

## THE LAW OF BAIL IN INDIA: AN ANALYSIS OF LEGISLATIVE AND JUDICIAL PERSPECTIVE

### ABSTRACT

The bail system creates a balance between the fundamental tenet of criminal law—that no one can be found guilty unless their guilt is proven—and the state's obligation to defend its inhabitants against the rampant criminal population. Obtaining assurance that the accused will continue to be accessible for trial is the goal of accepting surety bonds instead of bail. The court must also ensure that, even in cases where bail is granted, the accused is free to appear in court without interfering with the criminal justice system. The accused cannot disregard the terms and conditions of their bail, the court must also ensure. The Indian accusatorial system is inherently linked to the right to bail. In actuality, India's accusatorial system, which supports a bail system that typically allows an individual to remain out of jail until a trial has determined their guilt, is closely linked to the right to bail. In the Indian legal system, women and children are the only ones who can be granted bail or release on their own recognisance in cases when the offense is not punishable by death or life in prison.

### INTRODUCTION

The word 'bail' has been derived from the French word 'Baillier', which means to give and deliver as a whole. The word bail has been defined in the Criminal Procedure Code in India, whereas the dictionary meaning is "to set free or liberate a person on security being given of his appearance." And according to Stroud's Judicial Dictionary, Bail means 'release of a person from legal custody'. In layman's language, bail means the release of a person from the custody or restraint from arrest by taking security for his appearance. In ordinary cases, the law allows the grant of bail for the protection of his liberty rather than refusal. Therefore, bail is a rule and refusal is an exception. According to Corpus Juris Secundum, bail means delivery of the arrested person to his sureties, by taking security from them for the appearance of the person arrested at the time and place when needed. The main goals of the accused person's arrest and imprisonment are to guarantee his presence in court throughout the trial and to make sure that, should he be found guilty, he would be able to accept the sentence imposed by the court. Should his attendance at the trial deprive the accused of his liberty while the criminal procedures against him are pending would be unjust and unfair, unless a reasonable alternative could be secured to his arrest and incarceration. The purpose of the provisions pertaining to summons, arrests under warrant or not, and bail releases is to guarantee that the accused appears in court for his trial without unnecessarily and unjustifiably restricting his freedom. In general, bail

was a medium through which the appearance of the accused was secured at the time of hearing or judgment of the case and prevented him from tampering with the evidence or witnesses related to the case.

The Supreme Court made it clear in one of its rulings that release on personal bond and with sureties are both included in the concept of bail. According to this enlarged meaning, "bail" simply refers to release based on financial assurance, which might come from third parties' sureties or from one's own assurance (also known as a personal bond or recognizance).

Demands for the careful and cautious preference of circumstantial evidence in cases where a man's liberty was at jeopardy were becoming more and more pressing. The Indian Constitution guarantees several rights, including the presumption of innocence unless proven guilty, the right to know the reason for an arrest, and the right to be released on bail pending trial. A swift criminal trial was also encouraged by Kautilya's Arthashastra in order to prevent pre-trial incarceration, and the system of bail was also somewhat used in ancient India. During the Mughal period, the bail system was also widely used in the forms of Zamanat, or bail, and Muchalaka, or personal bond. The common law of bail was established in India with the arrival of British authority as well and got statutory recognition in the Codes of Criminal Procedure, 1973, and is now also described in the new criminal law, The Bhartiya Nagrik Suraksha Sanhita, 2023.

In the criminal Justice system in India, as we all know that these days bail is a very controversial topic which was also discussed in many reports.

Since governmental agencies administer the penalties for pre-trial detention, the accused's release on bond is essential. If the accused is not granted bail, he will be subject to the mental and physical hardships of incarceration even if he is deemed innocent until and unless his guilt is established beyond a reasonable doubt in court. The imprisoned accused thus loses his employment and is unable to make a meaningful contribution to the defense team's preparation. Not to mention, the innocent members of his family usually bear the brunt of his incarceration.

The law governing bail should strike a balance between two opposing goals: protecting the public from the misdeeds of the person who is accused of committing a crime and maintaining the accused's innocence until proven guilty. The lower courts are expected to be according to the guiding principle, jail is an exception, not the rule. However, even within this exception, the terms of the bail should not only be interpreted for the benefit of the accused, but also the benefit of the prosecution and society at large. This benefit may also be obtained directly or indirectly through the commission of an offense against society as a whole. When social security and individual liberty clash, the court must compromise society's security in order to protect individual liberty. According to Article 21 of our Constitution, personal liberty is a fundamental right that cannot be violated

unless it can be demonstrated that the legally sanctioned processes of arrest and imprisonment are reasonable, fair, and just.

