



Presumed Innocent, Treated Guilty: The Crisis of Undertrial Detention

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Abstract

The bail system in India reflects a striking disjunction between constitutional ideals and the reality of prolonged undertrial detention. Despite the consistent reiteration of the principle “bail is the rule, jail is the exception” by the judiciary, more than three-fourth of the prison population comprises undertrial detainees, where majority of them belong to economically and socially disadvantaged groups. This paper aims to critically examine the legal and systemic deficiencies that contribute in arbitrary and prolonged pre-trial incarceration, highlighting over-reliance on judicial discretions and monetary sureties. It further discusses various bail frameworks operating in different countries like the United Kingdom, United States, and South Africa and engaging in comparative study and highlighting best practices, including non-monetary bail conditions,

individualized risk assessments, and supervisory mechanism. The essay in Indian context examines Constitutional guarantees under Article 14 and Article 21, the recent statutory reforms under Bhartiya Nagarik Suraksha Sanhita, 2023, and the judicial precedents and guidelines laid under case of Satender Kumar Antil v CBI, Hussainara Khatoon v. State of Bihar in addition of recent technological intervention such as E-Prison Project. It contends that meaningful reforms must extend beyond legislative amendments to ensure structural transformation, enhanced judicial sensitization, and a paradigm shift from custodial mindset to right based adjudication. This paper concludes that to safeguard the pre-trial detainees, the bail system should be insulated from socio-economic contingencies and should be grounded in principles of justice, dignity and constitutional morality, thereby, harmonizing Indian bail system with its constitutional mandates and international human rights standards.

Keywords

bail, pre-trial, undertrial detainees, reforms, incarceration

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INTRODUCTION

The doctrine of presumption of innocence is the essence of criminal jurisprudence as it demands deprivation of personal liberty to be a narrow exception that does not amount to a general rule. The criminal administration reality in India however has a huge deviation from such a simple norm. In the official prison statistics, as far as it goes, the untrial population constitutes about seventy-seven per cent of the total population in prisons, which is to say of the system under which incarceration is commonly preceded by adjudication. This scenario has gross constitutional concerns to do with the protection of liberty, equality of law as well as procedural fairness. When the criminal justice system is trying to balance between personal freedom and the needs of justice, bail is the primary means of the law. Bail is pegged on provisions and amendments of the constitution in Articles 14 and 21 and

ought to assist in preventing arbitrary imprisonment and also ensure that the accused individual is present at the trial. The rule of bail and the exception of jail, according to the ruling of the judges, has always reiterated the words that any pillar of imprisonment must always be on substantial ground such as the possibility of flight, tampering of evidence or creating mayhem. Despite this established status, the bail and detention procedures in India continue to have a notable inconsistency, excessive relying on judicial goodwill, and structural dependence on financial situations. Although legislative change has occurred, via the advent of the *Bharatiya Nagarik Suraksha Sanhita, 2023*, and legal activism, such as the principles of action in the *Satender Kumar Antil case*, has also occurred. In their effort to justify arrest and bails, CBI, such a move at the court of law does not universally affect it in a balanced manner. The paper has put the dilemma of predicament detention in the constitutional prism of

India and the philosophical foundation of bail, structural injustices of practicing the same and the meaning of staying behind bars while awaiting trial.

STATEMENT OF PROBLEM

Although the primary objective of the bail system is to protect the personal liberty of the innocent, in contrast it disproportionately affects the individuals from the weaker sections of the society. Systemic failure combined with inconsistent application of judicial precedents contributes to prolonged detention. The over reliance on monetary sureties and lack of standardized system results in a two tier justice system, where the affluent easily escape the legal processes and disadvantaged struggles in the pre-trial stage. This raises critical questions regarding fairness, accessibility of the current bail system.

OBJECTIVES

1. To identify and analyze the legal and procedural shortcoming that contributes to undertrial detention, particularly among underprivileged groups.
2. To evaluate how economic criteria and judicial discretion contribute to unequal access to bail and to assess the broader impact of such detention on rights, livelihood and dignity of detainees.

