 DOI: *https://doi.org/10.63108/IJLMH.12794*

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 9 | Issue 4

2026

Bail as a Rule and Jail as an Exception: A Comparative Analysis of Pre-Trial Liberty in India and the United States of America

RAGHAV SHARMA*

ABSTRACT

The principle that bail is the rule and jail the exception is a cornerstone of modern criminal jurisprudence, securing the presumption of innocence and the right to pre-trial liberty. This article presents a comparative constitutional and statutory analysis of pre-trial bail in India and the United States of America. It examines how both jurisdictions, despite different constitutional frameworks and procedural traditions, have moved towards protecting the liberty of accused persons awaiting trial. Through examination of statutory provision, case law, constitutional guarantee and the difficulties of implementation, the article shows that both have embraced bail as the rule subject to narrow exceptions, though with significant variation in application and enforcement. Indian bail jurisprudence, grounded in Article 21 of the Constitution and in the code of criminal procedure, has developed substantial protections through decisions of the Supreme Court, while the United States, operating within the framework of the Eighth Amendment and the federal bail reform legislation, has similarly given priority to liberty while weighing considerations of public safety. The article identifies convergences and divergences, evaluates the exercise of judicial discretion, addresses socio-economic barriers to obtaining bail, and recommends practices for both jurisdictions. It contributes to the wider discourse on criminal justice by identifying exemplary practice and suggesting reforms to strengthen the right to pre-trial liberty.

Keywords: *Bail, Pre-trial liberty, Presumption of innocence, Constitutional rights, Comparative criminal law*

I. INTRODUCTION

The administration of criminal justice in a democratic state confronts a fundamental tension between securing the rights of the accused and maintaining public safety and the integrity of the judicial process. At the heart of that tension lies bail, a mechanism designed to secure the attendance of the accused at trial while permitting release from custody in the meantime. The choice between bail and detention is among the most significant questions in comparative

* Author is an Advocate at the Supreme Court of India and the Delhi High Court, New Delhi, India.

criminal jurisprudence, affecting millions of individuals and shaping criminal justice systems across legal traditions.

The principle that bail is the rule and jail the exception expresses the modern understanding that detention before trial should be rare, extraordinary and justified by compelling reasons. It reflects a commitment to human dignity, to the presumption of innocence and to the recognition that liberty is fundamental. Its translation into practice nonetheless reveals substantial differences between jurisdictions, and particularly between India and the United States of America, two large and diverse democracies with distinct constitutional traditions, procedural systems and social contexts.

This article undertakes a comparative analysis of pre-trial bail in the two countries. Its objects are to examine the constitutional, statutory and common law foundations of bail in both; to analyse the leading judicial pronouncements and their development; to identify and evaluate the criteria governing the grant or refusal of bail; to assess the practical implementation of those principles and the barriers to obtaining bail; to explore the socio-economic dimensions of inequality in bail systems; and to propose reforms for strengthening the protection of pre-trial liberty.

The study is significant for several reasons. It contributes to the discourse on criminal justice reform by examining how two major democracies approach the question of pre-trial liberty; it analyses how different constitutional frameworks address similar problems; it illuminates the gap between principle and implementation; and it addresses contemporary concerns about the scale of pre-trial detention, socio-economic disparity in access to bail and the reform of pre-trial justice.

II. CONSTITUTIONAL AND STATUTORY FOUNDATIONS

A. India

The Constitution of India enshrines the right to life and personal liberty in Article 21, which provides that no person shall be deprived of life or personal liberty except according to procedure established by law.[1] That provision has been interpreted expansively to include liberty during the period before trial, and the Supreme Court has consistently held that liberty is the natural condition of a person and that its deprivation must be justified by compelling reasons and strict procedural compliance.

[1] INDIA CONST. art. 21.

The Code of Criminal Procedure, 1973 supplied the procedural framework for bail. Section 41 restricted the power of the police to arrest, section 50 required an arrested person to be informed of the grounds of arrest and of the right to bail, and sections 436 to 450 governed bail and bonds.[2] Production before a magistrate within twenty-four hours is required by Article 22(2) of the Constitution and was provided for by section 57 of the Code.[3] The Code embodied the principle that bail should be the norm and detention exceptional, and it distinguished bailable from non-bailable offences, the latter being reserved for more serious crimes. Even in a non-bailable case, however, bail falls to be granted upon the merits and upon consideration of specific factors.