The Bhartiya Nagrik Suraksha Sanhita, 2023, Chapter 35, contains provisions about bail. The authority to set bail has been granted to the officer in charge of the police station and the competent court within sections 478 to 496 of the Act. In these sections, "Court" refers to the local court with jurisdiction. Therefore, the court must first establish whether it has jurisdiction over the case before releasing a defendant on bond. Therefore, the court must first establish whether it has jurisdiction over the case before releasing a defendant on bond. The Allahabad High Court shared this opinion, ruling that a bail order issued by a court lacking the authority to investigate and prosecute the accused for this type of offense is unconstitutional. In a Full Bench Case, the Patna High Court ruled that a magistrate with the authority to take cognizance and try an offense will have the authority to issue bail under section 437 of the Criminal Procedure Code, 1973.

The infamous case disposal delays are a flaw in the legal and judicial systems that cause the inmates who are awaiting trial to be egregiously denied justice. That an accused person's trial should take so long to begin is a poor reflection on the legal and judicial system. A year-long delay in the trial's start is already problematic; imagine how much worse things may get if there is a three-, five-, seven-, or even ten-year wait. The criminal justice system depends on speedy trials, and no question that waiting around for a trial to begin is a denial of justice in and of itself.

All things considered, the bail system created a balance between the state's need to defend its citizens from criminal activity and the fundamental tenet of criminal law—namely, that an individual cannot be found guilty unless their guilt is proven. The purpose of surety bonds, which are used as bail, is to guarantee that the accused will be present for their trial. In addition, the court must ensure that the accused is free to appear in court without interfering with the criminal justice system while granting bail. Additionally, the court must ensure that the accused cannot violate the terms and conditions of their bail.

## **BASIC PRINCIPLE REGARDING BAIL IN CRIMINAL LAW**

In the case of *Abdul Habib khan v. Emperor*<sup>1</sup>, it was held that in the case of bailable offenses seriousness of the offense is not considered to grant bail. The principle behind the concept of bail is 'everyone is innocent until proven guilty,' and as an innocent person, he is also entitled to enjoy freedom and liberty. The court held that 'Order granting or refusal of bail need not necessarily be speaking or reasoned<sup>2</sup>'.

### **Disposal of Bail Application**

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<sup>1</sup> AIR 1928 All. 211

<sup>2</sup> Jivaji Jadeja v. State of Maharashtra AIR 1987 SC 1491: 1987 Cr.L.J. 1850.

As held in the case of *Lateef v. State of U.P.*<sup>3</sup> the accused has the right to expeditious trial of his bail application, and the magistrate should also dispose of the same as soon as possible because it is a part of the right to liberty. If the charge has not been framed after the expiry of the period of one year from the commencement of the crime, then it is a legal ground to grant bail. While disposing of the bail application, if the court faces any practical difficulty, then the court should release such an accused after furnishing some sort of security for his appearance whenever needed. If the remand and bail application of the accused are received at the same time, then both will be heard together without adjourning the case,<sup>4</sup> whereas the J., Virendra Saran held in a case that refusing to hear the bail application when the accused is not in custody by a magistrate is valid.

### **Bailable and Non-Bailable Offenses**

The court has no discretion to refuse bail in the case of bailable offenses, but the bail granted in the case of a bailable offense may be cancelled due to conversion of the offense into a non-bailable offense or where the accused take undue advantage of the same.

In the cases of Non-bailable offense, the police officer has no power to grant the bail to the accused whereas the magistrate also has discretion to grant the bail in the cases where offense may be punished with death sentences or life imprisonment and court also has authority to impose any condition while granting bail in non-bailable offenses.

### **Who may grant Bail**

According to The Bhartiya Nagrik Suraksha Sanhita, 2023, either a police officer in charge or a court has the power to grant bail.

In the case of a bailable offense where the offense is not punishable with felony imprisonment, then the police officer is competent to grant bail by stating a reasonable reason. Under Sec 478 of the Bhartiya Nagrik Suraksha Sanhita, 2023, the power of a police officer to grant bail is discretionary, but when he grants bail in a bailable offense which are punishable with death or life imprisonment, then it is necessary to state the reason for doing so.