LITERATURE REVIEW

The debate of bail and undertrial detention in India has been developing within the constitutional safeguards, judicial precedents and research on prisons and comparative justice in criminal law. Although considerable research has been carried out in the study of bail on the basis of doctrine and process, the conjunction of constitutional guarantees, socio-economic divide and the biased custodial system is incompletely



synthesised. Indian bail jurisprudence is notably based on Article 21 and Article 14 of the Constitution of India. In cases like *Hussainara Khatoon v. Bihar, Public Prosecutor* points out a change in doctrine to substantive due process of procedural formalism. The cases have been argued by scholars to constitutionalise the bail by entrenching it in the larger context of the dignity and speedy trial jurisprudence. Nevertheless, commentators like *Abhinav Sekhri (2018)* note that, although constitutional rhetoric has gotten stronger, its application into foundational lower court practice has not been consistent. The rule of bailing, which is frequently quoted, is often ignored due broad judicial discretion and a subjective approach. Recent commentary post *Satendra Kumar Antil* indicates acknowledgement by judiciary of the systemic failures contrary to the bail is the rule doctrine. However, its implementation on the ground level is scarcely evaluated empirically. Empirical

Study on undertrial incarceration, especially by the National Crime Records Bureau (NCRB), the Commonwealth Human Rights Initiative (CHRI), and the India Justice Report, indicates that the number of economically and socially disadvantaged groups in the undetermined section of the prison population is disproportional. The research always points towards three recurrent structural causes; excessive trust in financial guarantees, delays and adjournments of procedures, poor delivery of legal assistance. According to the Prison statistics reports by the NCRB, more than three-fourths of the prisoners in India are undertrials. The investigations of CHRI also confirm that due to the inability to provide sureties bail orders are not always executed, granting conditional liberty a monetary concession. Although these articles are powerful in recording the extent of the crisis, they are inclined to concentrate on statistical presentation and management inefficiencies. The current bail system in

India violates the equal guarantee given under Article 14 structurally through indirect discrimination against the poor. There is also controversy in the scope and boundaries of judicial discretion in making bail decisions. According to *Kumar and Sharma (2025)*, contextual justice needs to be harsh but it should be designed by accountability systems. *Singh (2020)* points to the disconnection in assessing gravity of offence or the idea of public risk assessment. According to a study, subjective discretion tends to create a systemic bias. Where statutory ambiguity prevails, trial courts often fail to provide alternative detention options other than custodial detention. In India it is yet to be fully explored how discretion, monetary bail and socio-economic inequality are intertwined to create what can be termed as a two-tier bail system one to the economically secure and the other to the marginalised. Although comparative scholarship proves that non-monetary and risk-based systems are feasible, most Indian academic

scholarship as yet remains at the level of descriptive comparison. Minimal normative examination of the issue is on whether these models can be constitutionalized in the Indian context of a socio-legal environment, given the problem of overcrowding in prisons, delays in investigation, and inadequate supervision infrastructure. The study of the available literature shows that there are actually three gaps:

- There is no overall integration between constitutional theory, empirical prison studies and literature on comparative bail reform.
- There is not enough doctrinal argument to show how the current bail practices can constitute indirect discrimination based on Articles 14 and 21 although it recognizes inequality.
- The most recent statutory changes which are implemented under the Bharatiya Nagarik

Suraksha Sanhita (BNSS), 2023, and technological interventions like the E-Prisons Project have not been critically reviewed against constitutional morality and ground level institutional capacities. Placing of the Current Study.

This study attempts to fill these gaps by combining constitutional jurisprudence, empirical evidence, and model comparative reform to a combined analytic framework; analyzing bail not as a procedural issue, but as a structural inequality protection; determining whether new reforms are a transformational change or a form of symbolic compliance; putting forward a rights-oriented non-financial and institutionally responsible bail system that fits Indian conditions. This study tends to shift the descriptive criticism of the law of bail to constructive reconstitution of the bail jurisprudence by placing the undertrial detention in the

context of the wider discussion of constitutional morality, socio economic justice, and global reform movements.

RESEARCH METHODOLOGY

The study adopts a doctrinal and analytical research methodology to examine the plight of undertrial detainees in India. Doctrinal approach is used to examine the constitutional, judicial and statutory framework surrounding undertrial prisoners, while the analytical method is used to assess the effectiveness of bail jurisprudence prevailing in India. The research is qualitative in nature, specifically focused on legal analysis and human-rights based evaluation. Quantitative data is used up to the extent of contextual understanding like prison statistics, undertrial population ratio, and pendency data.

