

IMPOVERISHED JUSTICE: UNRAVELLING THE LAYERS OF BAIL AND JUDICIAL DISCRETION

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I. ABSTRACT

“The main objective of bail is neither punitive nor preventive, but only to witness whether the accused appears to take part in the trial.”– Justice G.S Singhvi

The theoretical aspect of the Indian Bail system protects the rights of the individuals and ensures fair treatment to all citizens, but the practicality shows poor implementation of the bail laws specifically while dealing with the poor or under-trials. Indian Judiciary plays a crucial role while granting bail, but they do not take into consideration socio-economic disparities of the economically marginalized. In a system where financial resources often dictate access to justice, individuals without means are disproportionately disadvantaged. As these people suffer to afford legal representation, paying sureties is even more difficult for them. Equality means to be treated as equal based upon the circumstance of the person. The Lower Level of Judiciary has shown only through a few circumstances where they have granted bail to poor or marginalised thus, adding a lot of burden to the High Courts and the Apex Court which shows shortfalls in the Bail System leading to delay in trials due to overcrowded courts and lengthy legal procedure.

There are potential methods to change the situation of the current system which are highlight in the research paper. It advocates for reforms aimed at enhancing access to legal aid for the economically disadvantaged, streamlining bail procedures to expedite hearings, and implementing mechanisms to ensure fair and consistent application of bail laws across different socioeconomic groups. It advocates for reforms aimed at enhancing access to legal aid for the economically disadvantaged, streamlining bail procedures to expedite hearings, and implementing mechanisms to ensure fair and consistent application of bail laws across different socioeconomic groups.

II. INTRODUCTION

For the past 75 years, India is a democratic country where everyone has certain rights guaranteed under the Constitution of India. As per **Article 21** “No person shall be deprived of his life except according to the procedure established by the law”.¹ Although bail has not been defined in Criminal Procedure Code (also referred as CrPC) but under *Section 2(a)* it talks about bailable offence which means offences

under **Schedule 1** of CrPC or any other legislation.

The statement where “everyone is considered innocent, until proven guilty” acts as a defense for applying for the bail and also acts as a savior from confinement. Since the idea of bail and personal liberty are closely related, everyone, even the accused, has the right to request bail in order to be released from custody until he is found guilty in a court of law.

The discretion of the judiciary also plays a prominent role in the matters of bail. In the case

¹Ind. Const. § 21.

of *State of Rajasthan versus Balchand* "Bail is a rule and jail is an exception" which acts as an ideal principle which the courts shall keep in mind while determining the question whether to grant the bail or dismiss.² The concept of judicial discretion in bail decisions empowers judges to consider other factors when determining whether an accused should be released before trial. These factors include the severity of the alleged crime, the defendant's criminal history and ties to the community and perceived risk of flight.

As one unravels the layers of this intricate web, it is important to confront the challenges faced by individuals with the limited financial means. Examining how judicial discretion shapes pre-trial outcomes and consequences of delay in trial. While peeling back these layers highlighting the issues of injustice and the urgent need for reforms that addresses the root causes within the bail system.

By unraveling these complexities, the aim is to foster a deeper understanding of the challenges faced by economically vulnerable groups, under trial prisoners and their family members in pursuit of equitable treatment within legal framework.

A. Delayed Trials and Consequences

Somewhere or somehow, speedy trials in the process of law can be advantageous to not just only the under-trial prisoners or jail inmates but can also be beneficial for the entire society or their family members. Due to the delay in the trial period, it can lead to delay in justice resulting in increased number of deaths of the prisoners behind the bars and losing the hope of fair justice and trust over Indian judicial system. From the point of view of witnesses, on one hand they might lose interest in the case whereas on the other hand they may forget the details of the case which can weaken the facts of the case.

A surge in case backlog can lead to overwhelming court dockets and straining the

allocation of judicial, legal, and administrative resources. Prolonged trials put forth administrative challenges, disrupting scheduling and overall court operations. Public perception of the justice system may be compromised, leading to diminished trust in the efficiency and fairness of judicial trials. Moreover, delayed trials hinder the establishment of legal precedents, impeding consistency in jurisprudence.

For instance, if the trial has been put off for a period of ten years and the accused is not released on bail, a number of bail applications, revision requests, and SLPs may be filed just for the grant of bail. But if the court deals with the matter prior to above mentioned procedure, it will save the time of the judicial authority as well as save the future of the under-trial prisoners.

1. Lack of budget as a cause of delay

(i) Out of several reasons, one of the prominent reasons why the judiciary lacks speedy trial is due to the lack of allocation of funds by the ministry. Several judges and Chief Justices many a time have raised their contentions that the inadequate allocation of budget from past several decades has not meet the appropriate requirement of judiciary for setting up of courts, building up of infrastructure and disposing of the number of cases pending in the various courts.

