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BAIL AS A RULE AND JAIL AS AN EXCEPTION: A CRITICAL ANALYSIS OF UNDERTRIAL DETENTION IN INDIA

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ABSTRACT

Pre-trial detention is a major problem for Indian criminal procedure. Bail is understood to be the rule, and the bulk of the evidence shows that undertrial detention is the dominant form of detention in Indian prisons. This Article examines this contradiction. Using doctrinal legal research, this Article examines the Indian Constitution, the Bharatiya Nagarik Suraksha Sanhita, 2023, and leading Supreme Court decisions, as well as recent prison data, Parliamentary documentation, reform studies, and socio-legal scholarship. This Article concludes that Indian bail law is liberty-centred in theory but, in practice, is dominated by unnecessary arrests, routine remands, arbitrary bail conditions, and avoidable delays. This Article also argues that the new procedural code, in and of itself, does not resolve the problem of bail law, though Section 479 does, in principle, provide a clearer justification for release in the case of prolonged detention. The major consequence of this Article is that undertrial detention should be viewed as a constitutional governance issue which entails a more rigorous justification for arrest and remand, an automatic review of prolonged detention, a more systematic application of personal bonds, and a more comprehensive system of detention oversight.

Keywords: Bail, Undertrial Detention, Article 21, Bharatiya Nagarik Suraksha Sanhita, Prison Reform

Introduction

Indian bail jurisprudence is rooted in Constitution Article 21, which guarantees protection against arrest and detention. It underscores the belief that while the State is empowered to confront and curb crime, it may not arbitrarily deprive a criminal suspect, still presumed innocent, of his or her personal freedom. This concern remains valid in India, where the criminal justice system is predominantly transactional through arrests, remands, and deferments far in advance of a determination of guilt. The usual discourse on bail is inextricably linked to the constitutional discourse on personal liberty, justice and the moderation of State power. When pre-conviction detention becomes the norm, criminal procedure is no longer purely procedural, but begins to take on a punitive dimension.¹

The primary issue analysed in the present research study is the divergence between Indian bail jurisprudence and its practical implementation. Indian courts, on multiple occasions, asserted that bail is the rule, and incarceration is the exception. In contrast, consistently overwhelming empirical evidence illustrates the predominance of undertrial prisoners in the total prison population in India.² This situation, more than a simple doctrinal inconsistency, casts doubts on whether the Indian legal system has, in effect, institutionalized prolonged pre-trial custody as a default and routine administrative practice following the filing of formal criminal charges. It is both the legality of detention and the lack of infrastructural frameworks, which provide the legal mechanisms for timely, cost-effective, and judicially acceptable solutions, that sustain the practice.

The Article uses a doctrinal method augmented by evidence from the public domain. It assesses constitutional provisions, the current legal situation regarding the Bharatiya Nagarik Suraksha Sanhita, 2023, leading cases on bail and extended detention, and newly published official statistics on the congestion status of prisons and the length of detention. Its main claim is that the rule-exception formula is still valid, but institutionally remains unenforced.³ Bail fails not because the governing rule is vague, but because the culture of discretionary arrests and remand, social and economic inequalities, and the perception of delay result in the overriding of the rule. The answer must, therefore, be a fusion of the law and administration.

¹ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 83 (Oxford University Press, New Delhi, 1st edn., 1999).

² National Crime Records Bureau, "Prison Statistics India 2022" 19 (Ministry of Home Affairs, 2023).

³ The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023).

Constitutional and Statutory Foundations of Bail

Current bail law cannot be confined to a narrow interpretation of practical legal discretion. In India, the legal framework justifying pre-trial release is as much grounded in constitutional provisions of human dignity and fairness as it is in the statutes concerning arrest, remand, and bail.⁴

Liberty, Equality and the Presumption of Innocence

The jurisprudence for bail begins with Article 21 of the Indian Constitution, which provides that an individual's personal liberty may be deprived only in accordance with a procedure that is fair, just, and reasonable. Article 14 provides that in order for a procedure to be fair, there must be a guarantee against arbitrariness, while a procedure which does not turn an accusation into a punishment, and which encompasses the presumption of innocence, is not explicitly provided for in a single clause of the Constitution.⁵ It does, however, provide a framework within which criminal adjudication is carried out. If the presumption of innocence is to be overridden, the justification for continuing to deprive an individual of his or her liberty during the pendency of a trial must be reasonable and cannot be justified on suspicion or the seriousness of the offence.