FOUNDATION OF BAIL IN INDIAN CRIMINAL JUSTICE SYSTEM

Bail in India is founded on the constitutional provisions on the guarantee of personal liberty and equality before the law. Article 21 of the Constitution stipulates the non-deprivation of life or personal liberty without due process of law as stipulated by law thus creating a positive duty on the State to ensure that one is not deprived of liberty arbitrarily². Article 14 also supports this duty by forbidding random and discriminatory state action³. Collectively, these provisions form the normative basis of bail jurisprudence in India, which states that pre-trial detention must be an exception to be supported by compelling reasons instead of a commonplace reaction to criminal alleged offense. This makes bail the key tool which the criminal justice system uses to balance the presumption of innocence and justice interests. Although this is how the constitution is set up, the reality of

how the bail system has always operated has long since left these principles behind and shown a gap between the constitutional meaning and the application on the ground. Currently, the legal system on the issue of bail is represented in the *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS). The bail on bailable offences under this regime has been considered a right whereas discretion lies in courts with regards to non-bailable offences but with statutory restrictions⁴. The BNSS also covers anticipatory bail and requires the release of untried inmates who have been in custody more than one half of the maximum sentence termed before conviction⁵. Even though these provisions are a rights-oriented approach that seeks to restrict an extended period of incarceration, they have not been implemented consistently. Specifically, the practice of not applying

² Constitution of India, Art. 21

³ Constitution of India, Art. 14.

⁴ *Bharatiya Nagarik Suraksha Sanhita, 2023*, §§ 478, 480, 482–483 (India).

⁵ *Bharatiya Nagarik Suraksha Sanhita, 2023*, § 479 (India).



the half-sentence rule on a regular basis still leads to pre-trial detention, which is not necessary, particularly in cases of accused individuals who are not economically healthy. Another major setback to the realisation of the constitutional objectives of bail can be seen in the inconsistency of the application of judicial discretion. Although discretion is vital in individualising justice, its blind use mostly leads to arbitrariness. The setting of bails is often affected by factors that are not related to the merit of the law such as socio-economic status, caste, or a perceived seriousness of the crime. This leads to unequal results where other accused parties are differently treated under similar circumstances and this nullifies the provision in the constitution that requires equal treatment before the law⁶. The tendency to use monetary sureties without determining the financial ability of the accused to appear instead transforms bail into a benefit

that is available mostly to the economically privileged⁷. This attachment to the custodial mentality that developed during the colonial era of handling criminals still reflects on the bail adjudication. Although constitutional jurisprudence has supported liberty, the impounding of people is usually the usual reaction to allegation and not a singular action. This practice has added to the congested prisons with a majority of under trial inmates and extended jail time leads to a diminishing human dignity and an unequal representation of under trial women who have escalating vulnerabilities due to institutional neglect and social stigma⁸. The judiciary has tried severally to bring back the bail jurisprudence to constitutional

⁶ Const *supra*, note 2 at 4

⁷ Commonwealth Human Rights Initiative, *Barred and Behind Bars: Pre-trial Detention in India* (2015).

<https://www.humanrightsinitiative.org/content/prison-reform-reducing-pretrial-detention>

⁸ *In re Inhuman Conditions in 1382 Prisons*, Report of the Supreme Court Committee on Prison Reforms (India).

https://api.sci.gov.in/supremecourt/2013/18545/18545_2013_Judgement_25-Sep-2018.pdf

principles. In *Hussainara Khatoon v. State of Bihar*, the Supreme Court acknowledged the right to speedy trial to be a part of Article 21 and highlighted the injustice of lengthy, undertrial detention through poverty and apathy of the administration.⁹ Later in *Gudikanti Narasimhulu*, the Court stated the same principle, which is that there should be bail and the absence of jail, as it should be reasonable, just, and fair to deprive a person of his or her liberty.¹⁰

In a more recent case, the case of *Arnab Goswami v. State of Maharashtra*, the Supreme Court declared that it had a constitutional role of the protector of personal liberty and warned against hyper-technical methods that erode basic rights.¹¹ Although these developments took place in terms of the doctrines, custodial detention remains

the default in the criminal justice system. This would be manifested by the continuance of discretionary inconsistency, economic impediments and institutionally inculcated custodial attitudes, which signify the partial internalisation of constitutional morality. Bail jurisprudence is thus underdeveloped, swinging between ideals and practice of liberality, there is a necessity of a long term reorientation to liberty-based adjudication.

PRE-TRIAL INCARCERATION AND BAIL INEQUITIES

The criminal justice system of India is also in a worsening crisis of under trial imprisonment with the undertrial prisoners forming an overwhelming majority of the prison population. *Prison Statistics India 2022* by the National Crime Records Bureau (NCRB) shows that the undertrial prisoners constitute over 77% of the overall prison population, which is indicative of a justice system that is less adjudicative

⁹ *Hussainara Khatoon v. State of Bihar*, (1979) 3 S.C.C. 532 (India).

¹⁰ *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 S.C.C. 240 (India).

