, circumstances, and public as well as state interest. The judicial principle established by the Apex Court is “bail is the norm and jail is an exception.”

In the case *Gurbaksh Singh Sibbia vs. State of Punjab*⁷, the Supreme Court ruled that the Punjab and Haryana High Court used strict limitations and rules on granting anticipatory bail under section 438 of CrCP. The power must be exercised only in exceptional cases. However, the apex court agreed that an unreasonable order of anticipatory bail should not be passed, it must be found on reasonable grounds. The Supreme Court overruled stringent propositions of high court judgment and provided a convenient framework for exercising judicial discretion and some guidelines.

In the case *Hussainara Khatoon vs. the State of Bihar*⁸, the Supreme Court stated that there was a violation of Article 21, and the prisoner was denied bail and detained beyond the imprisonment period. The Supreme Court ordered that there should be no discrimination against any detained person except the procedure established by law, the right to speedy trial covered under Article 21, and provide right to free legal aid which is the part of DPSP.

In the case, *Sanjay Chandra vs. Central Bureau of Investigation*⁹ 2011 the appellant accused of criminal conspiracy had applied for bail before a Special Judge (CBI) and High Court but was denied his application, thereafter filed a Special leave petition (SLP) under Article 136 in the Supreme Court. The Supreme Court stated that while granting bail check prima facie evidence with possible punishment if convicted without depriving the accused's liberty. Some

⁶ *State of Rajasthan vs. Balchand*, [1977] SC, [1977] AIR 2447

⁷ *Gurbaksh Singh Sibbia vs. State of Punjab*, [1980] SC, [1980] AIR 1632

⁸ *Hussainara Khatoon vs. State of Bihar*, [1979] SC [1979] AIR 1369

⁹ *Sanjay Chandra vs. Central Bureau of Investigation*, [2011] SC [2012] AIR 830

conditions were imposed such as the appearance of all dates of the hearing, and the surrender of the passport with a personal bond of 5 lakh.

In the case, *Arnesh Kumar vs. State of Bihar*¹⁰, the Court observed the arbitrary arrest in cognizable and non-cognizable offenses through misuse of section 41A of CrPC. Section 498A of IPC and Section 4 of the Dowry Act were misused by wives in the allegation of Dowry harassment against the husband. The apex court laid down comprehensive guidelines against indiscriminate arrests. One of them is that the states must provide police officers instructions to use their arrest authority carefully to prevent unauthorized arrests. Only when it is determined that an arrest under section 498A is required and after the requirements of section 41 of the CrPC have been followed may one be made.

STAGES OF BAIL

Anticipatory Bail: This bail is based on the legal principle of “presumption of innocence” Every individual accused of a crime is contemplated innocent until proven guilty. The term ‘Anticipatory bail’ can be found in the 41st report of the Law Commission, 1969 a comprehensive report for the revision of the Code of Criminal Procedure which was headed by Chairman K. V. K. Sundaram.¹¹. "The need for anticipatory bail arises principally because sometimes powerful individuals attempt to implicate their competitors in false cases for disgrace or other purposes by getting them detained in jail," the report said. Aside from fictitious cases, there doesn't seem to be any reason to require someone to submit to custody, stay in jail for a few days, and then apply for bail when there are good reasons to believe that the accused is unlikely to abscond or otherwise abuse his freedom while out on bail. There was a need to provide a provision to protect an accused who assumes or apprehends that he can be arrested for any non-bailable offense. The law commission recommends this power to the high court and Court of Session, the order comes into force at the time of arrest.

Anticipatory bail under section 482 of BNSS: Under section 482 the High Court and Court of Session issue directions for granting bail to a person apprehending arrest. Anticipatory bail can only be sought for offenses of a non-bailable nature. Such direction states the court can put the person under conditions depending on the case-specific including that the person shall make himself available for interrogation by a police officer when required.