Any magistrate, whether executive or judicial, may arrest a person who is committing any crime before him without being concerned about the cognizance of the case, but such detention for than twenty hours without producing him

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<sup>3</sup> 1990 All. L.J. 659

<sup>4</sup> Dr. Vinod Narain v. State of U.P. , Crim. Misc. Writ Petition No. 3643/1992 decided on 1.2.95 (FB) 1995 ACC 375 All.(FB).

before the competent magistrate and unless the order of custody has been obtained by the competent authority. If this procedure is not possible in either of the bailable or non-bailable offenses, then the magistrate/judge has the authority to grant bail to the accused under Sections 478 to 496 of The Bhartiya Nagrik Suraksha Sanhita, 2023. But the Magistrate has to take an undertaking of appearance before the court having jurisdiction on any appointed day.

In non-bailable offenses which are punished with imprisonment not less than ten years, where the investigation has not been concluded, and the anticipatory bail under Section 482 of The Bhartiya Nagrik Suraksha Sanhita, 2023 has been filed, then the bail may be granted. But in such non-bailable offenses, bail to an accused may only be granted only after imposed conditions by the competent court is fulfilled.

### **Grant of Bail to an Unsound Mind**

The court may grant bail to a person who is incapable of producing his defence by taking security from the sureties about the prevention of any crime committed by him against himself or other person and for his mandatory appearance before the magistrate whenever needed.

### **Bail by the High Court**

According to Section 482 of The Bhartiya Nagrik Suraksha Sanhita, 2023, whenever any person applies to the High Court to grant the bail in any non-bailable offense for which he may be arrested on the accusation of commencement of crime then it is the discretion of the High Court to grant him bail or not.

Where an accused filed an appeal before the High Court for release of a convicted person, then the High Court may grant his bail under Sec 483 of The Bhartiya Nagrik Suraksha Sanhita, 2023.

According to Sec 390 of Criminal Procedure Code, 1973 “Where an appeal has been preferred against the order of acquittal recorded by subordinate court then High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court and the court before which he is brought may release him on bail”.

### **Bail by the Supreme Court**

Under Articles 134 and 136 of the Indian Constitution, a person while in the custody after the refusal of bail by the High Court may approach the Supreme

Court for the same, and the Supreme Court may grant his release during the pendency of his appeal.

## BAIL AND JUDICIAL DISCRETION

The infamous delays in case resolution are a flaw in the legal and judicial systems that lead to the flagrant denial of justice to the convicts awaiting trial. That an accused person's trial should not even begin for several years is a negative reflection on the legal and judicial system. It's already terrible when the trial is delayed by a year, can you imagine how much worse things may get if the wait is extended to three, five, seven, or ten years? A speedy trial is essential to the criminal justice system, and no question that postponing a trial in and of itself results in a denial of justice.

Although the Indian Constitution does not expressly list a fast trial as a basic right. It is implied in the expansive meaning and provisions of Article 21, as construed by the Supreme Court. In that interpretation, it was decided that Article 21 grants an inalienable right to life and liberty to all individuals, provided that the procedure followed by the law is "reasonable, fair, and just." Merely having a procedure that resembles one prescribed by the law does not satisfy the Article's requirements. A person's fundamental right under Article 21 would be violated if his liberty were taken away from him in a way that was not "reasonable, fair, or just." In such a case, he would have the right to assert his basic right and get his release. A legal process designed to rob someone of their freedom cannot be considered "reasonable, fair, or just" unless it guarantees a speedy trial to ascertain the person's guilt. No process can be deemed "reasonable, fair, or just" if it does not guarantee a fairly swift trial, as this would violate Article 21.

What would happen if someone charged with a crime was refused a speedy trial, and he was attempted to rob him of his freedom by incarceration as a result of a protracted trial that violated his fundamental right under Article 21? Would he be entitled to an unconditional release from the charges brought against him, based on the argument that he would violate his fundamental rights under Article 21 of the Constitution if he were tried after an unreasonably long period and found guilty after such a trial? All these questions were observed in *Hussainara Khatoon V. State of Bihar*; however, one thing is for sure, and we cannot stress this enough to the State Government: it is past time for them to acknowledge their obligation to the people to administer justice and establish additional courts for case trials. We may point out that simply building more courts would not be sufficient; the State Government would also need to staff those courts with qualified judges. If the State Government wishes to enhance the administration of justice and turn it into a useful tool for delivering justice to the people, then it must take the necessary steps to attract qualified judges, such as raising their terms of service.

An expeditious trial is a necessary component of the "reasonable, fair, and just" process that Article 21 guarantees, and the State is required under the Constitution to design a process that would give the accused a speedy trial. The State is not allowed to deny an accused person their constitutional right to a fair trial on the grounds that the State lacks the funds to upgrade the judicial and administrative systems to guarantee a speedy trial. Notwithstanding the State's budgetary limitations and spending objectives, no government is allowed by law to deny its citizens their constitutional rights on the grounds of poverty.