¹¹ *Arnab Goswami v. State of Maharashtra*, (2021) 2 S.C.C. 427 (India).

and more inertial.¹² Delays in trial are thus not just the consequences of judicial slowness, but the result of both structural discrimination and archaic jurisprudence of bail, as well as insufficient protections of the process. Even with the presumption of innocence in the constitution, huge groups of people have been kept in lock-ups throughout the years without being sentenced as guilty or not guilty.¹³

The socio-economic background of the undertrial prisoners indicates the exclusionary characteristics of the bail system. One major group of detainees is that of the marginalized communities characterised by lack of formal

education, volatile income as well as the absence of a secure place to live. Those who cannot afford to hire personal attorneys or provide financial bonds are often swept into the criminal justice system with very little hope of being released any time soon. The NCRB data also shows that the high percentage of the non-convicted prisoners includes Scheduled Castes, Scheduled Tribes and Other Backward Classes, which have long been deprived of socio-economic empowerment and are therefore the ones who suffer the most as a result of this structural rigidity.¹⁴

Empirical research has shown that a high percentage of the non-convicted prisoners are individuals who have historically been excluded in the social empowerment of society and are therefore the ones who suffer the most by the systems as a result of this

¹² National Crime Records Bureau, Ministry of Home Affairs, *Prison Statistics* (2022), <https://www.ncrb.gov.in/uploads/nationalcrimerecordsbureau/custom/psiyarwise2022/1701613297PSI2022ason01122023.pdf>

¹³ Commonwealth Human Rights Initiative, *Looking into the Haze: A Study on Undertrial Prisoners in India* (2021), <https://www.humanrightsinitiative.org/download/Looking%20into%20the%20Haze%20%E2%80%93%20Functioning%20of%20Prison%20Visiting%20System%20at%20a%20glance.pdf>

¹⁴ Commonwealth Human Rights Initiative, *Barred and Behind Bars: Pre-trial Detention in India* (2015), <https://www.humanrightsinitiative.org/content/prison-reform-reducing-pretrial-detention>



structural nonconformity.¹⁵ Even though bail is ensconced in the constitution in regard to personal liberty in Article 21, its functioning in practice is more of a gate keeping aspect with broad and uninformed judicial discretion. Lack of standardisation creates absolute discrepancies where different accused people with identical circumstances are given different results. Others are freed within a few days, whereas those charged by similar statutory provisions are held in confinement over a long time. Research has pointed out that this discretion is often not justified by sufficient reason or attention to socio-economic facts, with implicit class and social preferences predetermining the decision on bail.¹⁶ The general overuse of monetary guarantees also

changes bail as a privilege into a privilege. It is a common practice in courtrooms to order bail conditions without evaluating the financial means of the accused to meet, and bailing becomes impractical. This lack of statutory certainty about the amount and means of verification of sureties has spawned cases where undertrials are languishing in custody despite the fact that the amount of bail has been formally awarded.

A study by the *Human Rights Law Network* has reported that a high percentage of prisoners at the Tihar jail in Delhi had remained in prison months on end merely because they could not provide the surety even after they had obtained bail orders.¹⁷ Long pretrial imprisonment has dire psychological and social effects. Studies on undertrial detention document high levels of

¹⁵ Human Rights Law Network, *Prison Reforms in India* 42–44 (2015),

https://nhrc.nic.in/assets/uploads/minute_of_meeting/Minutes%20&%20Reco%20Prison%20Reform.pdf

¹⁶ *In re Inhuman Conditions in 1382 Prisons*, Report of the Supreme Court Committee on Prison Reforms (India 2016), https://api.sci.gov.in/supremecourt/2013/18545/18545_2013_Judgement_25-Sep-2018.pdf

¹⁷ *India Justice Report 2022* 146–48 (Tata Trusts & Centre for Social Justice 2022), https://indiajusticereport.org/files/IJR%202022_Full_Report.pdf

anxiety, emotional distress, and psychological vulnerability among undertrial prisoners due to prolonged uncertainty and lack of procedural closure.¹⁸

Women undertrial prisoners have even greater vulnerabilities due to institute neglect and gender-based discrimination, with many of them being detained with minor children in conditions characterized by poor nutrition, poor healthcare, and poor mental-health provisions.¹⁹ The human cost of the long detention is also provided by reports of custodial violence and inhuman prison conditions. Overcrowding, lack of proper infrastructure, and unsafe custodial

facilities in the Indian prisons, especially among the undertrial, has been noted as the main problem by the *Supreme Court Committee on Prison Reforms* which has found themselves in the paradoxical state of being both subjects and victims to a prison system where incarceration has become the norm rather than the exception.²⁰