¹⁰ *Arnesh Kumar vs. State of Bihar*, [2014]SC [2014] AIR 2756

¹¹ SUNDARAM KVK, *Code of Criminal Procedure* (law commission report 41th, ministry of law 1969)

In the case *Gurbaksh Singh Sibbia v. State of Punjab*¹² -

Issue: Whether a straight-jacket formula could be applied to section 438 of CrPC, which has to be followed by the court while granting anticipatory bail.

The Supreme Court issued certain guidelines to be followed by the high court and the court of session while granting anticipatory bail under section 438 (now section 482 of BNSS) The guidelines are, that, Section 438 of CrPC the applicant sought the grounds on which anticipatory bail is prayed for such nature can be objectively analyzed by the court. Mere accusations, the person could not be entitled to apply for anticipatory bail. The filing of an FIR before the application for anticipatory bail is not a condition precedent. The applicant has solid reasons to anticipate an arrest the individual, is not eligible for anticipatory bail if he has already been arrested. In this situation, the individual must request bail under either Section 437 or Section 139 of the CrPC. Considering the purpose of section 438 is to give the High Court or the Court of Sessions, discretionary powers, such a court cannot leave the matter up to the magistrate, as required by section 437 of the CrPC. Additionally, doing so would negate the whole intent of the provision.

Regular Bail: Regular bail can only be sought by a person in judicial custody for non-bailable offenses. Any individual who is arrested or detained by a police officer without a warrant or who is brought before a court on suspicion of a bailable offense may be granted bail by the officer or the court. High Courts and Courts of Sessions are given special authority under Section 483 of the BNSS to issue bail to an individual who has been charged with a crime and is being held in jail under terms that the court determines appropriate. A person suspected of a crime punishable under Section 65 or Section 70(2) of the BNS cannot be granted bail by a High Court or Court of Sessions unless the Public Prosecutor is notified in advance of the bail application. Additionally, while hearing an application for bail for an individual accused of an offense triable under Section 65 or Section 70(2) of the BNS, the first informant or any other person designated by him/her must be present.

Default / Statutory Bail: This is a right to bail that accrues when the police officer fails to complete the investigation within a specified period, i.e. 90 days or 60 days in respect of a

¹² *Gurbaksh Singh Sibbia vs. State of Punjab*, [1980] SC, [1980] AIR 1632

person in judicial custody. It is also known as Statutory bail, which is mentioned under section 167 (2) of the CrPC (now under section 187(2) of BNSS, 2023)¹³.

Interim: This bail is given abruptly and for a short period, either while an application is ongoing or while the court is still considering an application for regular or anticipatory bail. Although interim bail is always subject to conditions and may be extended, the accused surrenders his freedom and will be put under arrest if it expires before he has been granted regular or anticipatory bail. He/she does pay the sum needed to keep the bail in effect.

*Arvind Kejriwal vs Directorate of Enforcement*¹⁴ Recently, the Supreme Court granted interim bail to former CM of Delhi Arvind Kejriwal in the case Delhi liquor excise policy case to campaign for the Lok Sabha elections. The Court clarified that the arguments raised on behalf of Arvind Kejriwal, challenging the ED's "reasons to believe" can be raised during his bail application hearing. Addressing his contention on the lack of recorded 'reasons to believe' and record reasons do not mention the "necessity to arrest," the Court referred to *Arnesh Kumar v. State of Bihar*.¹⁵, which mandates that officers must consider the necessity of arrest before detaining a person. The Court directed for his release on interim bail in connection with case ECIR (Enforcement Case Information Report), on the same terms as imposed that, He shall provide bail bonds of Rs.50,000/- with one surety. He shall not visit the Office and the Delhi Secretariat; he shall be bound by the statement made on his behalf that he shall not sign official files unless it is required and necessary for obtaining clearance/approval of the Lieutenant Governor of Delhi. He will not make any comment regarding his role in the present, interact with any witnesses, or have access to any official files connected with the case.

