PRE-TRIAL DETENTION AND BAIL REFORMS: RECONCILING PERSONAL LIBERTY WITH THE ADMINISTRATION OF CRIMINAL JUSTICE

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ABSTRACT

The institution of pre-trial detention occupies an inherently paradoxical position within constitutional democracies. Conceived originally as an exceptional procedural measure to secure the presence of the accused at trial, prevent the tampering of evidence, and shield society from imminent peril, it has metastasised across common law jurisdictions and, conspicuously within India, into a surrogate form of extra-judicial punishment. With under-trial prisoners comprising upwards of seventy-five per cent of India's aggregate correctional population, the statutory administration of bail operates through deeply regressive socioeconomic filters. The sacrosanct constitutional principle that 'bail is the rule, jail is the exception' has suffered systemic erosion due to mechanical judicial remands, unstandardized prosecutorial discretion, draconian special enactments reversing the burden of proof, and an archaic reliance on property-based surety bonds. This article provides a comprehensive legal critique of the structural pathologies characterising pre-trial incarceration. Evaluating constitutional jurisprudence under Article 21, empirical penological data, statutory shifts from the Code of Criminal Procedure, 1973 to the Bharatiya Nagarik Suraksha Sanhita, 2023, and comparative models across the United Kingdom and the United States, this paper argues for an overhaul of the bail regime. It advocates for the institutionalisation of actuarial pre-trial risk assessment frameworks, categorical prohibition of mechanical remand orders, strict statutory enforcement of temporal incarceration caps, and the enactment of an autonomous, standalone Bail Act.

Keywords: Pre-trial Detention, Bail Reform, Article 21, Under-trial Prisoners, Bharatiya Nagarik Suraksha Sanhita.

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INTRODUCTION

The foundational legitimacy of any criminal justice system is evaluated by its ability to maintain public order while simultaneously protecting individual liberty. In the constitutional realm, the principle of presumption of innocence is both a right and a procedural cornerstone. Despite this, penal systems in common law jurisdictions have demonstrated an alarming tendency to adopt pre-trial incarceration as a default. Pre-trial detention, which is meant to be an exception, has become the norm. In India, this trend has manifested in a human rights crisis of the first order. According to official statistics, over seventy-five per cent of India's prison population comprises those under trial languishing in overcrowded jails. This article contends that India's pre-trial detention regime, as it currently exists, is a violation of Article 21 of the Constitution of India. The right to life and liberty shall not be deprived of any person except according to procedure established by law.

Any custodial processing of an accused person, even if tentative, transforms them into a convict for all intents and purposes. Pre-trial detention, as a matter of Indian law and policy, has crossed the threshold of an exceptional, preventative measure and has mutated into a tool of social control. Under-trials in India suffer from social opprobrium, economic ruin, custodial torture, and psychological trauma even before conviction. Justice V.R. Krishna Iyer, in State of Rajasthan v Balchand, famously noted that "the basic rule may perhaps be tersely put as bail, not jail."

The article proceeds to examine the manifold ways in which pre-trial detention has become a punitive measure in India. It evaluates the fiscal and social barriers to bailing out of custody, which disproportionately impact the poor and vulnerable sections of society. It highlights the discriminatory impact of property-based sureties and examines the erosion of bail jurisprudence through various special laws. The article analyses the provisions of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and attempts to extrapolate the contours of a bail reform package based on comparative insights.

This journal article provides an in-depth treatment of the doctrinal, empirical, and comparative dimensions of pre-trial detention and bail reforms. It scrutinises the lacunae in Indian law about police remand, property-based sureties, and the bail jurisprudence in special laws. It comments on the fiscal and social impact of pre-trial detention on vulnerable groups and evaluates the policy implications of the BNSS. In the concluding section, the article proposes several reforms to reorient the bail jurisprudence in India.