This framework of the Constitution was relied upon by the Supreme Court in *State of Rajasthan v. Balchand @ Baliay*⁶ to articulate the rule and the exception. This framework of the Constitution was also relied on by the Supreme Court in *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*⁷ to insist that in exercising the discretion to grant bail, a close regard must be had to the individual's liberty. While the rhetoric in those cases garners the most attention, their greatest contribution was to abolish a presumption in favor of custody. To justify continued detention, the State must demonstrate that the accused is a flight risk, would interfere with the proceedings, or would otherwise pose a threat to the order, peace, or safety. The accused does not carry a burden to prove that he or she is not a threat to the order, peace, or safety of the State simply because criminal proceedings have been initiated against him or her.

⁴ K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* 88 (Eastern Book Company, Lucknow, 7th edn., 2023).

⁵ M.P. Jain, *Indian Constitutional Law* 127 (LexisNexis Butterworths Wadhwa, Nagpur, 6th edn., 2010).

⁶ (1977) 4 SCC 308.

⁷ (1978) 1 SCC 240.

The principle also intersects with equality in a unique and specific way. A formally existing bail power may still operate unequally when release conditions demand a stable residence, financial sureties, documents, and effective representation. Constitutional equality will be invoked when legal provisions disproportionately burden poorer accused persons. The formulation of bail conditions is of constitutional significance, given that liberty which is practically unattainable for the poor is liberty in name only. From that perspective, bail law occupies the interface of liberty, equality, and the lived realities of criminal justice.⁸

Bail under the Bharatiya Nagarik Suraksha Sanhita, 2023

The current statutory system is now codified in the Bharatiya Nagarik Suraksha Sanhita, 2023, which came into force on 1 July 2024. While the new code retains a great deal of the structure of the previous paradigms, it is a codification that matters because it directly regulates current arrest and bail practice. The new code continues to make distinction between bailable and non-bailable offences. It also retains discretionary powers of the lower courts and stronger bail powers of the higher courts. The most significant change to the debate around undertrial detention is the provision in Section 479 that establishes a clearer release mechanism for persons who have served a substantial part of the maximum period they can be lawfully detained.⁹

Section 479 is of great importance because it treats long-term pre-trial detainment as a serious issue that calls for legal remedy, as opposed to something that requires case-specific empathy. This Section orders the release of those under detention who have served a significant period of the maximum sentence specified for that offence, subject to important exceptions. This Section also provides that for first-offending undertrials, who have been granted bail, the maximum period of detention shall be one-third of the said maximum sentence. This Section addresses the problem of unjustified custody, which comes into operation only after a significant period of detention. Authors of texts on criminal procedure have pointed out that control over the decision to grant bail is of little value and is a mere theoretical exercise unless the court is willing to limit pre-trial detention.¹⁰

⁸ Andrew Ashworth and Lucia Zedner, *Preventive Justice* 96 (Oxford University Press, Oxford, 1st edn., 2014).

⁹ The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 479.

¹⁰ K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* 214 (Eastern Book Company, Lucknow, 7th edn., 2023).

Some of the more recent judgments of the Supreme Court have attempted to bring statutory bail into harmony with constitutional first principles. In *Dataram Singh v. State of Uttar Pradesh*¹¹, the Court reiterated that bail is the norm, and connected that principle with the presumption of innocence. In *Satender Kumar Antil v. Central Bureau of Investigation*¹², the Court moved beyond the realm of theory and enunciated specific principles to be followed regarding arrest and bail, with emphasis on avoiding unnecessary incarceration. These judgments indicate that the best interpretation of statutory law is to view it through the lens of constitutional law.