(ii) From the reports shown, out of the total expenditure of the Central government, only 0.1% of the total budget goes to the Ministry of Law and Justice. As per the data shared by India Justice Report 2020, which has scrutinized the budget between 2011-12 & 15-16, shows that no state or union territory across India has spent even 1% of its allocated budget on judicial system except Delhi. When adequate amount of funds are not being utilized by the bodies then it is burdensome to establish a fair and speedy trial system. Thus, it will lead to the increase in the number of prisoners, making them suffer behind the bars and not allowing them to be released on bails.

(iii) The Supreme Court being the apex court of the country holding such an immense power

²State of Rajasthan v. Balchand, All India Report 101 (Rajasthan High Ct. 1960)

has not taken much stand on the same. The power of judicial activism has not been correctly used by the apex court, as large number of cases is still pending before the courts and a substantial number of persons are languishing inside the jail with the hope in the judicial system of this country.

III. PROVISIONS OF BAIL IN INTERNATIONAL LAW

After birth every person is granted certain liberty and freedom which remain with them even after death. No authority or any person has such right or power to abridge other individual's liberty and freedom from him/her. The crime is not persistent or limited to only one country in the world but every country faces the consequences of crime and the only difference lies in the intensities of crime. Even the most developed countries report a significant number of crime rate for example as per the data shown by one of the renowned journalist Katharina Buchholz that in year 2020 the US saw a sudden spike in the crime rate. There were around 380.7 per 100000 people reported to the FBI.³

The concept of bail is now endowed in the laws of every country and many of these countries have also signed various international charters, declarations, covenants, rights and other such things which in clear manner specifies the rights and protection of the individuals behind the bars. Understanding the concept of bail in the international sphere requires an exploration of its purpose, legal frameworks, conditions, determination factors, and broader implications for human rights and cross-border cooperation. As globalization continues to reshape legal landscapes, the transnational crime presents new challenges and the significance of bail as a fundamental aspect of criminal justice transcends national borders, emphasizing the need for international cooperation and adherence to universal principles of fairness and due process.

Moreover, the concept of bail intersects with broader issues of human rights and procedural fairness. International laws guarantee the basic human rights including the right to liberty and the presumption of innocence, underscoring the importance of bail as a mechanism to protect these rights. Accordingly, pretrial detention should be used sparingly and as a measure of last resort, with individuals afforded due process and fair treatment throughout the bail process.

As the world becomes increasingly interconnected, transnational crime continues to pose challenges to law enforcement agencies and thus, the importance of understanding and navigating the concept of bail in the international sphere becomes ever more crucial. By promoting dialogue, collaboration, and adherence to universal principles of justice, countries can work together to ensure that bail serves its intended purpose that rights and dignity of all individuals is guaranteed, regardless of their nationality or location including those part of the criminal system.

A. International Covenant on Civil and Political Rights (ICCPR)

The main purpose for creation of this Covenant is to promote and respect the political and civil rights of the human beings. It includes numerous articles which support in the interest of human life.

As per Article 9 (1) of ICCPR, each and every person deserves right to liberty and freedom and no authority have such power to detain any individual arbitrarily.⁴ Article 9(3) in a simplest manner states that if a person is imprisoned then it will not be the general rule that he will stay behind the bars only, however release could be conditional on promise to show up for trial, any subsequent court appearances, and, if necessary, the execution of the verdict.

Article 10(2) of ICCPR, draws a thin line between the accused person and a convicted person. It

³Katherine Buchholz, *Violent Crime Rates Fall In the U.S.*, Statista (Oct. 8, 2023), <https://www.statista.com/chart/31063/violent-and-other-crime-rates-us/>.

⁴International Covenant on Civil and Political Rights, March 23rd, 1976, 9 N.H.R.C.

also provides that an accused person shall be kept away from the convicted person and shall be given a separate treatment.

The principle of everyone is deemed to be innocent until the guilt is proven has its traces under Article 14(2) of ICCPR.

While the ICCPR does not explicitly address bail, its provisions concerning the rights of accused individuals, including the right to be presumed innocent until proven guilty and the right to trial without undue delay, provide a framework that supports the availability of bail as a means to safeguard individual liberties pending trial.⁵

B. European Convention on Human Rights (ECHR)

The primary purpose of the ECHR is to protect individuals from abuses of power by governments and public authorities. It does so by setting out a range of civil and political rights that are considered fundamental to human dignity and democratic society. The rights given include the right to life, freedom from torture and inhuman or degrading treatment, the right to liberty and security, the right to a fair trial, freedom of expression, freedom of religion, and many others.

Under Article 6(2) of ECHR, it has been included that every person who has been charged of any criminal offences shall be presumed to be innocent in the eyes of law until the guilt is proven by the respective authority. This principle has also been laid down under Article 14(2) of ICCPR which also speaks the same. In case of *Salabiaku versus France (1988)* 13 EHRR379, Salabiaku was charged under drug trafficking in France. Before his trial there was extensive media coverage that portrayed him guilty and stated that in criminal activities. Out of which Salabiaku objected that it was unfair because it will make it hard for him to get fair trial. The court agreed, saying that everyone should be seen as innocent until proven guilty, and the media shouldn't make people look guilty before they've had their day in court. So,

the court said that what happened to Mr. Salabiaku was wrong and thus, violated his rights.⁶

C. American Convention on Human Rights (ACHR)

Article 7(5) emphasize that anybody who is detained has the right to be presented before a judge or other official who is legally empowered to exercise judicial power as soon as possible. They also have the right to a trial within a reasonable amount of time or to be released without jeopardizing the ongoing legal processes. His release could be conditional on guarantees that he will show up for the trial.⁷

While the American Convention on Human Rights does not explicitly address bail, its provisions concerning fair trial rights, access to justice, and the right to liberty contribute to the broader principles underlying bail decisions. These principles emphasize the importance of ensuring that individuals are treated fairly and have access to justice throughout the legal process, including during pre-trial detention.