Even though the statutory arrangements have free legal representation provisions through the Legal Services Authorities Act, 1987, it is still more of a formality. Legal aid systems are characterized by overload of cases, insufficient training and insufficient institutional backing. A large percentage of legal aid lawyers, reports India Justice 2022, do not receive specialised training in criminal procedure and effective communication with clients, which leads to the fact that, as stated in the India Justice Report 2022, many undertrial prisoners practically have ineffective legal aid as equivalent to

¹⁸ National Legal Services Authority, *Annual Report 2021–22* (India), <https://cdnbbsr.s3waas.gov.in/s32e45f93088c7db59767efef516b306aa/uploads/2025/04/2025040925439249.pdf>

¹⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners (the “Nelson Mandela Rules”), G.A. Res. 70/175, U.N. Doc. A/RES/70/175 (Dec. 17, 2015), https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf

²⁰ Legal Services Authorities Act, 1987, § No. 39, Acts of Parliament, 1987 (India),



the right to an adequate trial, which is ensured by Article 21 of the Constitution.²¹

UNDERTRIAL DETENTION AND HUMAN DIGNITY: HUMAN RIGHTS IN CUSTODY

India's current undertrial detention crisis represents a systemic failure involving constitutional liberties and human dignity. As per the data of National Crime Records Bureau ("NCRB") in 2022, over 4.3 lakh of 5.7 lakh prison inmates in India are undertrial detainees, which constitute around 75.8% of the prison population.²² This heavy reliance on pre-trial detention undermines presumption of innocence by subjecting individuals to punitive incarceration without clear adjudication of guilt. This structure reveals deficiencies in bail adjudication, judicial efficiency and access to justice. There exists a direct tension between extensive use of

undertrial detention and Article 21 of Constitution of India which ensure right to life and personal liberty and liberty must be just, fair and reasonable.²³

The prolonged incarceration of individuals often leads to the accused spending time in prison exceeding the maximum sentence prescribed for the alleged crime. Such practices undermine international human rights obligations, particularly the International Covenant on Civil and Political Rights which prescribes pre-trial detention as an exceptional measure.²⁴ The human rights implications are further spiked by chronic prison overcrowding. As per the official records Indian prisons are currently operating at its 131% of its capacity.²⁵ Overcrowding had heightened the risk of violence, diseases, mental health deterioration and custodial neglect, disproportionately affecting the

²¹ Const, *supra* note 1 at 5

²² National Crime Records Bureau, *Prison Statistics India 2022* at 11 (2023), <https://www.ncrb.gov.in/>

²³ Const, *supra* note 1 at 5

²⁴ International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

²⁵ NCRB *supra* note 21 at 8

vulnerable groups. These conditions neglect the basic humane treatment and make pre-trial detention a cruel punishment. The continuance of this crisis is a reflection of deep socio-legal inequities.

The economically weaker section is the community suffering the most due to systemic and monetary barriers, resulting in detention becoming a norm rather than last minute resort.²⁶ In 2008, NHRC acknowledged systemic deficiencies and issued guidelines focused on timely bail and expeditious trials.²⁷ The then chairperson of NHRC in 2012, emphasized on the point that continued detention after filing of chargesheet should justify compelling

reasons.²⁸ Recently in April 2025, by suo moto cognizance NHRC issued notice to all States and UTs regarding overcrowding, healthcare and absence of gender-sensitive infrastructure for women detainees.²⁹

However these interventions have limited implementation on ground level which creates a gap between standard and operational realities. The repercussions of the industrial crisis go far beyond custodial settings, families dependent on daily wage or agricultural income face financial destabilization when the primary earner is detained.³⁰

²⁶ Law Commission of India, Report No. 268, *Amendments to Criminal Procedure Code, 1973—Provisions Relating to Bail* (2017), <https://lawcommissionofindia.nic.in/reports/Report268.pdf>

²⁷ National Human Rights Commission, India, *Annual Report 2008–2009* (2009), https://nhrc.nic.in/assets/uploads/annual_reports/Final%20Annual%20Report-2008-2009%20in%20English.pdf

²⁸ National Human Rights Commission, *Annual Report 2014-2015* (2015), https://nhrc.nic.in/assets/uploads/annual_reports/NHRC_AR_EN_2014-2015.pdf

²⁹ Press Release, Nat'l Human Rights Comm'n (India), NHRC, India Takes Suo Motu Cognizance of the Difficulties Being Faced by the Prisoners, Including the Women Inmates and Their Children, in Various Jails Across the Country (Apr. 8, 2025), <https://nhrc.nic.in/media/press-release/nhrc-india-takes-suo-motu-cognizance-the-difficulties-being-faced-by-the-prisoners-including-the-women-inmates-their-children-in-various-jails-across-the-country>

³⁰ Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention* (Martin Schönteich ed., 2014),



Women face family abandonment, while their children face social and emotional trauma. These effects continue even after acquittal, as they face larger issues like unemployment, social isolation and psychological harm, making reintegration into society a new challenge. In rural and semi-urban areas lack of legal awareness and limited legal aid mechanism leads to prolonged detention, creating challenges in accessing justice. State counsels are overburdened with cases which often make it unable to effectively advocate for time-bound bail. Except its human cost, undertrial detention leads to substantial financial burden on the State.

