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Pre-Trial Detention, Bail and Human Rights in India: A Critical Study of Criminal Justice Reform

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ABSTRACT

This paper examines pre-trial detention, bail and the position of undertrial prisoners in India from constitutional, statutory and human rights perspectives. Pre-trial detention is one of the most visible points at which the power of the State comes into direct contact with the liberty of the individual; although the accused is presumed innocent until conviction, a very large proportion of persons remain in prison before their trials are concluded, raising serious human rights concerns relating to liberty, reputation, livelihood, family and dignity. Drawing upon constitutional provisions, Supreme Court decisions, recent prison data and the Bharatiya Nagarik Suraksha Sanhita, 2023, the paper argues that the central difficulty is not the absence of law but the weak implementation of bail principles, legal aid, undertrial review and speedy trial. It contends that criminal justice can be effective only when it is also fair, non-arbitrary and humane.

Keywords: *Pre-trial detention, bail, undertrial prisoners, Article 21, human rights, legal aid, speedy trial, BNSS, prison reform.*

I. INTRODUCTION

Criminal justice is necessary for every society, because law and order cannot be maintained without investigation, prosecution and punishment. At the same time, criminal justice is the area in which the power of the State is at its strongest and the position of the individual is at its weakest. The police can arrest, the prosecution can oppose bail, and the court can commit a person to custody. For this reason, criminal justice must always be controlled by constitutional values and human rights. If this control is absent, the process meant to protect society may itself become a source of injustice.

Pre-trial detention refers to the detention of an accused person during investigation, inquiry or trial, before final conviction. It may be justified in limited cases, such as where the accused may abscond, threaten witnesses, tamper with evidence, repeat the offence or obstruct the investigation. However, where detention becomes routine or continues for long periods only

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because the trial is slow, bail is costly, surety is unavailable or legal aid is ineffective, the detention takes on the character of punishment before conviction. This is the central human rights difficulty in the Indian bail system.

The Indian prison system illustrates the seriousness of the problem. According to the National Crime Records Bureau, Prison Statistics India 2023, Indian prisons held more than 5.73 lakh inmates at the end of 2023, and undertrial prisoners formed nearly three-fourths of the prison population.¹ This means that Indian prisons are filled not mainly with persons already convicted by courts, but with persons whose guilt remains undetermined. The data become more troubling when read together with prison overcrowding and the long pendency of criminal cases. Overcrowding worsens prison conditions, while delay prolongs undertrial detention.

The issue is also connected with poverty. A person of means can engage a private lawyer, move for bail quickly, arrange surety and comply with conditions. A poor accused may be granted bail in law yet remain in jail because he cannot furnish surety, or because no one explains the order to him. This renders the bail system unequal in effect. The legal rule may be the same for everyone, but the outcome differs because accused persons do not have equal social and economic capacity.

This paper studies bail and pre-trial detention as a human rights issue, and not merely as a technical matter of criminal procedure. Its central argument is that bail protects the constitutional principle that liberty cannot be taken away except by just, fair and reasonable procedure. At the same time, the paper accepts that victim protection, witness safety and public order are also important. The real requirement is a balanced criminal justice system in which detention is used only when necessary, bail is not denied mechanically, and trial is not delayed for years.

II. CONSTITUTIONAL AND STATUTORY FRAMEWORK

The law on pre-trial detention cannot be understood solely by reading the provisions on arrest and bail. It must be read together with the Constitution of India, the human rights principles of dignity and fair trial, and the statutory scheme of criminal procedure. The Constitution does not expressly recognise bail as a fundamental right, but the concept of bail is deeply connected with personal liberty under Article 21, equality under Article 14, and protection against arbitrary arrest under Article 22.

¹ National Crime Records Bureau, PRISON STATISTICS INDIA 2023 (Ministry of Home Affairs, Government of India, New Delhi, 2024).

A. Article 21 and the requirement of fair procedure

Article 21 provides that no person shall be deprived of life or personal liberty except according to procedure established by law. Following *Maneka Gandhi v. Union of India*, the expression "procedure established by law" has been interpreted to mean a procedure that is just, fair and reasonable, and not arbitrary, fanciful or oppressive.² This interpretation is of considerable importance for bail, because pre-trial detention is a direct deprivation of personal liberty. It may be permitted by law, but the law and its application must still satisfy the requirement of fairness.

The constitutional meaning of Article 21 is that the court must not treat custody as an ordinary administrative step. Every remand order and every refusal of bail takes away liberty, and reasons must therefore be given. The court must ask whether custody is necessary for investigation or trial, whether the accused is likely to flee, whether evidence can be protected by conditions, and whether the same purpose can be served by less restrictive means. If the accused can be made available through a bond, reporting conditions or restrictions on contact with witnesses, detention should not be continued merely as a matter of habit.

