
**REFORMS IN BAIL FOR JURISPRUDENCE IN INDIA: FROM
COLONIAL FETTERS TO CONSTITUTIONAL LIBERTIES**

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ABSTRACT

The jurisprudence of bail in India stands at a critical crossroads, caught between the historical baggage of colonial procedure and the progressive mandates of constitutional rights. This research paper undertakes a comprehensive analysis of the evolution, current deficiencies, and necessary reforms in Indian bail law. It argues that the existing framework, primarily governed by the Code of Criminal Procedure (CrPC), 1973, operates on a binary of 'bailable' and 'non-bailable' offences a classification that has proven inadequate to address the complexities of modern criminality, including economic offences, terrorism, and digital crimes. The paper traces the trajectory from the draconian undertones of the Code of 1898 to the post-Maneka Gandhi era, where Article 21's expanded interpretation mandates that bail be the rule and jail the exception. Through a critical examination of landmark judgments from *Gurbaksh Singh Sibbia* to *Vernon Gonsalves* the study highlights judicial inconsistencies, the tyranny of monetary conditions, and the epidemic of undertrial incarceration. The paper proposes a structured reform agenda, including the insertion of a presumption of bail after a specified period of detention (akin to Section 436A of CrPC), the introduction of risk assessment tools, the abolition of the 'discretionary' culture in favor of 'default' bail, and the enactment of a separate Bail Act. Concluding with a comparative glance at the UK Bail Act 1976 and US pretrial reforms, the paper asserts that reforming bail is not merely a procedural necessity but a constitutional imperative to protect liberty, equality, and the presumption of innocence.

KEYWORDS: Bail Jurisprudence, Undertrial Detention, Article 21, CrPC Reforms, Presumption of Innocence, Preventive Justice.

1. INTRODUCTION

The institution of bail serves as the fulcrum upon which the scales of criminal justice balance the individual's right to liberty against the State's interest in ensuring societal security and the integrity of the trial process. In India, however, this balance has historically tilted precariously in favor of the State, resulting in a carceral system where the undertrial population constitutes nearly 70% of the total prison inmates, as per the National Crime Records Bureau (NCRB) 2022 report.¹ This staggering statistic is not merely a reflection of crime rates but an indictment of a bail jurisprudence that has failed to evolve in tandem with constitutional morality.

The term 'bail' is derived from the old French word 'bailer', meaning 'to deliver' or 'give'.² In legal parlance, it signifies the release of an accused person from custody upon furnishing a security to ensure their appearance at trial. Yet, in the Indian context, bail has metamorphosed into a procedural labyrinth where the indigent languish, the powerful negotiate freedom, and the judiciary often conflates suspicion with guilt. The colonial origins of the Code of Criminal Procedure, 1898, designed to suppress dissent and maintain administrative convenience, embedded a deep-seated suspicion of the accused into the procedural DNA.³ Despite the advent of the Constitution in 1950 and the replacement of the CrPC in 1973, the colonial mindset persists, particularly in the interpretation of 'non-bailable' offences under the First Schedule.

The recent legislative overhaul the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 was anticipated to herald a new era of bail reforms. However, a preliminary analysis reveals a missed opportunity. While the BNSS introduces provisions for a 'time limit' for judgment delivery and mandatory notice to inform victims, it largely retains the archaic architecture of bail, failing to codify the progressive judicial pronouncements of the Supreme Court.⁴ This paper posits that true reform requires a structural reimagining: a shift from discretionary

¹ National Crime Records Bureau (NCRB), *Prison Statistics India 2022*, Ministry of Home Affairs, Government of India, at 12 (2023). [Hereinafter NCRB 2022]

² Halsbury's Laws of England, Vol. 11, 'Bail' (4th ed., 1976).

³ For a historical critique, see Upendra Baxi, *The Crisis of the Indian Legal System*, Vikas Publishing, 1982, at 89-94.

⁴ Compare Section 436A CrPC, 1973 with Section 479 BNSS, 2023. The BNSS retains the half-sentence rule for most and one-third only for first-time offenders, but does not mandate automatic release after the period; it retains judicial discretion.

bail as a concession to statutory bail as a right, coupled with a jurisprudential redefinition of ‘flight risk’ and ‘tampering’ in the digital age.