The Code has since been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023, which came into force on 1 July 2024 and now contains the corresponding provisions, bail and bonds being dealt with in Chapter XXXV.[4] The recodification preserves the structure described above, and the jurisprudence discussed in this article, which is constitutional in origin, continues to govern. References to the earlier Code are retained where the decisions under discussion were given under it.

B. The United States

The Constitution of the United States protects against pre-trial detention through several provisions. The Due Process Clause of the Fifth Amendment secures fairness in criminal proceedings, the Eighth Amendment prohibits excessive bail, and the Fourteenth Amendment extends those protections to the States.[5] In *Stack v. Boyle* the Supreme Court held that bail set at a figure higher than an amount reasonably calculated to ensure the attendance of the accused is excessive under the Eighth Amendment.[6]

Federal statutory protection is provided by the Bail Reform Act of 1984, which creates a presumption in favour of release on personal recognizance or on an unsecured bond except in specified circumstances.[7] The Act requires consideration of personal, family and community ties, of ties to the State, of criminal history and of the nature and circumstances of the charge. Detention before trial is permissible only where no condition of release can adequately protect the community or ensure attendance. State systems vary considerably, some having adopted

[2] The Code of Criminal Procedure, 1973, §§ 41, 50, 436-450, No. 2, Acts of Parliament, 1974 (India).
[3] India Const. art. 22, cl. (2); The Code of Criminal Procedure, 1973, § 57, No. 2, Acts of Parliament, 1974 (India).
[4] The Bharatiya Nagarik Suraksha Sanhita, 2023, ch. XXXV, No. 46, Acts of Parliament, 2023 (India) (in force July 1, 2024).
[5] U.S. Const. amends. V, VIII, XIV.
[6] *Stack v. Boyle*, 342 U.S. 1, 5 (1951).
[7] Bail Reform Act of 1984, 18 U.S.C. §§ 3141-3150.

risk assessment instruments and reforms directed at reducing pre-trial detention while others retain more restrictive practices.

III. THE JUDICIAL DEVELOPMENT OF BAIL JURISPRUDENCE

A. India

The Supreme Court has developed a comprehensive jurisprudence on bail. In *Maneka Gandhi v. Union of India* it established that the right to personal liberty cannot be taken away unless the procedure is reasonable, fair and just.[8] The proposition that gives this article its title was expressed by Krishna Iyer J. in *State of Rajasthan v. Balchand*, where the Court said that the basic rule may be tersely put as bail and not jail,[9] and the factors relevant to the exercise of the discretion were set out in *Gudikanti Narasimhulu v. Public Prosecutor*.[10]

In *Gurbaksh Singh Sibbia v. State of Punjab* a Constitution Bench established that personal liberty is among the most precious of rights, that bail is the rule and jail the exception, and that restrictive conditions of bail may amount to punishment before conviction.[11] The grounds upon which bail may be refused have been identified as reasonable grounds to believe that the accused has committed a grave offence, a substantial risk of absconding, and a substantial risk of tampering with witnesses or evidence. The gravity of an offence does not by itself justify detention, and criminal antecedents alone do not warrant refusal.

In *Arnesh Kumar v. State of Bihar* the Court introduced significant procedural safeguards against casual arrest, requiring the police to record reasons in writing before effecting an arrest in cases falling within the relevant provision, and thereby limiting arbitrary detention at the pre-trial stage.[12] That decision underscores the commitment of the Court to the principle that bail is the default position.