B. Equality, poverty and the real meaning of bail

Article 14 requires equality before the law and the equal protection of the laws. In bail matters, equality is not achieved merely by writing the same provision for all accused persons. The court must also consider how bail conditions operate in actual life. A high surety amount may appear neutral, but for a poor person it may prove impossible to meet. In *Moti Ram v. State of Madhya Pradesh*, the Supreme Court held that heavy surety conditions should not be imposed without considering the financial position of the accused.³ The Court criticised the notion that freedom can depend upon the ability to produce wealthy sureties.

This principle remains highly relevant. Many undertrial prisoners are daily-wage earners, migrants, homeless persons, students, women deserted by their families, or persons from marginalised communities. They may possess no property documents, local relatives or influential persons willing to stand as surety. If the court does not take these facts into account, bail becomes a remedy for the rich and not for the poor. The human rights criticism of bail law is that it sometimes appears equal in form yet becomes unequal in result.

C. Article 22, legal representation and the first production before the magistrate

Article 22 affords minimum constitutional safeguards to an arrested person. The arrested person must be informed of the grounds of arrest, must have the right to consult and be defended by a

² *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

³ *Moti Ram v. State of Madhya Pradesh*, AIR 1978 SC 1594 (India).

legal practitioner of his choice, and must be produced before the nearest magistrate within twenty-four hours.⁴ These protections are not empty formalities. They exist because arrest creates a sudden imbalance between the State and the accused. If the accused is not told why he is arrested, or is not produced before a magistrate, or has no lawyer, detention can easily become arbitrary.

The first production before the magistrate is one of the most important stages. It is the point at which the legality of the arrest, the need for custody and the availability of legal aid should be examined. In *Khatri v. State of Bihar*, the Supreme Court held that free legal aid is an essential part of fair procedure under Article 21, and that the State is under a constitutional duty to provide a lawyer to an accused who cannot afford one.⁵ This duty begins when the accused is first produced before the magistrate, because that is when liberty is most immediately at risk.

D. Statutory protection under the BNSS, 2023

The Bharatiya Nagarik Suraksha Sanhita, 2023 has replaced the Code of Criminal Procedure, 1973 and came into force on 1 July 2024.⁶ Under the new law, Section 479 deals with the maximum period for which an undertrial prisoner may be detained. It provides that where an accused has undergone detention for up to one-half of the maximum period of imprisonment specified for the offence, he shall be released on bail by the court, except where death or life imprisonment is one of the punishments prescribed. For a first-time offender, the law grants further relief by allowing release on bond after detention of up to one-third of the maximum period.⁷

The significance of Section 479 lies in its acceptance of a basic constitutional idea: that an undertrial cannot be permitted to remain in jail for an unlimited period. The provision also places responsibility on the Superintendent of the Prison to make an application before the court for the release of eligible prisoners.⁸ This is important, because many prisoners do not know the law or do not have lawyers to move such applications. However, the provision will operate effectively only if prison records are kept updated, legal aid lawyers are active, and courts hear such applications promptly.

The Ministry of Home Affairs has issued advisories to States and Union Territories for the implementation of Section 479, including a special campaign to identify eligible undertrial

⁴ INDIA CONST. art. 22.

⁵ *Khatri v. State of Bihar*, AIR 1981 SC 928 (India).

⁶ Ministry of Home Affairs, Government of India, Notification Enforcing the Bharatiya Nagarik Suraksha Sanhita, 2023 with Effect from 1 July 2024.

⁷ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023, sec. 479(1) (India).

⁸ The Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46, Acts of Parliament, 2023, sec. 479(3) (India).

prisoners.⁹ This demonstrates that the problem is not only legal but administrative. A progressive provision will not reduce undertrial detention unless prison authorities, district legal services authorities, the prosecution and the courts work together on a regular basis.

III. HUMAN RIGHTS CONCERNS IN PRE-TRIAL DETENTION

Pre-trial detention affects many rights at once. It affects liberty, dignity, family life, livelihood, health, access to counsel, reputation and, at times, even the capacity to defend the case. An accused in jail is in a weaker position to collect documents, contact witnesses, meet lawyers and prepare a defence. For poor families, the detention of one earning member can push the entire household into distress.

A. Presumption of innocence and the problem of punishment before conviction

The presumption of innocence is a basic principle of criminal law. It means that the prosecution bears the burden of proving guilt beyond reasonable doubt, and that the accused is not to be treated as guilty at the initial stage. In *Noor Aga v. State of Punjab*, the Supreme Court recognised the presumption of innocence as a human right, although it may be subject to statutory exceptions in special laws.¹⁰ If this principle is taken seriously, detention before conviction must remain an exception and not become the normal condition of an accused person.