D. United Kingdom

The Bail Act, 1976 is a significant piece of legislation in the United Kingdom that governs the law relating to bail. It provides a legal framework for when and under what conditions individuals accused of crimes can be released from custody pending trial. The Bail Act, 1976 talks about bail hostel, concept of street bail, bail by the police official, by judiciary and it also includes the concepts of sureties or bonds, etc.

The Bail Act, 1976 provides that if someone commits a crime, they can be arrested and can be taken in custody, but they may be granted bail if certain conditions are fulfilled. However, bail can also be refused if the case is serious and require investigation. It includes provisions relating to *arrest of person* absconding the from the bail conditions. Court reserves the power to not to grant bail, if there are substantial

⁵International Covenant on Civil and Political Rights, March 23rd, 1976, 10 & 14 N.H.R.C.

⁶*Salabiaku v. France*, 13 European Human Rights Reports 379 (U.K. Ct. 1988)

⁷International Covenant on Civil and Political Rights, November 22nd, 1969, 7 O.A.S

grounds for believing that person can tamper with evidences, can commit crime or failed to appear at any stage of the investigation. Section 8 of the Bail Act, 1976 grants bail with sureties and lays down that a person is granted bail in criminal proceedings on condition that he provides one or more surety or sureties as a promise that the person shall appear before authorities whenever required.⁸

E. United States

In the United States of America, the concept of bail dates back to the colonial era. The law of bail followed in America during pre-independence period had its traits from the common law of England, where the bail was used to secure the release of individuals who are awaiting trial. With the introduction of Virginia's Constitution which emphasized upon the prohibition of excessive bail, excessive cruel punishments, and imposing hefty fines except in case of rebellion or invasion which is mentioned under article 1 section 9 of the Virginia Constitution, 1776.⁹

The Judiciary Act of 1789 passed by the Congress contains laws that showed interest upon the concept of bail and conditions when bail may or may not be granted. As per Section 33 of the Judiciary Act, 1789 the bail shall be admitted except in cases where the punishment granted is death and in cases where bail cannot be granted then the judges of Supreme court or Circuit court can grant bail on basis of discretionary power.

In case of *Stack versus Boyle*, the Supreme Court addressed the issue of excessive bail and its violation of the Eighth Amendment's prohibition against excessive bail. The case involved several defendants who were charged with conspiracy to obstruct justice. The trial court set bail amounts ranging from \$50,000 to \$100,000, which the defendants argued were excessive and effectively denied them the opportunity for pretrial release. The Supreme Court unanimously ruled in favor of the defendants,

holding that the bail amounts set by the trial court were excessive and violated the Eighth Amendment. The Court emphasized that bail should not be set at an amount higher than necessary to ensure a defendant's appearance at trial. It recognized that excessive bail could effectively deny defendants their constitutional right to pretrial release, particularly for those who could not afford to pay.¹⁰

Stack versus Boyle established the principle that setting excessively high bail amounts can effectively deny defendants the opportunity for pretrial release and thus, is a violation of the Eighth Amendment's prohibition against excessive bail. This decision reaffirmed the importance of bail in the criminal justice system as a means to secure a defendant's appearance at trial while balancing the presumption of innocence and the protection of individual rights.

Post Judiciary Act of 1789, the Bail Reform Act 1966 was passed by the Congress in USA. It gave the utmost benefit to the accused, right to be released before trial, unless a judge decided they might not show up for court. If a judge in his opinion thinks that the accused might not show up, they could still be released if they followed mentioned rules, such as by not escaping from the town. While deciding the question of bail grant, judges have to take into consideration certain factors such as whether the person had a job, family or community ties and whether the person has shown up for court when asked.

Suppose if someone is charged with serious crime like murder or if they had already been convicted of crime and were waiting for sentencing, the judge had the authority to keep them in jail if he believes that there is a possibility that they might run or be dangerous for the society.

Later on, the Bail Reform Act of 1984 was enacted which brought about significant changes to the pretrial detention system in the

⁸Bail act, 63 B.A. § 8 (Lexis Nexis 1976).

⁹Virginia Const. § 1, cl. 9.

¹⁰Stack v. Boyle, 1 U.S. 342 (U.S. Supreme Ct. 1951).