B. The United States

The United States follows a risk-based model. In *United States v. Salerno* the Supreme Court held that detention before trial does not violate the Due Process Clause where it rests on a legitimate governmental objective, namely public safety and the securing of attendance, and where the regulation rationally serves that objective, but that the determination must rest on an individualised assessment.[13]

---

[8] *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248 (India).
[9] *State of Rajasthan v. Balchand*, (1977) 4 S.C.C. 308 (India).
[10] *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 S.C.C. 240 (India).
[11] *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 S.C.C. 565 (India).
[12] *Arnesh Kumar v. State of Bihar*, (2014) 8 S.C.C. 273 (India).
[13] *United States v. Salerno*, 481 U.S. 739 (1987).

 [ISSN 2581-5369]

The Bail Reform Act directs courts to consider the nature and circumstances of the offence; the weight of the evidence; the history and characteristics of the defendant, including personal ties, employment, education and physical and mental condition; family ties and residence; criminal history; the record of appearance at court proceedings; and financial resources.[14] Courts determine whether conditions can reasonably assure attendance and protect the community. Recent practice has seen wider adoption of risk assessment instruments and of pre-trial services, and progressive jurisdictions emphasise alternatives to financial bail, including release on personal recognizance, deposit bail and unsecured bonds, in recognition that financial bail perpetuates inequality.

IV. Convergences and divergences

A. Convergences

1. The presumption of innocence. Both jurisdictions recognise that the presumption continues through the period before trial, which tells against casual detention.
2. Liberty as fundamental. Both recognise liberty as fundamental to human dignity, Article 21 of the Indian Constitution and the Eighth Amendment protecting that interest through different doctrinal frameworks.
3. Individualised assessment. Both require individual consideration rather than the mechanical application of predetermined rules, so that the court examines the facts of the case, the background of the accused and the nature of the charge.
4. Proportionality. Both recognise that conditions of bail must be proportionate to the legitimate objectives of securing attendance and protecting the community, and that excessive or onerous conditions are to be disfavoured.

B. Divergences

1. The bailable and non-bailable distinction. Indian law classifies offences as bailable or non-bailable and prescribes a special procedure for the latter. American law does not employ that classification; presumptive standards of release apply irrespective of the severity of the charge, though the amount and conditions of bail may differ.
2. The role of monetary bail. The American system has traditionally employed monetary bail extensively, the amount serving as security. In India monetary bail exists but is used more sparingly, personal bonds and sureties being more common, and there is increasing emphasis on personal recognizance.

[14] 18 U.S.C. § 3142(g).

3. Judicial discretion. Both systems confer discretion, but its scope differs. Indian courts have developed doctrines restricting it, as in the rule that the gravity of an offence cannot alone warrant detention, while American courts enjoy broader discretion constrained by statutory criteria and risk assessment instruments.
4. Rates of detention before trial. The United States detains a significantly higher proportion of its population before trial than India, which reflects structural differences in practice, the influence of the commercial bail industry and the allocation of resources.

V. Landmark judicial pronouncements

A. India

State of Rajasthan v. Balchand and *Gurbaksh Singh Sibbia v. State of Punjab* established the foundational principle that bail is the rule. In *Gudikanti Narasimhulu* the Court articulated that while the nature and gravity of the offence are relevant they cannot be the sole determinant, and identified the considerations that bear upon the discretion. In *Madan Mohan Singh v. State of Haryana* it was emphasised that even in a serious case bail may be granted where the prosecution case is weak or the accused has roots in the community.[15] More recently, *Arnesh Kumar* introduced procedural safeguards requiring the police to record reasons in writing before arrest, recognising the need to prevent casual arrest.

B. The United States

Stack v. Boyle established that bail is a constitutional right where it is fixed at a figure calculated merely to secure the attendance of the defendant. *United States v. Salerno* addressed detention before trial, holding that the government may detain a defendant where no condition of release can reasonably protect the community or ensure attendance, but that the determination must rest on individualised assessment. Beyond the decisions of the Supreme Court, the pre-trial services programme of the District of Columbia and reforms in several States have influenced practice by demonstrating that structured systems with comprehensive pre-trial services can reduce both rates of detention and rates of failure to appear.[16]

---

[15] *Madan Mohan Singh v. State of Haryana*, (1998) 3 S.C.C. 542 (India).