Judicial Construction of the Rule-Exception Principle

The intersection of the rule-exception formula and the bounds imposed by judicial decisions has been addressed in both doctrine and practice. One of these streams of thought has revealed that bail doctrine is not a soft preference for leniency, but rather a constitutional safeguard that stops the criminal process from metamorphosing into a form of punishment that occurs prior to a criminal adjudication.¹³

From Foundational Bail Doctrine to Contemporary Liberty Review

Although bail cases from the early period of the Court's history provide the first appearance of this set of ideas, the most vividly expressive examples of this line of thought arise from cases where the Court has treated liberty as the central value of its interpretive exercise. This is evident in *Sanjay Chandra v. Central Bureau of Investigation*¹⁴, in which the Supreme Court stated that the seriousness of the charges cannot, by itself, justify the indeterminate pre-trial detention of the accused. The significance of this decision lies in its opposition to the most prevalent prosecutorial strategy, which seeks to draw a direct line between the seriousness of the charges and the justification for pre-trial detention. While the seriousness of the charges is relevant, it must be evaluated in a framework that considers the justification for detention in the absence of a procedural goal. Pre-trial detention, in this instance, does not serve a narrowly focused legal objective, but rather becomes a proxy for an expression of popular outrage.

¹¹ (2018) 3 SCC 22.

¹² (2022) 10 SCC 51.

¹³ Liz Campbell, Andrew Ashworth, et.al., *The Criminal Process* 184 (Oxford University Press, Oxford, 5th edn., 2019).

¹⁴ (2012) 1 SCC 40.

The Court's hearing of *Siddharth v. State of Uttar Pradesh*¹⁵ strengthened this aspect even more. For the first time, the Court stated that in case the accused person cooperates in the investigation, their arrest should not follow automatically after the filing of the charge sheet. This judgment is not important because it got rid of arrest discretion. What is important is that it highlights a deeply rooted administrative tendency, which is custodial formalism, but in reality is legal necessity. By dismissing arrest as a necessary means to validate prosecution, the Court upheld that the right to personal liberty may only be limited for specified and well-founded investigative or adjudicative needs. In addition to this, the Court showed that bail reform begins before the bail hearing, and it starts with having a practice of disciplined arrest.

Delay, Special Statutes and Constitutional Override

When special statutes that restrict the rule-exception principle meet extended trial delays, the most comprehensive test of this principle occurs. The problem becomes very serious in this case, because special laws usually tighten normal bail standards, and due to the nature of the investigations, the evidence is fragmented, which results in an unreasonably prolonged trial. Thus, in effect, it results in a system of preventive imprisonment, which may last for several years without an adjudication. If the courts are to treat statutory restrictions as absolute, the constitutional right to liberty would be subordinated to the rule of procedure. Thus, the courts have been required to address the issue of whether exceptional statutes can justify extended detention, even if the trial is far from being completed.¹⁶

In *Union of India v. K. A. Najeeb*¹⁷, the Court recognized constitutional courts' authority to intervene when a detainee's liberty is at risk due to declining custodial justice. The case's importance rests on its rejection of the argument that statutory rigidity is equivalent to an absence of Article 21. In cases of prolonged detention, especially where the completion of the trial is not expected in the near future, statutory provisions may be interpreted as a violation of the Constitution. Later cases regarding prolonged detention and the delay of charge framing have embraced that argument. A constitutional override doctrine is emerging, which permits special legislation to set higher bail standards, but cannot sanction unlimited pre-trial detention. An example of this is *Javed Gulam Nabi Shaikh v. State of Maharashtra*¹⁸, where the Supreme

¹⁵ (2022) 1 SCC 676.

¹⁶ Liz Campbell, Andrew Ashworth, et.al., *The Criminal Process* 201 (Oxford University Press, Oxford, 5th edn., 2019).

¹⁷ (2021) 3 SCC 713.

¹⁸ (2024) 9 SCC 813.