Bail Under UAPA (Unlawful Activities Prevention Act, 1967): Under section 2 of UAPA, any action conducted by an individual or association is considered "unlawful activity," whether it be by the commission of an act, spoken or written statements, signs, or visible representations. that encourage any individual or group of individuals to bring about the cession of a portion of India's territory or Union. The presumption of innocence is the mandatory rule of the criminal justice system it's part of Article 21, but in the UAPA Act presumption of innocence and right to trial are denied, and the pre-charge detention time is up to 180 days for

¹³ Bharatiya Nagarik Suraksha Sanhita, Criminal law, 25 December 2023

¹⁴ *Arvind Kejriwal vs Directorate of Enforcement*, [2024] SC, S.C.R. (6) 346

¹⁵ *Arnesh Kumar vs. State of Bihar*, [2014]SC [2014] AIR 2756

the accused. In the 2019 amendment, the Act empowers the government to designate individuals as terrorists.

Section 43D (5) describes the grounds for denied bail if the chargesheet or case diary provides a prima facie reasonable basis for the accusations to be true, rather than the strength of the evidence then the accused will not be released on bail or his bond. In the case *NIA VS. Zahoor Ahmad Shah Watali*¹⁶, the Supreme Court checked whether the allegations were prima facie true, SC overturned the Delhi High Court order and said bail should not be granted if the accusations appeared prima facie true, it was held that discussion on the merit or demerits of the evidence is not needed while grant bail or not.

According to the People's Union of Civil Liberties draft report¹⁷, the rate of conviction under UAPA was less than 3% between 2015 and 2020. Out of 8371 persons arrested under said stringent law, only 235 were convicted in a five-year period, which shows that persecution under UAPA lacks merit in the vast majority of cases. For instance, During the Citizenship Amendment Act (CAA) protest in 2019, Sharjeel Imam with other activists was detained under the draconian UAPA Act and still in jail for five years in prison without charge or trial. The bail application was submitted in April 2022 and has not yet been adjudication. Since Imam moved the Delhi High Court for bail, judges did not convene the matter, judges were transferred, and there have been 70 hearings, seven benches have changed, and three have recused themselves. The delay is extraordinary. When there is a case for grant of bail the court should not delay to grant bail. Allegations of the prosecutions may be very serious, but the courts must consider the case for bail by the law. Now we have said that Jail is the exception, bail is the rule that is applied even in special statutes. If the court denies bail in a deserving case there is a violation of Article 21 which is the right to life and personal liberty by Justice Oak.

Section 43D (5) of the UAPA Act's most controversial provisions the law, needs to be changed, reduce the period of pre-charge detention as a regular law to minimize unjust incarceration, and shift the burden to the prosecution to establish prima facie guilt before denying bail. There must be a line to complete the trial and investigation if exceeds the period, bail must be granted

¹⁶ *National Investigation Agency vs Zahoor Ahmad Shah Watali* [2019] SC [2019] AIR 1734

¹⁷ 'PUCL- UAPA 28.09.2022.Pdf' <<https://pucl.org/wp-content/uploads/2023/05/PUCL-28.09.2022.pdf>> accessed 18 February 2025.

automatically. Make strict provisions for the officials who misapply the UAPA Act to innocent persons and create a committee to review the cases of the UAPA Act.

BAIL JURISDICTION IN THE UNITED KINGDOM

The process for granting bail is outlined in the United Kingdom's 1976 Bail Act, governing the principles and procedures related to bail for the accused of criminal offenses; it is codified law. One important aspect is that the legislation aims to "reduce the size of the inmate population and grant legal aid to the defendant" Additionally, the statute has clauses guaranteeing defendants legal assistance. The Act acknowledges a "general right" to be granted bail. In section 4, Bail is granted based on strong presumptions in favour of bail, even in serious offenses. This section applies to a person who is accused of an offense when he appears or is brought before a magistrates' court or the Crown Court in the course of or in connection with proceedings for the offense, or he applies to a court for bail in connection with the proceedings. The Bail Act of 1976 established the bail provision in the UK (United Kingdom). It states that everyone has the right to bail, except those specified in the act's first schedule. The bail legislation establishes several reasons, based on the nature of the offense, for refusing bail. One of the justifications is that bail may be denied if the court has substantial evidence for suspecting that the prisoner would commit the same crime again if released on bail. Section 5 of the Bail Act, 1976 of the UK states that the Court has denied bail and given a reason for such refusal so that it becomes easy for the defendant to submit an application for bail on appeal.