DOCTRINAL FOUNDATIONS: THE PRESUMPTION OF INNOCENCE AND CONSTITUTIONAL DUE PROCESS

Presumption of Innocence as an Inviolable Standard: The foundations of freedom before trial take their origin in the Latin adage ei incumbit probatio qui dicit, non qui negat, which is held as the 'golden thread' running through the whole of criminal law by Lord Viscount Sankey in Woolmington v DPA.6 When the State resorts to coercion against an individual before trial, it acts unilaterally against a citizen who has not been found guilty and, therefore, cannot be justified on rehabilitative, retributive, or deterrent grounds. From the foundational ontological perspective, pre-trial detention can take place in the following circumstances. First, to secure the attendance of the accused persons in court (flight risk). Second, to prevent obstruction of justice (risk of tampering with evidence and/or witness intimidation). Third, to prevent the commission of fresh offences (risk to public safety). Pre-trial detention goes beyond the sphere of administrative measures to punish; therefore, it exceeds the limits outlined above.

Constitutionalising Bail: The Article 21 Jurisprudence: Indian jurisprudence is currently embroiled in a debate over the fundamental nature of bail statutory provisions. The Maneka Gandhi case, which held that any law restricting liberty must meet the test of reasonableness and necessity, provided the foundations for discussion of liberties. When examining the pre-trial detention of persons in India, one must remember the observations of the Hon'ble Apex Court in Babu Singh v State of UP. "The personal liberty, when it is threatened by the refusal of bail, is too great a price to be paid for the administration of justice to be suffered to be withheld for any but the most compelling reasons."

In Hussainara Khatoon (I) to (VI) v Home Secretary, State of Bihar, the Hon'ble Court was appalled to learn that thousands of undertrials in Bihar were detained in inhuman conditions in jails for far longer terms than the sentences awarded to them as they were unable to procure bail. "It is a crying shame upon the judicial system that poor undertrials in Bihar had been confined to jails for a period of time much longer than the sentences awarded to them because they were unable to secure bail," said Justice P.N Bhagwati. He ordered that persons unable to afford bail should be released on their personal bonds so that they may appear before the court for trial. The law of bail was next invoked by the Andhra Pradesh High Court in Gudikanti

Narasimhulu v Public Prosecutor13, where the Court noted that the imposition of bail should be guided by rational considerations and cautioned against moods and impressions. The detention of an individual for even a short period of time may cause psychological, social, and economic damage to an individual which cannot be compensated by a subsequent acquittal.

ANATOMY OF THE PRE-TRIAL DETENTION CRISIS IN INDIA

The Overcrowding Catastrophe and Empirical Realities: The systemic failure of the Indian bail system can be seen from the PSI's annual reports. According to the latest data of the National Crime Records Bureau (NCRB), the number of inmates is more than the authorised strength by more than 130%. The number of prisoners in jails in Delhi, Uttar Pradesh, and Uttarakhand has reached more than 170-200%. Under trials constitute about 76-77 per cent of all prisoners in these states, which is one of the highest rates in the world. Furthermore, statistical data shows that this population is dominated by the most vulnerable groups of the population: about 68 per cent are illiterate or have only an elementary education, and about the same percentage come from the most socially vulnerable castes and "lower" classes. 13 Under-trial prisoners generally come from socially disadvantaged groups who cannot afford to employ a private lawyer, pay a fine, or find sureties among relatives and friends.

The Culture of Mechanical Arrests and Pro Forma Remands: A major reason behind pre-trial overcrowding is the rampant misuse of arrest powers by the police and the mechanical grant of remand by the lower judiciary. Section 41 of the Code of Criminal Procedure, 1973 (CrPC) – as also Section 35 of the BNSS provides that arrest for cognizable offences punishable with imprisonment for a term of less than seven years should be an exception and only be made in cases of necessity, i.e., to prevent occurrence of any offence or to prevent tampering with evidence.

In the case of Arnesh Kumar v State of Bihar, the Supreme Court censured the practice of indiscriminate arrests and mandated that no arrest be made in cases of punishment for a term of less than seven years. It laid down guidelines which police authorities and judicial magistrates have been directed to follow, including a categorical direction that detaining accused persons under Section 167 CrPC was not to be done mechanically but after being satisfied about the justification for the same. The Court stated that the police should not resort to arrest as a matter of practice for offences punishable with imprisonment for a term of less than seven years unless specific reasons recorded by them are found to exist. It also directed the Judicial Magistrates to make sure that the police actually comply with such requirements before granting remand.