The difficulty in India is that undertrial detention often operates like punishment. The accused may spend months or years in jail, and may afterwards be acquitted, or may receive a sentence shorter than the period already spent in custody. In such cases, the process itself becomes the punishment. Compensation after acquittal is rare and cannot restore lost time, employment, education or social dignity. This is why bail is not a minor procedural benefit; it is a safeguard against punishment without adjudication.

B. Undertrial population, overcrowding and prison conditions

The high proportion of undertrial prisoners creates structural pressure on prisons. NCRB data for 2023 show that the prison occupancy rate at the national level was above the authorised capacity, and that the undertrial population was the largest category of inmates.¹¹ The India Justice Report 2025 also analyses prison capacity, overcrowding, staff vacancies and the

⁹ Ministry of Home Affairs, Advisory on Implementation of Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 by State Prison Authorities for Providing Relief to Undertrial Prisoners (Oct. 16, 2024).

¹⁰ *Noor Aga v. State of Punjab*, (2008) 16 SCC 417 (India).

¹¹ National Crime Records Bureau, PRISON STATISTICS INDIA 2023 (Ministry of Home Affairs, Government of India, New Delhi, 2024).

condition of justice-delivery institutions across the States.¹² When prisons are overcrowded, every right within prison becomes weaker. Space, sanitation, medical care, mental health support, meetings with lawyers and family visits all suffer.

Overcrowding is not merely a prison-management issue. It is also a bail and trial-delay issue. If a large number of inmates are undertrials, then reducing unnecessary pre-trial detention can directly reduce overcrowding. Building more prisons may be necessary in some places, but it is not the only answer. A justice system that sends too many accused persons to custody before conviction will continue to produce overcrowded prisons even if capacity is increased.

C. Delay in trial and speedy justice

Delay in trial is one of the principal reasons for prolonged pre-trial detention. Delay can arise from a shortage of judges, frequent adjournments, slow investigation, delay in forensic reports, the non-production of the accused, the non-service of summons, the non-appearance of witnesses and weak coordination between the police and the prosecution. The accused suffers because his liberty remains uncertain; the victim suffers because justice is not delivered in time; and society suffers because delay erodes faith in the criminal justice system.

In *Hussainara Khatoon v. State of Bihar*, the Supreme Court treated speedy trial as part of Article 21 and addressed the injustice faced by undertrial prisoners who had been in jail for long periods.¹³ The Court made it clear that a procedure which keeps poor accused persons in jail without trial cannot be regarded as reasonable, just or fair. Later, in *A.R. Antulay v. R.S. Nayak*, the Supreme Court again recognised speedy trial as part of fair, just and reasonable procedure.¹⁴ These cases show that delay is not merely an administrative inconvenience; it is a constitutional violation where it affects liberty.

D. Bail, surety and the criminalisation of poverty

The surety system is one of the weakest parts of bail practice. In theory, surety ensures that the accused will appear before the court. In practice, it often becomes a barrier for poor persons. A person may be granted bail yet remain in prison because surety is unavailable. This means that the court has accepted that custody is not necessary, yet imprisonment continues because of poverty. Such a situation is very difficult to justify under Articles 14 and 21.

¹² Tata Trusts, INDIA JUSTICE REPORT 2025: RANKING STATES ON THE CAPACITY OF POLICE, JUDICIARY, PRISONS AND LEGAL AID (2025).

¹³ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (India).

¹⁴ *A.R. Antulay v. R.S. Nayak*, (1992) 1 SCC 225 (India).

In *Hussainara Khatoon and Moti Ram*, the Supreme Court repeatedly observed that poverty cannot be allowed to defeat liberty.¹⁵ The law must move towards realistic conditions such as personal bonds, local verification, reporting at the police station, attendance through video conferencing, community surety or other non-monetary conditions. Bail conditions should be linked to the risk of absconding or tampering, and not to the financial status of the accused.

E. Custodial violence, mental health and vulnerable prisoners

Custody increases the risk of abuse, because the person is wholly under the control of the State. Custodial violence, torture, forced confession, the denial of medical treatment and humiliation are direct violations of human dignity. In *D.K. Basu v. State of West Bengal*, the Supreme Court laid down safeguards relating to arrest and detention, including the preparation of an arrest memo, information to relatives and medical examination.¹⁶ These safeguards remain important, because illegal methods of investigation not only violate rights but also weaken the reliability of criminal justice.