NEED FOR BAIL LEGISLATION IN INDIA – CRITICAL ANALYSIS

In addition, the legal system supposes innocence unless proven guilty, undertrial imprisonment seems to be an exception. However, in reality, courts frequently disregard this concept in favour of the gravity of the offense, which often results in the denial of bail in serious instances. A crucial component of the Indian legal system is the FIR. Bail should be determined by the judge's evaluation of the accused's likelihood of committing the crime as well as the evidence, not just the sections charged or the seriousness of the alleged offense. A comprehensive, just quick investigation can be conducted.

Modifying bail law is needed to ease certain problems and inequalities in the recent bail system in India. We seek to provide a just and fair system where the elimination of cash bail and sometimes bail conditions in cash bonds, surety, and solvency make it harder for poor people

to secure their release. There is a need to reassess and simplify bail conditions, such as the overcrowded prisoner occupancy rate of 131% in Indian jails, with undertrial prisoners constituting 75.8%. There is a pressing need for reform and swift trial which is the fundamental right, Chronic pretrial incarceration culminates in the deprivation of Article 21 constitutional right to liberty. The lack of comprehensive laws, overworked courts, and procedural delays, even the failure to swiftly hear bail applications are all contributing factors to the uncertain delays in granting bail and custodial violence.

A lack of uncodified bail laws caused arbitrary arrest and discretionary decisions of judges, police staff misusing their power leading to mental abuse of detainees caused custodial violence, and one of the main reasons for overburdened undertrials and delays in granting bail is the quick inquiry and incomplete information of FIR, which needs to introduce bail legislation like a bail Act to streamline the grant of bail, similar to the United Kingdom's Bail Act, of 1976. There is a pressing need to reduce pretrial prisoners by establishing special/fast-track courts to hear bail pleas expedited and disposal of the case promptly through e-courts.

The Indian government might contemplate enacting new laws or amending existing ones, which is based on the discretionary power of judges and precedents to improve the bail system. One such modification would be to eliminate cash bail to protect less-income defendants and lower the number of charges that are exempt from bail so that more people can post bond. The government should also consider establishing procedures for expedited bail hearings and decision-making processes for those who are detained. Evaluating society-based alternatives may improve the bail system, which provides defendants incapable of paying bonds with financial assistance, awareness among the community, and legal aid services to the detainees.

CONCLUSION

The criminal justice system is currently dealing with a highly complex situation that is irrefutable. Inarguably, judicial discretion impacts the role of deciding the grant of bail but also in imposing conditions for the same. The Supreme Court and other committees report recommends amending the recent bail framework into a new one similar to the United Kingdom's Bail Act 1976.

Following the implementation of the new laws such as BNSS, 2023 are in effect, the bail provisions differ significantly from those of the Criminal Procedure Code, 1973. Although the mention of the definition of bail, increased eligibility for release, particularly for first-time

offenders, and more stringent requirements for individuals facing numerous counts are some of the main enhancements. The idea of anticipatory bail has also undergone some slight modifications, as it no longer applies to bail in gang rape cases involving minors. Overall, it creates a process to guarantee that convicts awaiting trial are treated fairly. In *Satender Kumar Antil vs. CBI*¹⁸, the Supreme Court decided that bail should be given as the rule rather than the exception and that needless arrests should be avoided. The Court established criteria for granting bail and divided charges into four categories according to their seriousness. If the accused cooperates with the inquiry, there should be no arrest for minor offenses (which carry a maximum sentence of seven years). If there is no chance of evasion or evidence tampering, bail should be taken into consideration for serious and economic offenses. The Court stressed that personal liberty under Article 21 of the Constitution must be preserved and denounced the abuse of arrest authority by the police and subordinate courts. This ruling upholds the idea that bail is not incarceration.

¹⁸ *Satender Kumar Antil vs. CBI*, [2022] SC S.C.R(10) 351