Despite such directions, the lower judiciary still behaves like a processing centre for extending the period of custody of arrested persons by routinely granting remand on police application. There is little deterrence within the system for such acts of mechanical endorsement of police remand applications with standardised language. The incentives within the criminal jurisprudence for subordinate courts and judicial magistrates are skewed in the sense that the latter has an inherent fear of being accused of nepotism, partiality or misbehaviour on the part of the judicial system and thus, do not grant bail in highly contentious cases where the bail application has either been decided against them or have chosen to withhold order for the same for higher judicial review. Thus, there is an inclination to keep such matters pending within their jurisdiction for as long as possible or pass an order of remand since it is considered to be safer for them to leave such decisions to the higher judiciary.[15]

The Socio-Economic Class Divide: The Tyranny of Monetary Sureties: The procedural architecture of bail under Sections 436, 437, and 439 of the CrPC (and corresponding provisions in BNSS) is structural to property-based capitalism. In standard practice, when an order granting bail is secured, the court directs the execution of a personal bond accompanied by one or two solvent local sureties of equivalent monetary value.

This property-centric model creates an insurmountable barrier for migrant labourers, daily-wage earners, homeless persons, and impoverished defendants. An accused person who possesses no immovable property, has no bank savings, and works in an urban centre far from their ancestral village cannot produce 'local solvent sureties' with tax returns or land revenue documents. In Moti Ram v State of Madhya Pradesh, Justice Krishna Iyer delivered a searing indictment of this practice: "What is a dilute Indian to do if he is called upon to produce a surety from his village when he is in a city hospital? The poor man cannot produce a rich man to bail him out... It is a denial of justice to insist on conditions which the poor cannot satisfy."[16]

The Supreme Court emphatically held that courts must accept personal bonds without financial sureties whenever an accused is poor, and that the monetary quantum of bail must be calibrated strictly to the financial capacity of the defendant. Despite this binding precedent from 1978, the ground reality remains largely unchanged. Thousands of prisoners granted bail remain incarcerated in Indian prisons solely because they cannot furnish the financial surety bonds demanded by subordinate courts.

THE STRUCTURAL DISTORTION OF BAIL UNDER SPECIAL STATUTES

Reversing the Burden of Proof: The Phenomenon of Statutory Pre-Trial Incarceration: Indian criminal law, as shaped by the courts under the CrPC, has generally leaned in favour of personal liberty. Bail, in the ordinary scheme of things, is treated as the rule and jail the exception. But this liberal approach doesn't hold across the board. A handful of special statutes carve out a very different regime, one where an accused person's right to liberty pending trial is significantly curtailed.

Section 37 of the NDPS Act, Section 45 of the PMLA, Section 212(6) of the Companies Act, and Section 43D(5) of the UAPA are the usual suspects here. Each of these provisions imposes what's commonly called a "twin test" for bail. Before a court can release the accused, it must be satisfied of two things: first, that there are reasonable grounds to believe the person is not guilty of the offence, and second, that they're unlikely to commit any offence while out on bail.

The problem is obvious once you sit with it for a moment. At the bail stage, the trial hasn't even begun in any meaningful sense; the prosecution is still building its case, and the defence hasn't had a chance to cross-examine a single witness. Yet the judge is effectively being asked to form a view on the accused's innocence before any of that evidence has been tested. That's an unusually high bar to clear, and it’s precisely why bail under these statutes becomes so hard to secure, even at the earliest stage of proceedings.

Constitutional Friction: PMLA and UAPA Jurisprudence: The constitutional validity of these exclusionary clauses has generated intense jurisprudential friction. In Nikesh Tarachand Shah v Union of India, the Supreme Court struck down Section 45(1) of the PMLA as unconstitutional, holding that imposing twin conditions based arbitrarily on the classification of offenses punishable for more than three years violated Articles 14 and 21.[17] However, the Legislature bypassed this ruling through statutory amendments in 2018, which were subsequently upheld by a three-judge bench in Vijay Madanlal Choudhary v Union of India.[18] The Court in Vijay Madanlal rationalised the stringent threshold on the premise that money laundering constitutes a severe socio-economic menace threatening the financial stability of the state.