Vulnerable prisoners face additional problems. Women prisoners may have dependent children. Elderly and sick prisoners need medical care. Persons with mental illness may not understand the proceedings. Migrant workers may have no local surety. Transgender prisoners may face humiliation and risks to their safety. Prison Statistics India 2023 also records inmates suffering from mental health issues, including undertrial prisoners.¹⁷ A human rights approach requires that courts and prison authorities identify vulnerability early, and not after long detention has already caused harm.

F. Victims, witnesses and the public interest

A critical discussion of bail must also include victims and witnesses. Human rights are not only for the accused. The victim too has a right to dignity, safety and fair participation. In serious offences, especially sexual offences, trafficking, organised crime, domestic violence or cases involving intimidation, careless grants of bail may place victims and witnesses at risk. The answer, however, is not the automatic refusal of bail in every serious case. The answer is careful risk assessment and reasoned bail conditions.

Courts can impose conditions such as no contact with the victim, not entering a particular locality, surrender of the passport, regular reporting, joining the investigation, and not

¹⁵ *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (India); *Moti Ram v. State of Madhya Pradesh*, AIR 1978 SC 1594 (India).

¹⁶ *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610 (India).

¹⁷ National Crime Records Bureau, PRISON STATISTICS INDIA 2023 (Ministry of Home Affairs, Government of India, New Delhi, 2024).

influencing witnesses. In suitable cases, witness-protection measures can be employed. This balanced approach respects the liberty of the accused while also protecting the victim. A fair trial requires that both sides be able to participate without fear.

IV. JUDICIAL RESPONSE AND REFORMS REQUIRED

The Supreme Court has repeatedly developed bail jurisprudence in favour of personal liberty, but the difficulty lies in its uneven application at the ground level. The constitutional principle is strong, yet daily remand and bail practice is often mechanical. Reform is required not only in the law but in the institutional habits of the police, courts, prosecution, prisons and legal aid authorities.

A. Bail as the rule and jail as the exception

In *State of Rajasthan v. Balchand*, the Supreme Court stated the well-known principle that the basic rule is bail, not jail.¹⁸ In *Gudikanti Narasimhulu v. Public Prosecutor*, Justice V.R. Krishna Iyer connected bail with personal liberty and social justice, and warned against the mechanical refusal of bail.¹⁹ In *Sanjay Chandra v. Central Bureau of Investigation*, the Court held that the object of bail is to secure the appearance of the accused at trial, and that detention before conviction should not become punishment.²⁰

These decisions do not mean that every accused must be released. They mean that detention must rest on legal reasons. The court must examine the nature of the accusation, the severity of the punishment, the strength of the evidence, the possibility of absconding, the possibility of tampering with evidence, the threat to witnesses, the past conduct of the accused and the needs of the investigation. The seriousness of the offence is relevant, but seriousness alone cannot replace the requirement of reasons. If seriousness alone were sufficient, bail would disappear in many cases even where custody is not necessary.

B. Arnesh Kumar and control over routine arrest

The problem of pre-trial detention begins not only at the bail stage but also at the arrest stage. In *Arnesh Kumar v. State of Bihar*, the Supreme Court directed that arrest should not be made automatically in offences punishable with imprisonment of up to seven years, and that the police must satisfy the statutory requirements before arrest.²¹ The Court also required magistrates to examine whether the arrest was justified before authorising detention. This judgment is

¹⁸ *State of Rajasthan v. Balchand*, AIR 1977 SC 2447 (India).

¹⁹ *Gudikanti Narasimhulu v. Public Prosecutor*, AIR 1978 SC 429 (India).

²⁰ *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40 (India).

²¹ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India).

important, because unnecessary arrest generates unnecessary bail litigation and undertrial detention.

However, implementation remains weak. Arrest is still sometimes used as a routine response to the registration of an offence, as a method of pressure, or because the police regard arrest as proof of action. A rights-based approach requires that arrest be based on necessity, and not on habit. Written reasons for arrest, supervisory control and strict magisterial scrutiny can reduce unnecessary custody.

C. Role of the magistrate, legal aid and the Undertrial Review Committee

The magistrate is the first constitutional guardian of liberty in the criminal process. At the first production, the magistrate must ask whether the accused was informed of the grounds of arrest, whether there is a lawyer, whether medical examination is required, whether police custody is actually necessary, and whether bail can be considered. A remand order should not be a printed or routine order. It must show an application of mind.