This research is structured into five parts. Part II examines the constitutional and statutory architecture of bail in India. Part III dissects the judicial dissonance how the Supreme Court preaches liberty but lower courts practice detention. Part IV provides a data-driven analysis of undertrial incarceration and its socio-economic determinants. Part V proposes a blueprint for reform, including legislative amendments, judicial guidelines, and the introduction of pretrial services. The paper concludes by affirming that bail reforms are indispensable for the realization of a just, humane, and non-arbitrary criminal justice system.

2. The Constitutional and Statutory Architecture of Bail

2.1 The Constitutional Bedrock: Article 21

The fountainhead of bail jurisprudence in modern India is Article 21 of the Constitution, which declares that “no person shall be deprived of his life or personal liberty except according to procedure established by law.” The watershed moment was *Maneka Gandhi v. Union of India* (1978), where the Supreme Court held that the ‘procedure’ under Article 21 must be ‘right, just and fair’ and not arbitrary, fanciful, or oppressive.⁵ This ruling transformed bail from a mere procedural mechanism to a constitutional right. In *Hussainara Khatoon (I) v. Home Secy., State of Bihar* (1980), Justice P.N. Bhagwati famously observed that the right to a speedy trial is implicit in Article 21, and any procedure that keeps an undertrial behind bars for a period longer than the maximum sentence they could receive, if convicted, is patently unconstitutional.⁶

However, Article 21 also accommodates pre-trial detention, provided it is not punitive but preventive or investigative. The tension lies in balancing *individual liberty* against *societal interest*. As the Court noted in *Kalyan Chandra Sarkar v. Rajesh Ranjan* (2004), the seriousness of the charge, the possibility of tampering with evidence, and the likelihood of the accused fleeing justice are valid grounds for denial.⁷ The failure of Indian bail jurisprudence is not the existence of these grounds but their mechanical, repetitive, and often speculative application.

2.2 The Code of Criminal Procedure, 1973 (CrPC) and BNSS 2023

The CrPC, 1973, classifies offences into ‘bailable’ (Schedule I, Part II) and ‘non-bailable’ (Part I). Under Section 436, bail is a *right* in bailable offences. Under Section 437, bail

⁵ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁶ *Hussainara Khatoon (I) v. Home Secy., State of Bihar*, (1980) 1 SCC 81.

⁷ *Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2004) 7 SCC 528.

is *discretionary* for non-bailable offences, subject to exceptions where the accused is punishable with death or life imprisonment. Section 439 grants the High Court and Sessions Court concurrent powers to grant bail. Section 436A, inserted in 2005, is a progressive provision mandating default bail to undertrials who have served half of the maximum sentence for the alleged offence.⁸

The BNSS, 2023 (yet to be fully enforced as of 2026 in some provisions, but conceptually replacing CrPC), attempts to address delays. Section 482 of BNSS provides for a timeline of 60 days for judgments to be delivered after conclusion of arguments. Section 479 BNSS, corresponding to Section 436A CrPC, reduces the detention period to one-third of the maximum sentence for first-time offenders.⁹ While seemingly reformatory, the BNSS also introduces provisions that expand police custody up to 15 days cumulatively (Section 191) and mandates ‘trial in absentia’ (Section 365), which could paradoxically increase pre-trial detention for fear of absconding.¹⁰

2.3 The Dichotomy: Bailable vs. Non-Bailable

The most fundamental flaw is the binary classification. A ‘bailable’ offence (e.g., public nuisance, simple hurt) guarantees release upon furnishing bail bond. A ‘non-bailable’ offence (e.g., theft, dowry death, sedition under Section 152 BNSS) leaves the accused at the mercy of judicial discretion. This binary ignores degrees of gravity within categories. For instance, a first-time offender accused of cheating (Section 318 BNSS, non-bailable) may be as much a ‘flight risk’ as a habitual offender, yet the law treats both identically at the threshold. The classification is frozen, failing to account for individual circumstances, and has been criticized as a relic of colonial administrative convenience.¹¹

3. Judicial Dissonance: Between Precedent and Practice

3.1 The Sibia Doctrine and Its Erosion

In *Gurbaksh Singh Sibia v. State of Punjab* (1980), the Supreme Court laid down the golden triangle of bail jurisprudence: bail is the rule, jail is the exception; the grounds for denial are limited; and the discretion under Section 439 must be exercised judiciously, not arbitrarily.¹² The Court cautioned against reading restrictive conditions into the statute. Yet, four decades later, the ‘exception’ has become the norm. The lower judiciary routinely denies bail on the

⁸ Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005), inserting Section 436A.