[16] *See* John Philbrick, *Toward Effective Bail and Detention Practices: A Practitioner's Handbook* (Pretrial Justice Inst. 2016); Timothy R. Schnacke, *The History of Bail and Pretrial Release*, 2 Pretrial Justice Insights 1 (2014).

VI. RECOMMENDATIONS FOR REFORM

A. India

1. Legal representation. Trained legal aid advocates should be available at bail hearings, and specialised bail units might be created within legal aid organisations.
2. Pre-trial services. Agencies should be established to investigate facts relevant to bail, to prepare reports for the court and to manage conditions of release, which would reduce the asymmetry of information.
3. Procedure. Congestion should be reduced through specialised bail courts and expedited hearing procedures, and technology-enabled petitions can shorten the process.
4. Monetary conditions. Reliance on monetary bail should be reduced in favour of personal bonds and recognizance subject to conditions addressing specific risks.
5. Risk assessment. Culturally sensitive instruments should be developed and piloted in selected courts in order to reduce bias and to standardise decisions.

B. The United States

1. Money bail. Monetary bail should give way to risk-based conditional release, cash bail being confined to extraordinary circumstances.
2. Pre-trial services. Every jurisdiction should provide comprehensive services of investigation, supervision and support.
3. Algorithmic bias. Where risk assessment instruments are used there should be transparency of the algorithm, regular audit for bias and human oversight, so as to prevent discriminatory outcomes.
4. Due process. Hearing procedures should allow adequate time for preparation, the presentation of evidence and appellate review, and the right to counsel must be meaningful.
5. Data. Data on bail decisions, outcomes of detention and rates of failure to appear should be collected systematically in order to inform policy.

C. Both jurisdictions

1. Judicial training. Comprehensive programmes should be provided for judges and magistrates on bail jurisprudence, unconscious bias, constitutional principle and alternatives to detention.

2. Research and evaluation. Empirical studies of outcomes, success rates and disparities should be commissioned and used to guide policy.
3. Community-based alternatives. Alternatives to detention should be developed, including day reporting centres, electronic monitoring and community supervision.
4. Transparency. Data on bail decisions should be published, disaggregated by offence type, characteristics of the accused and outcome, and the performance of the system should be open to public scrutiny.

VII. Conclusion

The principle that bail should be the rule and detention the exception represents a norm of democratic societies, reflecting the value placed upon liberty and human dignity. This comparison of India and the United States shows that both have constitutionally entrenched protections for pre-trial liberty and have developed a jurisprudence emphasising the presumption of innocence.

The Indian system, rooted in Article 21 and developed through decisions of the Supreme Court, emphasises categorical protection and procedural safeguard, while the American system, grounded in the Eighth Amendment and the Bail Reform Act, employs individualised risk-based assessment. Both aim at protecting liberty while maintaining the integrity of the court and public safety. The gap between principle and implementation nonetheless remains substantial in both, since socio-economic inequality, inadequate representation, institutional constraint and asymmetry of information undermine the protection of bail rights for vulnerable populations.

The scale of pre-trial detention in both jurisdictions, affecting large numbers of people who are presumptively innocent, represents a failure to translate constitutional principle into lived reality. The recommendations advanced here, emphasising access to representation, pre-trial services, the reduction of monetary bail, risk-based assessment, judicial training and systematic data collection, rest on comparative experience. Neither jurisdiction need begin afresh: India may learn from the American emphasis on comprehensive pre-trial services and structured conditional release, and the United States from the categorical approach of Indian law and the principled stance of its Supreme Court against casual detention.

Realising the principle that bail is the rule and jail the exception requires sustained commitment to reform, adequate resources, judicial leadership and the political will to prioritise liberty over punitive impulse. It requires courts, legislatures and executive agencies to work together to transform systems that presently operate as engines of mass pre-trial detention into institutions genuinely committed to liberty and justice. The comparison shows that while legal frameworks matter, the quality of a criminal justice system depends upon institutional capacity, the commitment of resources and a settled cultural commitment to human dignity. Both countries possess the constitutional foundation and the jurisprudential tradition required for a just system of bail; what remains is the collective will to overcome systemic obstacles and to translate principle into equitable practice.

*****