One of the essential rights to life and liberty protected by Article 21 of the Constitution is the right to a speedy trial. Several issues need to be taken into account when determining whether this right has been violated in a specific instance. Was there a delay? What was the duration of the delay? Given the circumstances surrounding the case, the limited availability of legal services, and other pertinent factors, was the delay unavoidable? Was there a valid cause for the delay? Was the prosecuting agency's willfulness or carelessness a contributing factor in any portion of the delay? In the end, the question of whether the fundamental rights to life and liberty guaranteed by Article 21 have been violated—including the right to a speedy trial—remains one of fairness in the criminal justice system, even though "acting fairly" is central to the natural justice principles and "fair and reasonable procedure" is what the law's expression procedure in Article 21 contemplates.

The Supreme Court also held in the *R.D. Upadhyay case*<sup>5</sup> that a speedy trial is a basic right protected by Article 21 of the Indian Constitution. The Supreme Court of India issued the following ruling after observing that approximately 1930 undertrials had been detained in the Central Jail in Tihar, Delhi, for periods ranging from one year to eleven years. The ruling noted that the right to a speedy trial is protected by Article 21 of the Indian Constitution and ordered that ten Additional District Judges be designated to handle the trial of the 880 undertrials who were facing murder charges, to conclude the cases in approximately six months.

It is up to the judge to decide on bail. The greater interests of society and competing claims to the accused's freedom must be taken into account while deciding whether or not to grant bail. Every person in India is guaranteed the right to a speedy trial under Article 21 of the Constitution. A speedy trial is the goal of the new Code of Criminal Procedure. The trial's prolonged adjournment breaches both the fundamental right to a timely trial and the constitutional principle of a fair, just, and reasonable process.

Without a doubt, a prompt trial and an early conclusion to criminal proceedings are intended by Article 21 of the Constitution. It includes every phase, including the investigation, inquiry, trial, appeal, revision, and retrial phases. Every case is unique, and any delay must be assessed in light of all relevant factors, such as the

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<sup>5</sup> R. D. Upadhyay v. State of A.P. 1999 SC 2183

type of offense committed, the quantity of witnesses and accused, the court's caseload, the local environment, etc. However, a delay by itself cannot serve as justification for granting bail. Along with it, all other relevant variables should be taken into account. It is preferable to prevent such likely disasters or problems. We urgently need to take action regarding the bail jurisdiction.

The Supreme Court noted in one of these cases that the punitive procedures for upholding national integrity, public order, state security, and the general welfare are constitutionally justified by the idea of police authority. However, given the gravity of the situation, the most important factors about the social welfare goals outlined in the Indian Constitution are those that involve the denial of human freedom, whether it be temporary or permanent.

## CONCLUSION AND SUGGESTIONS

The law governing bail should strike a balance between the competing interests of society at large. Protecting the public from the mishaps of those who are purportedly involved in criminal activity and upholding the accused's presumption of innocence until a guilty verdict is reached. The principle "Bail is the rule and jail is an exception" is meant to serve as a guide for the courts that follow. However, even this exception is subject to the caveat that the provisions of bail should not only be interpreted for the benefit of the accused but also for the benefit of the prosecution and society at large, which may also be directly or indirectly impacted by the commission of an offense against society. The court does not have to sacrifice the security of the community on the altar of individual liberty when social security and liberty clash.

The courts are required to apply certain standards, such as the type and gravity of the prosecution, while evaluating bail applications. The type of evidence utilized by the prosecution, the seriousness of the punishment that a conviction will bring, the accused's reputation, behaviour, and character, and the likelihood that the accused won't be present at the trial. It is also the law for the courts to consider the prosecution's claims as primary guidance when deciding whether to grant bail. The courts do not have to, and usually should not, address defences that the accused may raise unless they shed light on the veracity of the prosecution's accusations. The likelihood of the subordinate Courts making a mistake is reduced if the aforementioned legal principles are taken into consideration when deciding on bail applications.

When determining whether to grant bail, the court must often take into account the following factors:

- (1) The form and gravity of the accusation;
- (2) The seriousness of the offenses;
- (3) The type of evidence gathered and the accused's character and behavior;
- (4) The likelihood that the accused would flee and not show up for the trial;

- (5) The likelihood that the same crime will be committed again:
- (6) Last but not least, there is a chance that the accused will tamper with the evidence and witnesses.
- (7) Greater concern for the people and the government.

The possibility of the accused escaping from justice and his tampering with prosecution evidence related to guaranteeing a fair trial of the case in a court of justice are the two most important factors for granting bail. These two grounds must receive the appropriate consideration about other variables. Whether the accused will evade prosecution or tamper with evidence, the court will take these significant circumstances into account while evaluating the bail request. These are the two key elements that continue to influence the bail-granting process even now.