Legal aid must also be made meaningful. The Legal Services Authorities Act, 1987 was enacted to provide free and competent legal services to the weaker sections of society.²² The National Legal Services Authority has framed schemes for the provision of legal services to prisoners, undertrials and persons in custody.²³ But legal aid fails where the lawyer meets the accused only on the date of hearing, does not file a bail application, or does not explain the bail order to the family. Effective legal aid means an early interview, study of the case file, the filing of a bail application, follow-up on surety, and coordination with prison legal aid clinics.

Undertrial Review Committees can play a major role. They can identify prisoners eligible under Section 479 of the BNSS, prisoners unable to furnish surety, women prisoners, sick or infirm prisoners, persons charged with petty offences and those who have spent long periods in custody. The Supreme Court has also supported the institutional review of undertrial prisoners in order to reduce unnecessary detention.²⁴ But such committees must meet regularly, maintain data and ensure that their recommendations actually reach the court.

D. Data-based and human rights-based reform

Reform must be data-based. Every district should maintain data on the number of undertrial prisoners, the period of detention, the category of offence, bail applications pending, prisoners granted bail but not released for want of surety, and prisoners eligible under Section 479 of the

²² The Legal Services Authorities Act, 1987, No. 39, Acts of Parliament, 1987, sec. 12 (India).

²³ National Legal Services Authority, Standard Operating Procedure for Representation of Persons in Custody (NALSA, New Delhi).

²⁴ *In re Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700 (India).

BNSS. Without such data, the system cannot identify where liberty is being lost. The data should not remain only in annual reports; they must be used by district judges, prison superintendents, legal services authorities and prosecution offices for monthly review.

The first reform should be the reduction of unnecessary arrest. The second should be quick bail hearings. The third should be realistic bail conditions. The fourth should be the automatic identification of Section 479 cases through e-prison records. The fifth should be speedy trial for accused persons in custody. The sixth should be accountability for custodial violence. The seventh should be the protection of victims and witnesses through conditions and witness-protection measures. These reforms are not against criminal justice; they make criminal justice more credible.

E. Critical evaluation of the present system

The present system has strong constitutional principles but weak enforcement. Courts say that bail is the rule, yet many accused remain in jail because bail hearings are delayed or bail conditions are difficult to satisfy. The law provides for legal aid, yet legal aid is sometimes merely formal. The BNSS provides for release after a certain period of detention, yet this depends on jail records and applications. Human rights standards exist, yet custodial violence and overcrowding continue to be reported. This gap between law and practice is the principal weakness.

A further difficulty is the culture of treating custody as proof of seriousness. In public discourse, release on bail is sometimes treated as if the accused had been declared innocent, or as if the court were soft on crime. This is legally incorrect. Bail is not acquittal. It means only that custody is not necessary during the trial. If the public and the police understand this distinction, bail decisions can become more rational and less emotional.

The criminal justice system must also avoid selective harshness. Powerful accused persons may sometimes obtain quick relief, while poor and unknown accused remain in jail for petty offences. Such inequality damages public trust. A human rights-based approach requires that liberty should not depend on social power, money or publicity. It must depend on the law, the facts and reasoned judicial discretion.

V. CONCLUSION

Pre-trial detention is one of the most serious human rights concerns in the Indian criminal justice system. The State has a duty to investigate crime and protect society, but this duty cannot be performed by ignoring liberty and dignity. An accused person is not a convict. If he is kept in

jail for a long period before conviction, the process itself becomes punishment. This is contrary to the spirit of Article 21, the presumption of innocence and the basic idea of a fair trial.

The Indian legal framework contains many safeguards. Articles 14, 21 and 22 protect equality, liberty and procedure. The Supreme Court has recognised speedy trial, legal aid, protection against arbitrary arrest, fair bail and safeguards against custodial violence. The BNSS, 2023 has also provided an important statutory protection through Section 479 for undertrial prisoners. But the real problem is implementation. Rights written in judgments and statutes do not help the prisoner unless the police, courts, prisons and legal services authorities act in time.

A good criminal justice system is not one that keeps the maximum number of people in jail before trial. It is one that punishes the guilty after a fair trial, protects victims and witnesses, and prevents the unnecessary suffering of those whose guilt has not been proved. Bail should not be treated as a weakness of the law. It is a constitutional method of balancing individual liberty against the needs of the trial. At the same time, bail orders must be careful in cases where victims or witnesses may be threatened.

The way forward is clear. Arrest should be based on necessity, remand should not be mechanical, bail conditions should not punish poverty, legal aid should begin from the first production, Section 479 of the BNSS should be implemented continuously, and undertrial review should be data-based. If these reforms are taken seriously, India can reduce unnecessary detention and prison overcrowding while still maintaining an effective criminal justice system. Human rights and criminal justice are not enemies. Human rights make criminal justice legitimate, fair and trustworthy.