In the year 2021-22, the sanctioned prison expenditure increased by 13%, primarily to meet the basic requirements.³¹ Despite increased sanction, living conditions are still

inadequate. The undertrial prisoners are generally also excluded from contributing in prison labour and training programs, which only incur significant custodial cost. They are allowed to only clean barracks, cells, and yards.³²

Subsequent procedural delays also add to the cost through documents, repeated transportation and security for regular court appearances, which leads to misallocation of public funds and public resources. Collectively, industrial detention in India erodes human dignity, increases socio-economic inequalities and imposes fiscal cost on the State. Addressing these crises requires not only procedural reforms but also fundamental reorientation of the system towards liberty and accountability.

<https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf>

³¹ National Crime Records Bureau, *Prison Statistics India 2021* (2021), <https://www.ncrb.gov.in/>

³² Ministry of Home Affairs, Government of India, *Model Prison Manual, 2016* (2016), https://www.mha.gov.in/sites/default/files/2025-04/PrisonManualA2016_20122024_2.pdf

GLOBAL BAIL PRACTICES: COMPARATIVE PERSPECTIVES ON BAIL REFORM

Presumption of Innocence

India's current crisis of undertrial incarceration shows the systemic loopholes of the framework governing bail adjudication and raise concerns regarding personal liberty of individuals. The pre-trial detention system in India continues to operate as a norm rather than exception despite constitutional guarantees. India's under-trial framework contributes to overcrowding of prisons and deprivation of liberty. Contrary to this, examinations of bail framework in other common law countries like the United Kingdom, the United States and South Africa offer valuable insights which find a balance between individual liberty and justice. The comparison focuses not only on the doctrinal similarities but also gives non-custodial alternatives to pre-trial detention. The core distinction across jurisdiction lies in the manner in which

bail framework is conceptualized. The *Bail Act, 1976* of the United Kingdom establishes a presumption in favour of bail, thus affirming liberty over conviction as a norm.³³ This presumption can only be displaced if prosecution establishes substantial grounds, such a risk of absconding, threatening witnesses, or commission of offences. The subsequent legislations including *Criminal Justice and Public Order Act, 1994* restricts bail in offences like rape, homicide, and murder to stop further grave offences.³⁴

Notably, the bail system in the UK withholds bail based on cash or commercial bail system to ensure equality. In contrast the United States depicts a more fragmented version of bail framework constructed by statutory and constitutional developments. The 8th amendment to the US Constitution implicitly recognizes bail as a

³³ *Bail Act 1976*, c. 63 (UK)

³⁴ *Criminal Justice And Public Order Act 1994*, c. 33 (UK)

constitutional right against arbitrary detention.³⁵ The bail statute of the US, *The Bail Reforms Act, 1966* also reinforced this principle by presumption of innocence.³⁶ However, in 1984 this orientation shifted with the *Bail Reform Act of 1984*, which institutionalized preventive detention on grounds of public safety, resulting in expanded scope of judicial discretion in pre-trial cases.³⁷ This resulted in a transition from liberty presumptions to risk-management framework in bail.

South Africa, on the other hand also adopts the same principle of bail as right unless its denial is imperative to prevent prejudice to justice under the *Criminal Procedure Act, 1977*.³⁸ South African law requires judicial review of detainees within 48 hours of arrest, establishing procedural accountability in arbitrary

incarceration.³⁹ These models demonstrate that although preventive detention is recognized over globe, its legitimacy depends upon procedural safeguards and judicial accountability, the features which are applied inconsistently within India's bail system.

Monetary Bail vs. Risk Assessment

Commercial bail is a critical axis of securing pre-trial release. The United Kingdom eliminates the commercial bail framework to remove wealth-based disparities thereby ensuring that liberty does not depend upon the financial capacity of the accused. In contrast, the United States historically relied heavily on cash bail resulting in income-based disparities in bail cases. This inequity prompted reforms like *Manhattan Bail Project (1961)*, which focused on how supervised release could ensure court appearance in a better manner than monetary bail.⁴⁰ This project laid the

³⁵ U.S. Const. Amend. VIII.