In the sphere of national security legislation, Section43D (5) of the UAPA bars bail if the court, on a perusal of the case diary or charge-sheet, thinks that there are reasonable grounds for believing that the accusation is prima facie true. In *National Investigation Agency v Zahoor Ahmad Shah Watali*, the Supreme Court ruled that at the stage of considering bail under UAPA, the court cannot conduct a mini-trial, probe the evidentiary veracity of prosecution documents, or examine the admissibility of material.[19] The judicial inquiry is confined to accepting the prosecution's unilateral narrative at face value.

The harshness of the Watali doctrine created a systemic dilemma: trials under UAPA routinely span five to twelve years due to massive witness rosters and procedural delays, effectively transforming the denial of bail into decade-long preventative detention without trial. Recognising this constitutional crisis, the Supreme Court introduced a critical protective doctrine in Union of India v K.A. Najeeb.[20] A three-judge bench held that statutory restrictions on bail under special statutes like UAPA do not oust the jurisdiction of constitutional courts under Articles 32 and 226 to grant bail where there has been an egregious violation of the fundamental right to a speedy trial under Article 21. The Court asserted:

"Adjudication of bail applications under special enactments cannot be conducted oblivious to the constitutional command of Article 21. Where timely trial is impossible and prolonged incarceration has already occurred, constitutional courts are obligated to enlarge the accused on bail."[21]

This jurisprudential synthesis was further expanded in *Manish Sisodia v Directorate of Enforcement*, where the apex court reaffirmed that even in serious economic and corruption prosecutions under PMLA and the Prevention of Corruption Act, prolonged pre-trial custody cannot be permitted to become a disguised form of punishment.[22]

JUDICIAL REFORMS AND THE NEW STATUTORY FRAMEWORK: CRPC TO BNSS

Section 436A CrPC and its Successor: Section 479 of the Bharatiya Nagarik Suraksha Sanhita: Recognising the scandal of undertrial detention, the Parliament amended the Code of Criminal Procedure, adding Section 436A by the Code of Criminal Procedure (Amendment) Act, 2005. This provided that if a person had been confined for a period equal to or more than half the maximum punishment for the offence for which he was on trial, he shall be released on his personal bond with or without sureties.

Despite being mandatory, Section 436A was rarely used. The prisoners were simply unaware of it; the Under Trial Review Committees (UTRC) set up by state governments met rarely, if at all, and the jail authorities were not recording detainees' time served systematically. In Re Inhuman Conditions in 1382 Prisons, the Supreme Court issued a continuing mandamus to the UTRCs in all districts, to inspect jails every week and to release prisoners whose sentences entitled them to release under the new law.[23]

With the overhaul of Indian criminal procedure through the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), the legislature enacted Section 479 (replacing Section 436A CrPC) with notable modifications:

First-Time Offenders: Section 479(1) introduces a progressive sub-clause mandating that a first-time offender (a person who has never previously been convicted of any offence) shall be released on bail if they have undergone detention for a period extending up to *one-third* of the maximum period of imprisonment specified for that offence.

Mandatory Duty on Jail Superintendents: Section 479(3) imposes a positive statutory obligation on the Superintendent of the jail to apply directly to the court on behalf of the under-trial prisoner upon the completion of the one-half or one-third period.

Exclusionary Provisos: Conversely, Section 479 retains stringent carve-outs: it categorically excludes offences punishable by death or life imprisonment, and introduces restrictions where an accused faces multiple pending charges or cases arising out of different transactions.