United States. One of the most notable alterations was the provision allowing judges to detain defendants before their trial if they were deemed to be dangerous to the community or posed a flight risk. This marked a departure from previous bail practices, where the primary consideration was the defendant's likelihood of appearing in court. Under the new law, the government could argue for pretrial detention by demonstrating that no conditions of release would sufficiently ensure public safety or the defendant's presence at trial.

Additionally, the Bail Reform Act of 1984 established a presumption of detention for certain serious offenses. This presumption applied to cases involving crimes carrying maximum sentences such as life imprisonment or death, as well as certain drug offenses with penalties exceeding ten years. By creating this presumption, the law aimed to address concerns about the potential dangers posed by individuals accused of the most severe crimes, ensuring that judges could prioritize public safety when making detention decisions.

Furthermore, the Act outlined specific factors for judges to consider when determining whether to detain the defendant. These factors included the nature and circumstances of the offense, the defendant's criminal history, and the strength of the evidence against them. By requiring judges to take these factors into account, the law sought to ensure that detention decisions were based on comprehensive assessments of each defendant's circumstances and the potential risks they might pose to the community or the integrity of the judicial process.

Overall, the Bail Reform Act of 1984 represented a significant shift in the approach to pretrial detention in the United States, prioritizing public safety and the integrity of the legal system while still recognizing the presumption of innocence and the importance of individual rights.

In case of *United States versus Salerno*, 1987 the Supreme Court ruled that the Bail Reform Act,

1984 which allows for the pre-trial detention of individuals deemed dangerous to the community, does not violate the Eighth Amendment. This decision upheld the government authority to detain defendants without bail if they are deemed threat to public safety.¹¹

IV. CLASSIFICATION OF BAIL AND ITS LEGISLATIVE PROVISIONS

The process of granting bail is not uniform and varies accordingly to the charges that have been imposed upon the person, severity of the offence and public safety concerns. Therefore, several types of bail are discussed below:

A. Regular Bail

The regular bail is granted to an accused person who is under arrest or custody, by allowing them to be released temporarily unless and until their trial or investigation comes to an end. The purpose of the regular bail is to secure the release of an accused who has already been detained. In case of *Gurwinder Kaur versus State of U.P.*¹², the bench of Allahabad High Court has held that "the regular bail is sought when applicant is taken under custody".

B. Interim Bail

The concept of interim bail is nowhere described under Code of Criminal Procedure, 1973. But the term interim bail denotes, release of an accused person on temporary basis by the court authority till the time his application for anticipatory bail or regular bail is pending before the court. In layman terms, this bail is granted when regular bail application is pending before the court. It is upon discretion of the court whether to grant such interim relief to the individual or not. It can be granted after furnishing surety or bonds including certain specified restrictions. Its main purpose is to maintain the balance between the interest of justice and rights of accused such as in case of medical emergencies.

C. Anticipatory Bail

¹¹United States v. Salerno, 481 U.S. 739 (U.S. Supreme Ct. 1987).

¹²Gurwinder Kaur v. State of U.P., JKO (Allahabad High Ct. 2023)

The concept of anticipatory bail came through 41st Law Commission Report, which simplified the need for the introduction of anticipatory bail. The anticipatory bail allows an individual to seek pre-arrest bail from the court, once he gets an anticipation of his arrest. It enables the individual to approach to the court for protection against the potential harassment or wrongful arrest by law enforcement agencies. When granting anticipatory bail there is no time limit and it can last until the trial is over. Section 438 of CrPC discusses the anticipatory bail which will be discussed in detail later in this chapter.

D. Default Bail

The term default bail has not been expressed in any procedural or substantive law. But multiple numbers of times it has been used by the courts and advocates. Default bail means when the chargesheet has not been filed by the police officer as per the given period of time and the period has exceeded then the accused or detainee reserves the right to demand the default bail before the court. The grant of default bail is necessary as it is granted because of the failure of the investigating agency to complete the investigation as the authority failed to complete investigation with the stipulated given period of time and it is the right of an accused person.

V. BAIL IN CASE OF BAILABLE OFFENCES

In our Indian law, Section 436 of Code of Criminal Procedure explains the bailable offences. Section 436 states that where any person is guilty of a bailable offence is ready to give bail while he is in custody or during the pendency of trial, then as per the prescribed section such individual is entitled to bail.¹³

In the case of *Rasiklal versus Kishore, 2009*¹⁴, the respondent filed a complaint of defamation against the appellant for a bailable offence. The Judicial Magistrate First Class granted bail to the appellant after he furnished a surety of Rs 5000/-. The respondent was not satisfied with the decision of the judicial magistrate.

Therefore, the respondent approached the High Court of Madhya Pradesh.

The High Court cancelled the bail of the appellant, out of which matter went to the Apex Court where the Supreme Court held that when an offence qualifies for bail, the right to demand bail provided by Section 436 of the Code is an unalienable and absolute right. When it comes to bailable offences, Section 436 must be followed without exception.