³⁶ *Bail Reform Act of 1966*, Pub. L. No. 89-465, 80 Stat. 214.

³⁷ *Bail Reform Act of 1984*, Pub. L. No. 98-473, §§ 202–210, 98 Stat. 1837, 1976–87 (1984).

³⁸ *Criminal Procedure Act 51 Of 1977* (S. Afr.).

³⁹ S. Afr. Const. 1996 § 38(5)

⁴⁰ Vera Institute of Justice, *Toward Justice for the Poor: The Manhattan Bail Project* (1964)

foundation of pre-trial service agencies which conduct background checks, safety risks and recommend non-custodial conditions for accused.⁴¹ The outcomes have been substantial, Washington has achieved high court appearances without relying on financial bail.⁴² Additionally, Illinois became the first US state to entirely eliminate cash bail under the *Safety, Accountability, Fairness, and Equity-Today (SAFE-T) Act*.⁴³

South Africa, also currently relies on financial bail, courts recently started prioritizing non-monetary conditions, specifically for vulnerable sections of the

society. This move from purely financial guarantees to non-monetary frameworks reflects acknowledgment of socio-economic inequalities prevailing in cash-based bail. In contrast, India still heavily relies on sureties and financial conditions, often leading to prolonged detention of individuals who cannot afford bail requirements. The lacuna of structured risk assessment tools further widens this disparity, resulting in unequal bail outcomes.

THE NEW ERA OF BAIL: GUIDELINES AND REFORMS

India has recently recognised these systemic flaws. India's judicial and legislative steps have concretized the current bail framework. The Supreme Court in the case of *Satinder Kumar Antil v. The Central Bureau of Investigation* strongly criticized the denial of bail, and emphasized that custody and arrest should not be treated as the norm in cases.⁴⁴ The court issued Antil guidelines

<https://www.ojp.gov/ncjrs/virtual-library/abstracts/toward-justice-poor-manhattan-bail-project>

⁴¹ Goldkamp, J.S., *Two Classes Of Accused* (Ballinger, 1979).

⁴² Henry F. Fradella & Christine Scott-Hayward, *Pretrial Release Doesn't Harm Public Safety*, *Washington Post* (Ripple) (Sept. 10, 2025), <https://www.washingtonpost.com/ripple/2025/09/10/bail-reforms-across-the-us-have-shown-that-releasing-people-pretrial-doesnt-harm-public-safety/> accessed on 14 August 2025

⁴³ M. Spencer Green, *Illinois Becomes First State to Abolish Cash Bail*, Equal Justice Initiative (Sept. 20, 2023),

<https://eji.org/news/illinois-becomes-first-state-to-abolish-cash-bail/>

⁴⁴ *Satinder Kumar Antil V. CBI* (2022) 10 Scc 51.

which categorized the offences and mandated release of accused in cases punishable less than seven years of imprisonment, unless there are contrasting reasons to justify detention. Further, legislative reforms under the *Bharatiya Nagarik Suraksha Sanhita* ("BNSS") marked a foundation step towards procedural accountability. Section 479 of BNSS aims to curb prolonged detention by time-bound disposal of bail application within 90 days.⁴⁵ Section 35 also strengthens the procedural safeguards by requiring police officers to note down reasons for arrest and by informing the accused the right to legal counsel.⁴⁶ These statutory provisions represent a paradigm meaningful shift from the earlier Code of Criminal Procedure era.

India has also allowed technological interventions to complement these reforms. The technological advancements like *E-Prison Project*,

enables the real-time tracking of undertrial detainees, bail status, and the timelines of release of prisoners.⁴⁷ Also, the *Inter-operable Criminal Justice System* ("ICJS") integrates data across police, courts, prosecution and forensic agencies, with an aim to reduce delays and information asymmetry.⁴⁸

Although these initiatives make a meaningful shift, significant gaps still persist in ground-level implementation. Judicial discretion still dominates bail outcomes in lower courts thereby overshadowing judicial, constitutional and statutory principles. Technological advancements need support by trained personnel, and safeguard against privacy violations.

⁴⁷ Ministry of Home Affairs, Govt. of India, Guidelines for Implementation of the E-Prisons Project (June 15, 2018), <https://www.mha.gov.in/en/commoncontent/prison-reforms>

⁴⁸ Ministry of Home Affairs, Govt. of India, *Inter-Operable Criminal Justice System (ICJS)* (last updated Sept. 13, 2024), <https://www.mha.gov.in/en/commoncontent/inter-operable-criminal-justice-system-icjs>

⁴⁵ *Bharatiya Nagarik Suraksha Sanhita*, 2023, § 479.