Court recognized extraordinary delay and lengthy detention as sufficient to overcome statutory bar of release. The Court's recent focus on a speedy trial advances the idea that the enforcement of constitutional detention provisions is not static, but instead, is mutable and dynamic over time. Detention that may be initially defensible as constitutional, due to delay, may become, in effect, a violation of the Constitution. The burden of delay in investigation and the framing of charges as well as the conduct of the trial, ultimately strengthens the detainee's constitutional right to be released from custody. In the modern context of bail, delay is recognized as a constitutional right of release.

Structural Drivers of Undertrial Detention

Undertrial detention remains a problem not only because of gaps in the law but also because various institutional practices convert discretionary custody to administrative default. As a result, a critical approach must look beyond the boundaries of appellate doctrine and focus on the structures that render unjust detention the norm, the rule, the predictable, and socially stratified.¹⁹

Arrest as Administrative Default

The first of these structures is the practice of considering an arrest as the standard opening step in the criminal process. In practice, an arrest often communicates seriousness as well as administrative and evidentiary efficiency, even where the threshold for custodian intervention is legally weak. This practice distorts the institution of bail. Once an arrest is made, the accused has to overcome the remand momentum, police narratives on the conduct of the investigations, and the magistrate's judicial circumspection in the preliminary hearing. From that moment on, the path of preventive custody is irreversible. What could have been a summons-based or a bail and appearance-based system transforms into prolonged detention without the necessity for a fresh showing.²⁰

Comparative socio-legal research illustrates how the damaging effects of early detention stretch beyond the first hearing. For instance, pre-trial detention studies indicate that being in custody results in higher levels of guilty pleas and even convictions. This is, in part, due to the fact that detained individuals are under the pressure of either releasing themselves or finalizing the

¹⁹ Upendra Baxi, *The Crisis of the Indian Legal System* 102 (Vikas Publishing House, New Delhi, 1st edn., 1982).

²⁰ Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51.

sentence, as opposed to having a full trial.²¹ Although these studies derive from different jurisdictions, their relevance to this analysis is clear. Detention shifts bargaining power, disrupts family and work relationships, and the ability to assist a lawyer is weakened. In India, where frequent adjournments and resource shortages are the norm, the persuasive impact of even brief pre-trial detention will most likely be increased, and not diminished.

This impact is why the frequent use of remand orders ought to be analysed more than the standard practice suggests. Typically, remand hearings are low-visibility, procedural stages. However, it is at these hearings where liberty is most easily, and most often, normalized away through the use of formal logic. Where judicial orders rest on the seriousness of the allegations or the need to further the investigation, and fail to explain why detention is necessary, constitutional discretion collapses into clerical approval. Although the issues are not as striking as the examples of unlawful detention, they are far more frequent. Administrative default thrives when legal justifications are provided in a highly abstract manner and are never adapted to the concrete necessities of the individual case.²²

Poverty, Sureties and Unequal Access to Release

The second structural driver of the undertrial phenomenon is socio-economic inequality. Bail doctrine presumes certain things about defendants: that they can post bail, find and pay a surety, attend court, and maintain documents and contact with a lawyer. These presuppositions are unrealistic for much of the incarcerated population. Therefore, bail may legally exist while being practically inaccessible. This is also why the undertrial problem cannot be diagnosed as simply the courts' reluctance to grant bail. Even when bail is granted, the cost of complying with the conditions of bail can serve as a secondary detention mechanism. The nature of conditions is as important as the abstract granting of the right to be free.²³

The case of *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*²⁴ put the issue of bail for the poor on the map. The case involved the court's consideration of a long-standing problem in the justice system of illegal imprisonment in the absence of adequate mechanisms to provide

²¹ Will Dobbie, Jacob Goldin, et.al., "The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges", 108 *American Economic Review* 201 (2018).

²² Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

²³ Marc Galanter, "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change", 9 *Law and Society Review* 95 (1974).