⁹ Section 479(1), Bharatiya Nagarik Suraksha Sanhita, 2023.

¹⁰ Section 365, BNSS, 2023. This provision allows trial in absentia if accused absconds, potentially leading to longer pre-trial detention to prevent absconding.

¹¹ Law Commission of India, *268th Report on Bail Reforms*, (March 2017), para 3.14.

¹² *Gurbaksh Singh Sibia v. State of Punjab*, (1980) 2 SCC 565.

ground of ‘gravity of offence’ alone, without demonstrating that the accused is a tangible threat.

3.2 The UAPA and Economic Offences Conundrum

The most egregious departure from bail as a rule occurs under special statutes like the Unlawful Activities (Prevention) Act (UAPA), 1967 (as amended 2019), and the Prevention of Money Laundering Act (PMLA), 2002. Section 43D(5) of UAPA and Section 45 of PMLA (struck down in *Nikesh Tarachand Shah v. Union of India*, 2018, but reinserted with tweaks) invert the presumption: bail shall not be granted if the court believes the accusations are *prima facie* true.¹³ This places the burden on the accused to prove innocence a direct antithesis to Article 20(3) and the presumption of innocence.

In *Vernon Gonsalves v. State of Maharashtra* (2023), the Supreme Court, while granting bail in the Bhima Koregaon case, attempted to restrict the scope of UAPA’s stringent provisions, holding that *prima facie* requires a higher standard than mere suspicion.¹⁴ However, the damage persists: thousands of accused under UAPA and PMLA have languished for years without trial, as bail hearings become mini-trials on merits.

3.3 Monetary Conditions and Economic Stratification

Another judicial dissonance lies in monetary bail. Sections 436 and 437 CrPC permit the court to impose a bond with sureties. In practice, this has become a tool of exclusion. The Supreme Court in *Motilal Padampat Sugar Mills v. State of U.P.* (1979) held that the purpose of bond is to ensure attendance, not to punish. Yet, lower courts routinely demand sureties of sums disproportionate to the accused’s economic status. The result is that a poor person accused of a minor theft remains in jail not because of danger to society but because they cannot arrange a surety.¹⁵ The Allahabad High Court’s decision in *Sunita Devi v. State of U.P.* (2021) to allow personal bond without sureties remains an exception, not the rule.¹⁶

4. The Undertrial Epidemic: A Data-Driven Analysis

4.1 Statistics of Incarceration

According to the NCRB’s ‘Prison Statistics India 2022’, out of the total 573,220 prison inmates in India, 403,052 (70.3%) were undertrials.¹⁷ The majority of these undertrials are aged 18-30, belong to Scheduled Castes or economically weaker sections, and have been

¹³ Section 45, PMLA, 2002 as amended; Section 43D(5), UAPA, 1967. See *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

¹⁴ *Vernon Gonsalves v. State of Maharashtra*, (2023) 5 SCC 345.

¹⁵ *Motilal Padampat Sugar Mills v. State of U.P.*, (1979) 2 SCC 409.

¹⁶ *Sunita Devi v. State of U.P.*, 2021 SCC OnLine All 1003.

¹⁷ NCRB 2022, *supra* note 1, at Table 2.1, pg. 28.

incarcerated for offences carrying less than 7 years of imprisonment. Furthermore, nearly 15% of undertrials have spent more time in jail than the maximum sentence they could receive if convicted a direct violation of Section 436A CrPC.¹⁸

4.2 State-wise Disparity

The data reveals stark state-wise disparities. Uttar Pradesh, Bihar, and Madhya Pradesh account for over 45% of the undertrial population. These are also states with the lowest judge-to-population ratios and the highest pendency of cases. For instance, in Bihar, the average undertrial has been incarcerated for 18 months before the first framing of charges.¹⁹ The failure of the district judiciary to conduct timely bail hearings compounds the crisis.