Of all the people incarcerated, the majority are made up of undertrial prisoners or those detained by the State on remand. Additionally, the pretrial detention time is excessively lengthy, especially for the impoverished. Because of poverty, the right to bail is frequently unfairly refused or neglected. India's current bail system is ineffective and insufficient to serve its intended purpose. Across the nation, Grotesque crimes involving extreme violence are becoming more common. Since 1953, the amount of crimes involving murder, rape, kidnapping, and abduction has grown. The Indian criminal justice system is not likely to be responsive given the rising crime rate, inadequate infrastructure, antiquated investigative tools, and other issues. As such, the bail system is hardly a magic bullet. Recalibrating the bail provisions in the Criminal Procedure Code to better reflect the times and circumstances the Society faces today and will likely confront shortly is, in fact, a minor step in the right direction.

This research aims to shed light on the various discrepancies in bail standards by offering guidelines and proposing changes to how the authority to grant or refuse bail is used. It is feasible to reach consensus on a few fundamental ideas about bail procedures, specifically:

**The Procedures Need to be Just and Grounded in Facts:** A person accused of a crime shall not be negatively impacted by decisions concerning custody or release due to their gender, race, ethnicity, financial situation, or social standing.

**The Two Main Objectives of the Practices Should Be:**

- (1) Guarding against the possibility that the accused won't show up on the appointed date;
- (2) Guarding against threats to the community's or a particular person's safety.

Pretrial detention should be kept to a minimum. Detention is harmful to the individual charged with a crime for which many people are detained, it creates an

unnecessary burden for the government, and it may have a negative influence on future criminal behavior. It also lessens the possibility of reformative outcomes. One of the key pillars of the legal system that oversees the criminal justice system in any nation, including India, is the law of bail. At the stages of arrest, investigation, trial, and appeal following the accused's conviction, the issue of bail or jail alternatives must be addressed. The "freedom of person" and the "interests of social order" should have equal weight in bail jurisprudence.

In actuality, the presumption of innocence premise and the bail laws must be consistent. If someone who is detained awaiting trial is subject to the same limitations on their freedom as someone who is serving a jail sentence following a conviction. By keeping accused persons out of custody until tried, convicted, and sentenced, bail should protect against the negation or dilution of the presumption of innocence.

Inconsistencies and ambiguities taint our nation's bail laws. The laws about bail that are found in our Code of Criminal Procedure reflect an unclear and inchoate legislative policy. Although there is a vast list of factors to take into account, the discretion granted to courts in bail issues is judicially and practically limitless, making it challenging to justify the use of discretion in a given situation.

It is questionable if the current legislative measures, when examined in the context of the judicial guidelines established by the Supreme Court and several High Courts to regulate the discretion in the "Bail or Jail" decision, amount to "reasonable, fair, and just" law as defined by Article 21 of our constitution.

Some suggestions reflected by this paper are-

- 1. Adoption of a Comprehensive Code:** Adopting a comprehensive code to supersede the current bail legislation would be necessary to implement the current bail laws. The suggested code must take into account the fundamental ideas, necessity theory, usefulness, and guidelines for granting or rejecting bail.
- 2. Examine the Criminal Justice System:** Immediate attention is required to ensure that police authority is utilized properly, to establish tools to limit that power, to ensure that legal aid services are available during preliminary steps, and to expedite the accused's trial.
- 3. Statutory Limit of Bail Bond and Sureties Must Be Fixed:** In essence, the amount of bail bond and sureties is determined at the discretion of the court; there is no set statutory limit. It is necessary to make provisions for various classifications.
- 4. Justification for the Court's Discretionary Power to Grant Bail:** Discretionary power to grant bail has been granted to the judges. Usually, the Higher Court revokes bail orders issued by subordinate courts. Bail must be granted or denied based on reasonable standards to prevent judges from abusing their authority.

## **5. Other suggestions**

- (i) The judicial officer's duties should be clarified if they are releasing an accused person from custody without a good basis.

(ii) Appropriate checks should be made on the judicial officers' discretionary powers when it comes to granting bail. If an officer is determined to be at fault and to have granted bail to the accused without a reasonable basis, that officer may be held liable and face penalties commensurate with their level of misconduct.

(iii) Appropriate rules should be in place to determine the standards for determining whether to grant the accused anticipatory bail.

(iv) When giving bail to the accused, the court officer had to take a reforming stance in light of Article 21 of the Indian Constitution.

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