²⁴ (1980) 1 SCC 81.

justified release. This problem still exists. Recent studies of legal aid and undertrial prisoners show that the state legal aid system services only a small number of legal aid recipients in prison, resulting in a significant implementation gap between the right to aid and actual provision.²⁵ The consequence is that for those who are the least able to negotiate the system—who most need legal aid—the gate to liberty is most firmly shut.

Financial conditions create a concealed constitutional cost. Decision-makers weigh options in binary, either custodial detention or the release of individuals under conditions of middle-class stability. The breadth of options is narrowed, to include, for example, personal bonds, simplified reporting obligations, realistic appearance requirements, and legal aid. A system where the rule-exception principle is employed cannot treat financial and surety conditions as neutral. They shape who has the ability to transform a bail order into actual release. For poor undertrials, the divide between detention and conditional liberty is established by economic resources, not legal theory.²⁶

Delay and Carceral Inertia

The third of these structural drivers is delay. The combination of investigational delay, adjournments, slow service of process, fragmented witness examination, and congested dockets, even where the original justification for detention is weak, makes custody more difficult to challenge. In this case, delay develops what might be described as carceral inertia. Once a person has remained in custody through the early stages of a procedure, continued detention begins to seem reasonable, simply due to the fact that it has already taken place. In this case, time is used as a source of legal passivity. The system adjusts to the continued presence of the person in custody, rather than the system justifying the continued presence of the person in custody.²⁷

Empirical research carried out in other areas substantiates this concern. Leslie and Pope have shown that even brief periods of pretrial detention can result in worse case outcomes. Research by Petersen also suggests that detention has a systematic influence on the timing and frequency

²⁵ Anup Surendranath and Gale Andrew, “State Legal Aid and Undertrials: Are There No Takers?”, 6 *Indian Law Review* 1 (2022).

²⁶ Moti Ram v. State of Madhya Pradesh, (1978) 4 SCC 47.

²⁷ Hussain v. Union of India, (2017) 5 SCC 702.

of guilty pleas.²⁸ More recent causal research has shown that detention has a material effect on the incidence of guilty pleas and convictions, and on the length of custodial sentences.²⁹ These studies may not be directly relevant to the Indian position, but they do strengthen the case against routine custody on more persuasive grounds.³⁰ If detention in fact predictably alters outcomes, the legal order should treat detention as a significant legal intervention, not as a passive custody measure.

In the case of special statutes and in multi accused or document-heavy prosecutions, the effects of carceral inertia can be even more pronounced. Detention delay becomes intentional as opposed to incidental. The accused can end up spending years in custody with the courts treating the unresolved seriousness of the case as a reason for not granting bail. This analysis must, however, keep in mind that there is no longer a distinction between legal detention and administrative malfunction. In cases of intentional delay, the responsibility to justify the delay must rest with the State and not with the undertrial prisoner.³¹

Conclusion

The phrase that bail is the rule and jail the exception has remained a powerful idea because of its focus on the Constitution's simplicity. Even when the situation calls for more serious measures due to elevated public and police concerns, criminal procedure cannot disregard liberty. This is because of the issues with administrative convenience.³²

This Article has claimed that, contrary to popular belief, India has enough bail doctrine. There is plenty of Constitutional and statutory coverage, along with judicial support, to protect individuals from the regularization of pre-trial detention. The more extensive problem is with the current operational situation. Arrest is used as a default mechanism, remand is rarely challenged, and financial conditions verify the norm of pre-trial detention for the poor. The problem is compounded with delays that formalize a custody sanction. This creates a justice system where the detention of persons awaiting trial is the rule, and the distinction between

²⁸ Emily Leslie and Nolan G. Pope, “The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments”, 60 *Journal of Law and Economics* 529 (2017).

²⁹ Nick Petersen, “Do Detainees Plead Guilty Faster? A Survival Analysis of Pretrial Detention and the Timing of Guilty Pleas”, 31 *Criminal Justice Policy Review* 1015 (2020).