In a landmark ruling interpreting the temporal application of Section 479 BNSS, the Supreme Court in In Re: Policy Strategy for Grant of Bail, held that the beneficial provisions of Section 479(1) regarding the one-third detention threshold for first-time offenders must apply retrospectively to all pending under-trial proceedings across India, irrespective of whether the original First Information Report (FIR) was registered before July 1, 2024.[24]

The Jurisprudence of Satender Kumar Antil: The definitive judicial restatement of Indian bail law emerged in Satender Kumar Antil v Central Bureau of Investigation.[25] The Supreme Court cataloged offenses in to four distinct categories (A, B, C, and D) and prescribed tailored, binding protocols for each:

Category A (Offences Punishable with up to 7 Years Imprisonment): No arrest should be made routinely. Upon filing of the charge-sheet/complaint without arrest during investigation, summons should be issued in the first instance, followed by bailable warrants, and interim/regular bail should be decided without taking the accused into physical custody.

Category B (Offences Punishable with Death, Life Imprisonment, or Imprisonment Exceeding 7 Years): Bail applications must be decided strictly on merits, assessing flight risk, gravity, and evidence tampering.

Category C (Offences under Special Acts Containing Twin Conditions: NDPS, PMLA, UAPA, Companies Act): Stringent statutory conditions must be satisfied, subject to the constitutional caveat of prolonged trial delay violating Article 21.

Category D (Economic Offences not Covered by Special Acts): Bail must be evaluated on individual facts; economic offences cannot be subjected to a blanket, categorical denial of bail.

Crucially, the Supreme Court in Satender Kumar Antil issued a formal recommendation to the Government of India to consider enacting a specialised, autonomous statute—a' Bail Act '—modelled on legislation in other common law jurisdictions to streamline bail adjudication and eliminate arbitrary judicial discretion.

COMPARATIVEJURISPRUDENTIALPERSPECTIVES

The United Kingdom: The Bail Act 1976 Framework: The United Kingdom reformed its approach to pre-trial detention nearly fifty years ago. Section 4(1) of the Bail Act 1976 requires courts to release an accused person on bail unless there are significant grounds for believing they would fail to surrender to custody, commit an offence, or interfere with witnesses or obstruct justice while released. Put simply, bail is the default position; it's the state that carries the burden of justifying why someone should be detained, not the individual who has to justify their release.

The UK has also taken wealth largely out of the equation. Judges can no longer condition bail on the accused posting a bond, handing over a cash deposit or property, or securing a bondsman, someone paid to guarantee the defendant's appearance at trial. Instead, where there's genuine concern that someone might abscond, courts can impose conditions like surrendering a passport, wearing an electronic tag with a curfew, or reporting regularly to a local police station. But these measures come into play only when the risk is real; if a judge isn't convinced there's any danger of the accused fleeing, there's no basis to impose them in the first place. 27

The United States: The Federal Bail Reform Act and Algorithmic Risk Assessment: In the United States of America, federal bail laws are determined by the Bail Reform Act of 1984 (18 U.S.C. §§ 3141-3156). Generally, this regulation stipulates “a defendant shall be released on his own recognizance or on an unsecured appearance bond unless the judicial officer finds that such release will not promote appearance of the defendant at future proceedings or will endangered the safety of any other person”. 28 However, according to the 18 U.SC §3142(c)(2), the judicial officer “may not impose a financial condition of release that will result in the pretrial detention of the person”.

Meanwhile, in states, the commercial cash bail system resulted in ethnic and racial inequities, which motivated historic bail reforms. For instance, in 2017, the State of New Jersey (NJ) eliminated cash bail after adopting an algorithm known as the Public Safety Assessment (PSA). 29 This software was designed to “use statistical analysis of factors such as age, criminal history and failures to appear for past court dates to determine the likelihood that a defendant will re-offend or fail to appear in court,” and set release conditions without considering the ability to pay. As a result, the proportion of persons incarcerated in the state was reduced by 44% with no increases in re-arrests and failures to appear for court dates. Recently, the State of Illinois advanced a similar bail reform bill entitled the Pretrial Fairness Act (SAF-T Act) of 2023 to end cash bail in all charges.