Many a times the Supreme Court has reiterated that “poor suffer in jail and the rich gets bail”. The bench of S.K Kaul and M.M Sunderesh has observed that it’s the poor who suffers behind the bars and whereas the influential riches commit the offence and escape from the country which is more easier for them due to the contacts they have created or because of their money power.¹⁵

VI. PROVISION OF BAIL IN CASE OF UNDER-TRIAL PRISONERS

The under trials have been protected under section 436-A of Cr.P.C, 1973, which states that if an under trial during investigation, inquiry or trial has not been awarded sentence related to punishment of death and has been kept in detention for one half of the max period of detention, then the person shall be released after furnishing the bail bond with or without sureties.¹⁶ The period of detention granted by the court may be extended if the public prosecutor provides sufficient reason if writing that such person should not be released.¹⁷ NCRB has published “Prison Statistics India” report for 2022 and has shown that the under trial prisoners who were languishing behind the bars from past 1 year. India ranks second to Bangladesh out of 54th commonwealth countries.¹⁸

¹³Ians, *Poor Suffer In Jail, Rich Gets Bail: Sc For Early Release Of Prisoners Suffering Over 10 Years*, Deccan Herald (Feb. 25, 2022), <https://www.deccanherald.com/india/poor-suffer-in-jail-rich-get-bail-sc-for-early-release-of-prisoners-serving-over-10-years-1085148.html>.

¹⁴Code of criminal procedure, 02 C.R.P.C. § 436A (Lexis Nexis 1974).

¹⁷Code of criminal procedure, 02 C.R.P.C. § 436A proviso (Lexis Nexis 1974).

¹⁸Shreehari Paliath, *76% of Indian Prisoners Are Awaiting Trial. A Separate Bail Law Could a Start of Change*, Scroll.in (Aug. 28, 2022), <https://scroll.in/article/1031294/76-of-indian-prisoners-are-awaiting-trial-a-separate-bail-law-can-be-the-start-of-a-change>.

¹³Code of criminal procedure, 02 C.R.P.C. § 436 (Lexis Nexis 1974).

¹⁴*Rasiklal v. Kishore, 4 SCC 446 (Supreme Ct. 2009)*

Now, the counsels even in civil matter or commercial disputes try to put forth the same as it will look like a criminal case. Leaving out the habitual offenders, the common individual after arrest loses all hopes from the society and is deprived of source of income.¹⁹

The introduction of the Bhartiya Nagrik Suraksha Sanhita, 2023 (BNSS) added a proviso under Section 479²⁰, said that if a person is not a habitual offender and has never been convicted in any offence in past he shall be released on bond, if the individual has been detained up to one third of maximum period of imprisonment for such offence under such law.

Section 479 (3) of BNSS,2023 was added in the statute which said on completion of the said mentioned period the Superintendent of jail has to make an application to the court for release of such person.

VII. BAIL IN CASE OF NON-BAILABLE OFFENCES

Section 437 of Cr.P.C, 1973 provides the conditions where bail can be granted if the offence is of non- bailable nature.²¹ If any person gets arrested or detained by any officer in case of non-bailable offence he shall not be released if there are reasonable grounds such as when the court thinks he is guilty of offence punishable with death or imprisonment for life.

In case of *Prahlad Singh Bhati versus NCT Delhi*, the court held that it is important to keep in mind that the legislature has used the word "reasonable grounds" instead of using "evidence" when a court grants bail, it does not require the same level of evidence as needed for a conviction. The court looks for "reasonable grounds for believing" that there is a genuine case against the accused and that the prosecution can provide some initial evidence supporting the charges. This means that at the bail stage, the court does not need proof of guilt beyond a reasonable doubt, which is required for a conviction.

The focus is on ensuring that there is a valid case against the accused and that there is enough evidence to support the charges, even if not yet proved conclusively.²²

Another sub-clause says that Magistrate shall not release such person who had been held for offence of cognizable nature or had previously convicted for offence whose punishment is life imprisonment, imprisonment for 7 years or more or he has been convicted for more than two occasions of cognizable offence. But there lie two exceptions:

1. If the person under the above section is under the age of sixteen years or is a woman or sick or infirm, then court may grant bail in non-bailable offence.²³

As per BNSS,2023 Section 480, it says court may grant bail to such person, is he/she is a child or is woman or sick or infirm.

2. If any special reason is there then court may grant bail.²⁴

The power of releasing the accused in case of non bailable offences is discretionary. From the above clauses every time the word "may" has been used instead of shall. The "may" in the above clause indicates for the discretion of the court. But if any person is released on bail as per the above clauses then it shall be the duty of the court to record the reasons for granting such bail in a non-bailable offence.

Provision in the act creates a dilemma within the Criminal court, as should they grant bail in such offences which are of cognizable and non bailable in nature. As due to this if the courts will deny the application for bail then question for public liberty arises whereas in situations when bail is granted then it becomes a question of public good.

VIII. IMPACT OF BAIL ON POOR

The one who suffers every time is poor person. The reason why poor suffers behind the bars is due to the lack of awareness amongst them

¹⁹Harinder Singh @ Harry v. State of Punjab, SCC OnLine 9855 (Punjab & Haryana Ct. 2013)

²⁰The Bhartiya Nagarik Suraksha Sanhita, 174C B.N.S.S. § 479 (LexisNexis 2023).