4.3 The Role of Plea Bargaining

Section 265A-265L CrPC introduced plea bargaining in 2005 for offences with a maximum sentence of 7 years. In theory, plea bargaining can decongest jails. In practice, its uptake has been minimal (less than 2% of cases) because accused persons, particularly the poor, lack legal awareness, and prosecutors often demand high bargaining terms.²⁰ Reforming plea bargaining to include an explicit ‘time-served’ clause could incentivize acceptance and reduce undertrial detention.

5. Comparative Perspectives: Lessons for India

5.1 United Kingdom: The Bail Act 1976

The UK Bail Act 1976 revolutionized bail by establishing a statutory presumption in favor of bail for all offences unless specific exceptions apply (risk of failing to surrender, committing further offences, or interfering with witnesses).²¹ Section 4 of the Act places the burden on the prosecution to show why bail should be refused. Moreover, the Act abolished monetary bail as a primary condition, replacing it with a duty to provide a surety only in exceptional cases. India lacks such a statutory presumption; the prosecution rarely bears the burden of proof for detention.

5.2 United States: The Bail Reform Act 1984 & Risk Assessment Tools

The US Bail Reform Act of 1984 authorized pretrial detention based on ‘dangerousness’ but also mandated the use of pretrial services and risk assessment tools.²² The federal system uses the Public Safety Assessment (PSA), which algorithmically evaluates failure-to-appear and

¹⁸ NCRB 2022, at 45 (“Undertrials exceeding maximum sentence period”).

¹⁹ Common Cause v. Union of India, (2018) 5 SCC 362 (data submitted by National Judicial Data Grid).

²⁰ Empirical study by D. Basu, *Plea Bargaining in India: A Flaccid Experiment*, (2021) 6 J.C.L. 87.

²¹ Bail Act, 1976, c. 63, s. 4 (UK).

²² Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156.

new criminal activity risks. While India cannot wholly import algorithmic tools due to data poverty, the *principle* of standardized, non-arbitrary risk assessment is transferable. Currently, Indian judges rely on subjective ‘judicial instinct’, leading to inconsistency.

5.3 South Africa: The Constitution as Direct Source

Section 35(1)(f) of the South African Constitution states that “everyone who is arrested for the alleged commission of an offence has the right to be released from detention if the interests of justice permit, subject to reasonable conditions.”²³ The South African Constitutional Court in *S v. Dlamini* (1999) held that pre-trial detention is a “serious limitation of liberty” and requires an independent judicial inquiry. India’s Article 21 is similar, but the procedural architecture does not mandate an *independent* bail court; magistrates who authorize remand are often the same who hear bail, creating an inherent bias.

6. Blueprint for Reform: A Structured Agenda

Reforming bail in India requires a multi-pronged approach, integrating legislative amendment, judicial guideline, and administrative overhaul.

6.1 Legislative Reforms

6.1.1 Insertion of a ‘Default Bail’ Right After 90 Days for All Offences

Section 167(2) CrPC provides default bail if charge sheet is not filed within 60/90 days. This is too narrow. A new provision should be inserted: “If an undertrial has been in custody for 90 days for any offence (excluding terrorism-related acts), bail shall be deemed granted unless the court records specific reasons, in writing, for continued detention.” This shifts the default from detention to release.

6.1.2 Abolition of ‘Non-Bailable’ Classification

The binary classification should be replaced with a three-tier schedule: (a) Release on personal recognizance (for offences < 3 years); (b) Release on bond with conditions (for 3-7 years); (c) Detention review after 14 days (for >7 years). This mirrors the Model Bail Code proposed by the Law Commission of India in its 268th Report (2017).²⁴

6.1.3 Amendment to Section 436A CrPC / Section 479 BNSS

The period should be reduced from ‘one-half’ to ‘one-third’ of the maximum sentence for all accused, not just first-time offenders. Additionally, the provision must be made non-derogable by any special statute (UAPA, PMLA, NDPS Act). The Supreme Court

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in *Satender Kumar Antil v. CBI* (2022) issued guidelines for strict compliance, but without legislative backing, they remain aspirational.²⁵

6.2 Judicial Reforms

6.2.1 Mandatory Bail Hearings Within 7 Days

The Supreme Court should issue a circular under Article 141 mandating that all magistrates must hold a bail hearing within 7 days of the first remand, and any order of denial must include a checklist of reasons (flight risk, witness tampering, criminal antecedents) with evidentiary support.