COMPREHENSIVE REFORM PARADIGMS FOR THE INDIAN LEGAL ORDER

Enactment of a Dedicated Standalone Bail Act: The piecemeal, scattered nature of bail provisions across the CrPC/BNSS and various special enactments has created severe jurisprudential inconsistency. India urgently requires a standalone, codified Bail Act. This legislation should explicitly enshrine:

A statutory presumption of entitlement to pre-trial release for all bailable and non-bailable offences carrying imprisonment up to seven years, rebuttable only by clear prosecutorial evidence of flight or obstruction risk.

A categorical prohibition against financial conditions that result in involuntary pre-trial incarceration due to indigence. Strict statutory timelines for the disposal of bail applications (e.g., maximum 2 weeks for trial courts and 4 weeks for High Courts).

An explicit requirement for reasoned, written orders whenever bail is rejected, subject to direct, expedited appellate review.

Transition from Property-Centric Sureties to Non-Monetary Supervision: The legal system must discard its archaic fixation with property titles and local financial sureties. In an era of universal digital identity (Aadhaar), biometric verification, and mobile connectivity, securing the presence of an accused can be achieved far more effectively through non-monetary supervisory mechanisms. Courts should systematically utilise:

Personal Recognisance Bonds: Mandatory release on personal undertaking for indigent and first-time offenders without requiring co-signers or financial security.

Digital and Geo-Fencing Supervision: Periodic biometric check-ins via mobile applications, geo-fenced travel boundaries, and, in severe cases, electronic ankle monitoring tags (subject to strict privacy safeguards).

Community Sponsorship Programs: Authorising registered civil society organisations, legal aid clinics, and community leaders to act as institutional guarantors instead of solvent property owners.

Institutionalisation of Pre-Trial Risk Assessment Frameworks: Judicial discretion in bail matters must be anchored in objective, verifiable criteria rather than subjective judicial temperaments. State legal services authorities and the judiciary should collaborate to develop culturally and socio-economically calibrated Pre-Trial Risk Assessment Tools (PRAT). These empirical tools would evaluate objective factors, such as residential stability, employment history, family ties, record of court appearance, and severity of the current charge, to furnish magistrates with an evidence-based risk profile during the initial remand hearing.

Absolute Cap on Pre-Trial Incarceration (Statutory Custody Time Limits): To dismantle the culture of indefinite judicial remands, India must institute strict statutory Custody Time Limits (CTLs) analogous to the UK framework. The law should mandate that if the investigation is not completed and charges are not framed within a fixed temporal limit (e.g., 60 days for magisterial offences and 180 days for sessions offences), the accused must be released on mandatory statutory bail, with zero judicial discretion to extend pre-trial custody. Incarceration must never be permitted to become an open-ended substitute for efficient criminal investigation and prosecutorial readiness.

Judicial Accountability and Prosecutorial Disincentives: Finally, meaningful reform requires systemic accountability. High Courts must incorporate adherence to Arnesh Kumar and Satender Kumar Antil guidelines into the Annual Confidential Reports (ACRs) of subordinate judicial officers. Magistrates who repeatedly pass mechanical, unreasoned remand orders should be subjected to mandatory judicial training. Furthermore, statutory compensation schemes must be instituted for individuals subjected to unlawful arrest or prolonged pre-trial incarceration who are ultimately acquitted, creating institutional disincentives against malicious and speculative prosecutions.

CONCLUSION

The current crisis of pre-trial detentions in India represents a constitutional wrong. By allowing the mechanism of arrests and bail to work as an instrument of social discrimination, the criminal justice system betrays the very idea of the Constitution. Pre-trial detention of those under trial cannot continue to be a punishment, and bail cannot be a privilege for the rich and the powerful. While the new criminal procedure code provides an opportunity to reinvigorate the system of arrests and bail, it will remain a dead letter unless there is a philosophical turnaround within the police, prosecution, and judiciary. Liberties cannot continue to be the privilege of the few; they have to be elevated to a fundamental right. Thus, a separate Bail Act has to be enacted which removes financial sureties as a determinant for release on bail. Objective parameters for pre-trial evaluations and judicial custody have to be evolved. Furthermore, the time-bound release of under trials is essential to prevent abuse of criminal law as an instrument of social control and subjugation.

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