²¹Code of criminal procedure, 02 C.R.P.C. § 437 (Lexis Nexis 1974).

²²*Prahlad Singh Bhati versus NCT Delhi*, 4 SCC 280 (Supreme Ct. 2001)

²³Code of criminal procedure, 02 C.R.P.C. § 437 (Lexis Nexis 1974).

²⁴The Bhartiya Nagarik Suraksha Sanhita, 174C B.N.S.S. § 480 (LexisNexis 2023).

about their rights. It is one of the biggest pain when the individual is not able access his liberty just because he is illiterate or underprivileged. The President Lyndon B. Johnson, while signing the Bail Reforms Act, 1966 said that:

{He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only—because he is poor.}²⁵

If such poverty continued and remained with the person then it will become way too impossible for such person to avail bail as a matter of right and he will continue languishing in jail. In cases of bailable offences bail can be attained by such person as a matter of right but if the person is poor and has no relatives in the society then it is not easy for him to get himself out of bail. Just by writing it down in the law that if a person not able to furnish the surety in one week will considered as indigent and shall be released the main question arises is how much is it followed by the authorities.

Another major reason why the concept of bail is more favorable to rich and against the poor is due to the inability of poor person to pay for the amount of bail. The amount of bail imposed by the court are in such figures that sometimes it becomes way more difficult to arrange such hefty amount, so due to such reason they believe to suffer in jail rather than becoming a liability upon his own family or else the family would always have to stay in debt by asking for loans from their near ones and in future they have to suffer for pressure of returning back the loan amount.

In case of *Moti Ram and Ors versus State of Madhya Pradesh*²⁶, accused was a poor person and the apex court passed an order to CJM to release the accused on bail without any

sureties, bond etc. But CJM deliberately directed the accused to furnish the security of Rs. 10,000/-. Due to this, poor person went back to apex court where it was held by the court that Court shall be more inclined towards bail and use jail in exceptional circumstances.

Failure to consider financial ability has generated many controversies in recent years, as bail requirements may discriminate against poor people and certain minority groups who are thus deprived of an equal opportunity to secure their freedom, pending trial.

To ask a poor man to furnish surety who already earns hand to mouth is like asking for an impossible task to be performed by him. Ultimately, the poor accused's hope, trust, and faith in liberty and justice can only be sustained by the Court's character, command, wisdom, and will to uphold the law by ensuring that the flame does not go out due to a lack of desired awareness or extent on the part of the administration of justice, held in the case of *Nanu Gordhan versus State of Gujarat*.²⁷

Even after several amendments made in penal laws it is the surety which determines who will be provided bail and who will remain in jail. Financially sound individual has easy access to purchase their freedom where its difficulty arises for the ones who can arrange such amount for their release. The case of *Rudal Shah versus State of Bihar*²⁸ the petitioner was acquitted by the court earlier but was released from the jail after 14 years. If civilization is to survive in this nation—as it has in a few others that are too famous to mention—we must educate ourselves to recognize that respect for individual rights is the real foundation of democracy.

Unfortunately, the impoverished in our nation are being priced out of the legal system, leading them to lose faith in the ability of our judicial system to improve their living circumstances and provide them with justice.

²⁵Satender Kumar Antil v. C.B.I, SCC OnLine SC 825 (Supreme Ct. 2022)

²⁶Moti Ram and Ors versus State of Madhya Pradesh, All India Report 1574 (Supreme Ct. 1978)

²⁷Nanu Gordhan v. State of Gujarat, 2 Gujrat Law Report 1698 (Supreme Ct. 1995).

²⁸Rudal Shah v. State of Bihar, All India Report 1086 (Supreme Ct. 1983).

The underprivileged have consistently found them on the losing end of the judicial system's deal. Poor have always come across "law for the poor" rather than "law of the poor".²⁹ They view the law as something fascinating and oppressive that always takes something away from them rather than as a useful tool that can improve their lot in life by altering the socioeconomic system and giving them the rights and advantages. As a result, the less fortunate members of the community no longer trust the legal system.

Instances like the case of Rudal Shah highlight a recurring issue where individuals from economically disadvantaged backgrounds suffer unjust incarceration despite being acquitted by the court. Section 358 of Cr.PC addresses compensation for wrongful arrests, yet reports indicate that the awarded compensation often fails to adequately account for the extensive suffering endured by the individual and their family. Detainment under unlawful grounds and receiving meager compensation undermines the principles of fairness and justice. Everyday inside jail feels like 365 days, because in jail it's not the only single person suffering but his entire family is struggling outside. Compensation should not merely reflect the duration of incarceration but must encompass the entirety of suffering endured by the individual and their family due to baseless arrest and ensuing humiliation.

IX. JUDICIAL DISCRETION

Judicial discretion stands at the heart of the legal system, embodying the nuanced application of law within the complexities of individual cases. It represents the authority granted to judges to interpret and apply the law in a manner that achieves justice while accommodating the unique circumstances of each situation.