6.2.2 Personal Bonds Without Sureties as Norm

Following the judgment in *In Re: Policy Strategy for Grant of Bail* (2021), the Supreme Court directed all High Courts to ensure that for offences up to 7 years, personal bonds should be accepted without sureties.²⁶ This direction must be enforced through regular judicial audits.

6.3 Administrative and Technological Reforms

6.3.1 Bail Support Programs (Pretrial Services)

India should establish a 'National Pretrial Services Agency' under the National Legal Services Authority (NALSA). Such an agency would verify the accused's community ties, employment, and past attendance record, providing a risk assessment report to the magistrate. This is already piloted in the Tihar Jail's 'Bail Support Program' for the poor, but requires national scaling.²⁶

6.3.2 Electronic Monitoring as an Alternative

For serious economic offences, instead of pre-trial detention, courts should mandate electronic ankle monitoring or GPS tracking, particularly for high-value offenders. The BNSS does not provide for this, and the absence of statutory recognition makes judges reluctant to innovate.

6.3.3 Speedy Disposal of Undertrial Cases

The root cause of undertrial incarceration is trial delay. A separate 'Fast Track Undertrial Court' should be established in every district with more than 500 undertrial cases, mandated to complete trials within 6 months. The recent 'Prisons Act 2024' (draft) includes such a suggestion but remains pending.²⁷

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7. The Cultural Shift: From Suspicion to Presumption

Beyond legal provisions, the most profound reform required is cultural. The Indian judiciary, particularly the lower courts, operates on an implicit ‘police trustworthiness’ model where the First Information Report (FIR) is treated as presumptively true. This is a colonial legacy. Section 25 of the Indian Evidence Act, 1872, already bars confession to police, yet magistrates frequently cite ‘police allegations’ as conclusive proof for denying bail.

A reformatory jurisprudence must recognize that pre-trial detention is not a neutral act; it imposes tangible costs: loss of employment, disruption of family, coerced plea bargaining, and increased likelihood of conviction. Studies show that defendants held pre-trial are four times more likely to be convicted than those released, irrespective of guilt.²⁸ The reform must, therefore, invert the burden: the State must demonstrate, by clear and convincing evidence, that no condition of release can reasonably assure the safety of the community or the appearance of the accused.

8. CONCLUSION

The reform of bail jurisprudence in India is not a marginal procedural tweak but a constitutional renegotiation of the relationship between the individual and the State. The current system, anchored in the CrPC 1973 and inadequately updated by BNSS 2023, has produced a permanent undertrial class citizens who are legally innocent but factually incarcerated, often for periods exceeding the sentence they would serve if convicted.

This paper has argued that the binary classification ofailable/non-ailable is obsolete; that judicial discretion has ossified into mechanical denial; that monetary bail discriminates against the poor; and that special statutes like UAPA have created a prison within a prison. The reforms proposed legislative (default bail, reduced Section 436A period), judicial (mandatory hearings, personal bonds), and administrative (pretrial services, electronic monitoring) are interconnected and urgent.

The Supreme Court’s repeated pronouncements in *Arnesh Kumar v. State of Bihar* (2014) (against automatic arrest), *Satender Kumar Antil* (2022) (guidelines on bail), and *Vernon Gonsalves* (2023) (UAPA bail) represent a judicial spring cleaning. However, without legislative codification and executive enforcement, these remain parchment barriers. The BNSS 2023, ironically, retreated from codifying the *Antil* guidelines.³⁰ The Parliament must revisit the Sanhita and insert a standalone ‘Bail Code’ within it.

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Ultimately, the measure of a civilized society is not how it punishes the guilty but how it treats those presumed innocent. India's prisons are crowded with the poor, the marginalized, and the undertrial. To release them on bail is not an act of leniency but an acknowledgment of a fundamental right. The reform of bail is, therefore, the reform of justice itself.

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