³⁰ Stephen Koppel, Tiffany Bergin, et.al., “Examining the Causal Effect of Pretrial Detention on Case Outcomes: A Judge Fixed Effect Instrumental Variable Approach”, 20 *Journal of Experimental Criminology* 439 (2024).

³¹ Union of India v. K. A. Najeeb, (2021) 3 SCC 713.

³² M.P. Jain, *Indian Constitutional Law* 117 (LexisNexis Butterworths Wadhwa, Nagpur, 6th edn., 2010).

adjudication and punishment, while formally maintained, is practically non-existent.³³

The best option is to bridge doctrine and institutional design. Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 gives a legal basis to order a review of extended detention. This, however, has a lot to do with the automatic identification, coordinated legal aid, systematic arrest, and open data on detention. The burden of the Constitution has to shift to showing that continued detention is justified. Only then will the legal system uphold the principle that liberty is preferred over detention. The ultimate challenge for bail law in India is not the language appellate courts use to describe the law, but whether the number of undertrial prisoners who are in detention because the law has become a means of punishment decreases.³⁴

Suggestions

The analysis of undertrial detention supports the following institutional suggestions:

- Institutionalise necessity-based arrest: Rather than judging arrest based on offence severity, officers should note case-specific reasons describing why an arrest is warranted. Trial courts should stop viewing an arrest as a standard precursor to prosecution when a less restrictive means can obtain an appearance, cooperation, and evidence.
- Require reasoned remand orders: Every remand order should explain why continued detention is necessary to achieve a specific investigative or adjudicative goal. Generic statements surrounding the severity of the offence or the various stages of the case should be considered inadequate as they obfuscate the necessity of detention.
- Operationalise Section 479 through automatic screening: Both prisons and circuit courts ought to have both digital and hard copy detention logs that instantly notify them of prisoners who have gone beyond statutory custody limits. Automatically notifying courts decreases reliance on singular applications and provides protection for prisoners who do not have any legal representation or familial and social support.
- Expand release on personal bond: In cases where accused individuals do not have the financial means to pay bond and are determined to have a low risk of flight, courts should use personal bonds more frequently. This would reduce the disparity in which

³³ Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51.

³⁴ The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 479.

formal bail is provided, but the actual release of the accused individual is prevented because of poverty and lack of legal procedures.

- Strengthen prison legal aid follow-up: Providing legal aid beyond the first appearance or a basic bail application is inadequate. Legal aid teams based in prisons should assess custody length, along with obstacles to compliance, to determine the potential for subsequent bail applications and support renewed applications based on delay, circumstance, or changes to eligibility criteria.
- Create district bail dashboards: High Courts should require the publication of basic detention indicators at the district level, such as statistics on arrest, average length of remand, the percentage of undertrials, and Section 479 releases. When detention indicators are made assessable, they will provide a means by which the abstract principle of individual liberty, can be measured.
- Prioritise early hearing for long-custody cases: Judicial bodies must keep a distinct catalogue for bail requests that involve custody beyond six months, one year, and two years. A prioritized listing system acknowledges that the constitutional nature of detention deteriorates with the passage of time, and that a postponed hearing may contribute to the injury of one's liberty.
- Rationalise bail conditions for poor accused persons: In the pre-trial regime, in order to ensure the accused person's attendance in the court, imposing residence verification, attendance, and reporting requirements should be adjusted to the accused person's actual means and location. Conditions that are, ostensibly or to the naked eye, neutral, but are practically impossible to satisfy should be treated as incompatible with substantive pre-trial release.
- Integrate prison and court data systems: Detention review becomes problematic when prison records, prosecution records and court records are not aligned. A working data interface between these institutions would help identify unnecessarily long waits in custody, failure to produce, delays in framing charges, and repeated remands requiring judicial intervention.
- Adopt a proportionality approach to prolonged detention: Courts should specifically consider if continued custody is proportionate with respect to the time elapsed, the progress of the trial, and the extent of the maximum sentence. This would change the bail assessment process away from rigid seriousness evaluations and allow for a review of constitutional necessity.