However, the exercise of judicial discretion is not without its challenges, as it requires a delicate balance between upholding the rule of law and

addressing the complexities of human experience.

The law makers has nowhere defined the term judicial discretion in any of the statutes but still it holds the dictatorial position in the court of law. As multiple times it has been used by the court, the judges mentioning judicial discretion while delivering any judgement, order etc.

Every case has its own facts and circumstances and holds different value in the eyes of law, where statutes remain silent the judges have to apply their judicial mind to interpret. But while applying judicial discretion the judges have to keep in mind that the decision they are passing in their judgment shall not have kind of arbitrariness.

If we look at the statutes, very often we encounter with words mentioned such as "as courts thinks reasonable", "as the court directs", or "as courts deems proper in the interest of justice" which directs the discretionary power to the judges of the court to judicially apply their mind and give such order or verdict. Which in itself proves the factor that, how many powers has been conferred to the judges while determining the case?

One of the primary reasons for the arbitrariness in bail decisions is the wide discretion granted to judges. While this discretion allows judges to consider the unique circumstances of each case, it also opens the door to personal biases and subjective interpretations of the law.

Moreover, external pressures, such as public opinion, media scrutiny, and political considerations, can also influence bail decisions. Judges may feel compelled to deny bail in high-profile cases to appease public sentiment or avoid criticism, even if the legal merits support granting bail. Conversely, there may be instances where bail is granted to individuals with significant social or political connections, despite the seriousness of the charges they face.

"Decisions are not based on Shastras only,

²⁹Hussainara Khatoun v. State of Bihar, 3 Supreme Court Report 532 (Supreme Ct. 1979).

In trials without imagination, miscarriage of justice arises.” – Brihaspati

The arbitrary detention of Khurram Parvez coordinator of Jammu Kashmir Coalition of Civil Society (JKCCS) and Irfan Mehraja journalist formerly associated with JKCCS has been similarly detained since March 2023.

Both were languishing inside Rohini Jail in India which condemned by various international authorities as well as international government bodies. They been in pre-trial detention for two years under politically motivated charges under the Unlawful Activities Prevention Act (UAPA). Khurram's detention is highlighted as arbitrary, with charges deemed fabricated.

The misuse of the UAPA is condemned, particularly its provisions allowing prolonged pre-trial detention without evidence and difficulty in obtaining bail. The UN Working Group on Arbitrary Detention (WGAD) has declared Khurram's detention arbitrary and called for his immediate release.³⁰

X. CONCLUSION

In our society the liberty of an individual has been the fundamental right. Article 21 of Indian Constitution supports, “no person shall be deprived of his personal liberty, except according to the procedure established under prescribed law”.³¹ Law itself purports that the only way freedom of an individual can be curbed is through a prescribed procedure laid down in the law. When someone's life or freedom is at risk, it's really important that all the rules and steps laid out in the law are followed exactly.³²

The legal process shouldn't be stopped suddenly or unfairly because it could seriously hurt the person involved. This means making sure that everything is done properly and fairly

to protect their rights. If the rules aren't followed correctly, it could cause a lot of harm to the person, so it's crucial to stick to them carefully to make sure everyone is treated fairly and respectfully.

As per the reports of the Law Commission, the under trials inmates make up to 67% of the total jail population, which shows how much slow the judicial process is working that 67% of under trials are behind the bars with a hope in their mind that they will get fair justice and they believe in the judicial system of this country.³³

It has been rightly quoted by Nelson Mandela, “*That no one truly knows a nation until one has been inside its jail. A nation should not be judged by how it treats its highest citizens but its lowest ones*”.³⁴ From the reports of the Law Commission it can be clearly seen that how many under trials prisoners i.e. 67% are illiterate or semi- illiterate who just even don't know how to get out of this vicious circle or will they ever be able to come out of this or not. This leaves a question in their mind that whether the judicial system of this country is speedy or fair enough to get them out of prison or for remaining life they have to suffer behind these bars only.

XI. SUGGESTIONS AND RECOMMENDATIONS

The above-mentioned thorough analysis has shown how India's bail system is still inaccurate. The present loopholes in the code at hand must be fixed immediately to prevent the number of victims from rising, which would be disgraceful on a global scale. The following recommendations will help address the problem as soon as possible:-

A. Separate Act

The central government shall enact a specific legislation for bail, “Bail Act” same as in U.K to streamline the bail process in India. The purpose of such legislation would likely be to address concerns regarding delays in the bail process, which can often lead to prolonged

³⁰Human Rights Defenders, *India: Two years of Arbitrary detention of Kashmiri human rights defender Khurram Parvez*, FIDH (Oct. 21, 2023), <https://www.fidh.org/en/region/asia/india/india-two-years-of-arbitrary-detention-of-kashmiri-human-rights>.

³¹Ind. Const. § 21.

³²Riya Jain, *Article 21- Understanding The Right To Life And Personal Liberty from Case Laws*, Academic (Dec. 12, 2023), <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>.