⁴⁶ *Bharatiya Nagarik Suraksha Sanhita*, 2023, § 35.



SUGGESTIONS AND WAY FORWARD

India's current bail and detention framework is drenched with judicial backlogs and undertrial injustice, India currently stands at juncture where there is pressing need to reform its bail framework. The current system requires a paradigmatic reorientation from custodial approach to one aligned with constitutional morality and human rights norms. The current system of bail is fragmented, discretionary and highly biased against the marginalized. This requires concentrated legal, institutional and technological reforms.

Primarily, bail should be recognised as a right and not a privilege. A shift in this approach is long overdue. To uphold the spirit of constitutionalism, it is necessary that it draws its legitimacy from Article 21 of the Constitution which embodies the principle of presumption of innocence and the procedural safeguards given under Article 22. Significantly in bailable and non-heinous offences the

courts must recognise bail not as an exception but as a right. The apex court's order in landmark judgements like *Hussainara Khatoon V. State of Bihar* and *Satendra Kumar Antil V. CBI*, has done the groundwork but its codification and systemic implementation across all judicial forums is need of the hour to ensure uniformity, predictability and delivery of justice.

Technological integration must be made central to bail reforms. Technology will help in reforming India's bail system into responsive, transparent, and people centric. Technological interventions like e-filing of bail applications, upload surety documents, and conducting virtual bails can deal with the problem of procedural delays and will aid in timely adjudication. The Supreme Court's current digitalization efforts should also include tracking of bail status, and transparent access to bail order. The existing monetary bail framework continues to disproportionately affect

the marginalized and vulnerable. To mark a shift from commercial bail, a transition toward community based alternatives must be explored. Community bail models, in which civil society and local self-government bodies undertake the role of supervising, this will act as an alternative to monetary bails.

Simultaneously, parole schemes should also be made more accessible and effectively regulated, allowing conditional release of low-risk inmates. Further, a unified legal instrument concerned around Bail is essential. Absence of unified legislation and standard bail law contribute significantly to arbitrary and inconsistent bail decisions. A Model Bail Code or a consolidated Bail Act is imperative to harmonize bail framework across jurisdictions. Such legislation should clearly exemplify guiding principles, grounds for denial of bail, strict timelines for adjudication. In addition, it

should also specify the measure and quantum of compensation in cases of wrongful prolonged detention. Lastly, reforms are far more than just policies and frameworks, it requires robust monitoring and accountability framework to ensure its effective and transparent implementation.

Periodic audits of trial-awaiting inmates, collection of gender-sensitive data, and the publication of compliance reports by the High Court will contribute in ensuring transparency. There must be proactive involvement of NALSA and SLISA and they should be empowered to identify eligible detainees, ensure legal representations and take suo moto legal actions wherever necessary. To fulfil the constitutional promise of justice, it is necessary to reimagine the concept of bail not as an instrument of incarceration but as an instrument of justice and liberty. It should be supported by innovation and technological augmentation. This is not about

fine-tuning the system but about reengineering its moral compass. These are not just administrative adjustments but critical structural reforms necessary to reinforce public confidence and trust and to ensure that no person is subjected to suffering due to prolonged and unjust legal procedure.

CONCLUSION

The problem of undertrial detention in India is a systemic issue, which undermines constitutional morality and the presumption of innocence. Article 21 should be undermined by pre-trial imprisonment which is meant to be an exceptional course being transformed into a routine course of action, thus, interfering with personal liberty.

As the privilege, bail is becoming more of a privilege, conditioned by the socio-economic status, rendering the two-level justice system that breaches both Articles 14 and 21. As the rich get set free easily, the poor end up languishing in years of detention before they are

tried. The comparative jurisprudence shows that the world is moving towards non-financial, risk-based and individualized bail systems, but the Indian system still remains in a custodial paradigm, which was based on colonial criminal administration. Although the courts have repeatedly reiterated the liberty in cases like *Hussainara Khatoon*, *Gudikanti Narasimhulu*, *Arnab Goswami* and *Satender Kumar Antil*, trial courts often fail to abide by these concepts and maintain high levels of undertrial detention.

The adoption of legislative reforms based on the *Bharatiya Nagarik Suraksha Sanhita*, 2023, and technological projects such as the e-Prisons Project can be taken as a positive step, but their practical implementation requires active judicial enforcement and significant access to justice. That is why bail reform in India needs to shift the system to liberty-based adjudication where it should be reiterated that pre-trial



detention is the exception and liberty is a constitutional guarantee, rather than a conditional privilege.