³³*Law Commission Report*, IAS Parliament (May 26, 2017), <https://www.shankariasparliament.com/current-affairs/law-commission-report>.

detention of individuals awaiting trial. The code must contain the provision, some of them are given as follows –

- i) Object and utility of bail.
- ii) Powers of judiciary with respect to granting of bail with check and balance so there will be no abuse of powers.
- iii) Power of police for granting bail.
- iv) Detailed provisions regarding the acceptance and refusal of bail applications.
- v) Remedies in case of abuse of power of granting bail.

B. Avoiding diversion of police from investigations

Police officers working on a specific inquiry cannot be transferred to another law and order-related task. Therefore, taking a diversion from the investigation may cause it to take longer. When police officials are diverted from their primary investigative responsibilities to address law and order issues, it can disrupt ongoing investigations and hinder progress in resolving cases.

Investigations require dedicated time, effort, and expertise, and any interruptions or diversions from these tasks can impede the timely gathering of evidence, interviewing of witnesses, and overall progress toward solving crimes.

C. Fixation of limit for bail bonds and sureties

The absence of statutory limit for bail bonds and sureties in the Indian legal system means that the determination of this amount is totally in the hands of the court. Such discretion can lead to variations in bail requirements, resulting in potential disparities in treatment among individuals facing charges.

Statutory limits should be established for bail bonds and sureties. These limits would provide clear guidelines for courts to follow when setting bail amounts, ensuring greater consistency and fairness in the bail process.

D. Timely Disposal of bail applications

Ensuring the expeditious disposal of bail applications is crucial for upholding the rights of individuals awaiting trial and maintaining the

efficiency of the judicial process. Therefore, it is proposed that bail applications should ideally be resolved within a timeframe of two weeks, unless specific legal provisions dictate otherwise.

This expedited timeline aims to prevent unnecessary delays in the administration of justice and to mitigate the adverse consequences of prolonged detention on individuals and their families. By setting clear timeframes for the disposal of bail applications, the legal system can enhance transparency, accountability, and accessibility for all parties involved. Timely resolution of these matters also contributes to reducing case backlogs and improving the overall efficiency of the judicial system.

E. Fast Track Courts

To establish fast-track bail hearings, India should first designate specialized bail courts or allocate specific sessions within existing court schedules dedicated solely to bail matters. These specialized courts would prioritize bail hearings, ensuring prompt consideration of applications without being delayed by other trial proceedings.

Implementing electronic filing systems for bail applications and hearings would further streamline the process by reducing paperwork and administrative burdens. Additionally, expedited review processes should be introduced, setting shorter deadlines for prosecutors to respond to bail applications and scheduling hearings soon after their submission.

By minimizing procedural formalities, such as limiting the scope of arguments and waiving unnecessary documentation requirements, the bail process can be expedited without compromising on fairness or due process.

F. Adequate Compensation Guidelines

To enhance the bail structure in India and address the issue of groundless arrest, it's crucial to introduce provisions for adequate compensation for individuals who have been unjustly detained. This compensation mechanism would serve as a safeguard

against wrongful arrests, providing recourse for those who have suffered loss of liberty, reputation, and livelihood due to unfounded charges.

By establishing clear guidelines and criteria for determining eligibility and quantum of compensation, the legal framework can ensure that victims of groundless arrest receive fair and timely redress.

XII. REFERENCES

1. Geeta Kanwar, Does India Needs to Spend More on its Court to Ensure Justice?, The Quint (Apr. 2, 2022), <https://www.thequint.com/opinion/india-judicial-budget-stagnant-spend-more-justice>.
2. Human Rights Defenders, India: Two years of Arbitrary detention of Kashmiri human rights defender Khurram Parvez, FIDH (Oct. 21, 2023), <https://www.fidh.org/en/region/asia/india/india-two-years-of-arbitrary-detention-of-kashmiri-human-rights>.
3. Ians, Poor Suffer In Jail, Rich Gets Bail:Sc For Early Release Of Prisoners Suffering Over 10 Years, Deccan Herald (Feb. 25, 2022), <https://www.deccanherald.com/india/poor-suffer-in-jail-rich-get-bail-sc-for-early-release-of-prisoners-serving-over-10-years-1085148.html>.
4. Katherine Buchholz, Violent Crime Rates Fall In the U.S, Statista (Oct. 8, 2023), <https://www.statista.com/chart/31063/violent-and-other-crime-rates-us/>.
5. Law Commission Report, IAS Parliament (May 26, 2017), <https://www.shankariasparliament.com/current-affairs/law-commission-report>.
6. Riya Jain, Article 21– Understanding The Right To Life And Personal Liberty from Case Laws, Academic (Dec. 12, 2023), <https://www.lawctopus.com/academike/article-21-of-the-constitution-of-india-right-to-life-and-personal-liberty/>.
7. ShreehariPaliath, 76% of Indian Prisoners Are Awaiting Trial. A Separate Bail Law Could a Start of Change, Scroll.in (Aug. 28, 2022),

<https://scroll.in/article/1031294/76-of-indian-prisoners-are-awaiting-trial-a-separate-bail-law-can-be-the-start-of-a-change>