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# The Right to Bail in India: A Critical Analysis of Its Alignment with Human Rights Principles

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## ABSTRACT

*Society is very interested in the decisions about bail, as every crime is viewed as against the state. The choice of whether to grant bail requires balancing individual freedom with the safety of society. In India, the Constitution provides basic rights, such as life and personal liberty. Article 21 ensures that no one can be deprived of these rights except through legal procedures, protecting personal liberty from improper interference. Being in jail, including during preventive detention, greatly restricts a person's liberty and contact with others, which is lawful only if backed by law. Article 21 safeguards all people, including citizens and non-citizens, but this freedom can be limited by law. Violating someone's liberty is serious and should only happen when the law permitting it is fair and for the common good. A system that respects the law should impose few and reasonable restrictions on personal liberty. Police cannot make arrests just because they can; they must have a valid reason beyond their authority. Arrests can harm a person's reputation, so officers need to ensure there is sufficient justification for them. While law enforcement focuses on prosecuting crimes, it is also vital to protect individuals from misuse of power by authorities. There is an ongoing tension between the need for public safety and the need to protect personal liberty and dignity. Justice Cardozo raised an important question about whether protecting individual rights interferes with societal safety, stressing the importance of a fair legal system. The Supreme Court has recognized the conflict between society's needs and individual rights. In the past, society's need to convict took precedence, but now there is more emphasis on protecting individuals from wrongful arrest and detention. International human rights law states that pre-trial detention should only be used when necessary for justice. It promotes humane treatment and strict conditions to avoid unnecessary limitations. Sometimes laws restrict freedom to maintain order and justice, especially if someone might commit a crime. A main reason for arrest is to ensure the accused appears for trial and receives a sentence if convicted. If this can be done without detention, it would help balance personal freedom with justice. Bail is intended for this balance, allowing arrested individuals to remain free while awaiting trial, provided they can reassure the*

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*court of their appearance. Bail is a way to secure release from custody for someone awaiting trial by offering a form of security. The Tokyo Rules recommend using non-custodial measures, like bail or supervision, instead of pre-trial detention whenever possible. This can help reduce overcrowding in detention facilities and prevent abuses related to lengthy investigations. Pre-trial detention should be a last resort, considering the investigation's needs, societal protection, and the victim's rights.*

*A flexible criminal justice system should provide different non-custodial options from pre-trial to post-sentencing, designed to ensure fair sentencing practices and requiring the offender's consent before formal proceedings. International laws and principles acknowledged by the Supreme Court highlight the negative effects of pre-trial detention on human rights. An accused person's liberty can only be taken through lawful and fair procedures. Bail is a non-custodial option allowing release without endangering the reasons for the arrest. Bail law aims to balance police power and the presumption of innocence. Offenses are labeled as bailable or non-bailable, where bail is a guarantee in bailable offenses but discretionary in non-bailable ones. Courts must exercise this discretion fairly and based on legal rules. The current bail system faces criticism and suggestions for reform from various legal bodies. Generally, people accused of non-bailable offenses do not automatically receive bail as those accused of bailable ones do. Courts must carefully evaluate these cases, following established principles. Judicial discretion should not be completely free, but guided by known rules. The Supreme Court and High Courts have issued guidelines for granting bail, though compliance is inconsistent, indicating the need for a thorough review of current laws and guidelines. The idea of bail in India has evolved over time due to court judgments and laws, leading to a complicated system regarding its application and the powers of the courts. This paper examines bail laws, the influences on bail decisions, and how judges use their discretion. It evaluates the balance between individual rights and societal needs, discusses challenges courts face, and looks at how bail laws affect vulnerable groups in India.*

## **I. INTRODUCTION**

The concept of bail is important in the criminal justice system, deeply connected to the ideas of life, liberty, and human dignity. It gives individuals a chance to thrive even when accused of a crime. The Supreme Court has shaped the principles of bail to balance a person's right to freedom with the need for justice. Being in custody restricts a person's freedom and challenges their presumption of innocence until proven guilty. However, the bail system has not always prioritized individual liberty and is often seen as unfair for those who cannot afford to pay. Bail is mainly defined as the temporary release of someone accused of a crime in exchange for a

promise to return for court appearances. The value of personal liberty is significant and should not be compromised by judicial decisions. The history of bail dates back to ancient civilizations, with evidence of its practice seen since the time of the Greek and Roman empires. Today, many countries incorporate bail into their legal systems. This paper discusses the history, meaning, and philosophy of bail.<sup>3</sup>

‘Bail’ comes from the old French verb ‘baillier’, which means to ‘give or deliver’. Although bail is not defined in the Criminal Procedure Code (Cr.P.C.), it is frequently mentioned and is crucial to the criminal justice system, aligning with fundamental human rights as stated in Parts III and IV of the Constitution and international treaties. Wharton’s Lexicon and Stroud’s Judicial Dictionary define bail as the release of a defendant from legal custody, with the assurance from sureties that he will appear at trial. The principle of bail has been recognized as a right to freedom against state constraints, finding its place in human rights since the Universal Declaration of Human Rights in 1948.

Bail denotes security for a prisoner’s appearance and allows the community to help ensure a prisoner’s presence in court. The concept of bail dates back to 399 B. C. with Plato attempting to release Socrates. The modern bail system originated in England. In medieval times, sheriffs had the power to release or detain suspects, but some abused this power until the Statute of Westminster in 1275 set limits. By the early 17th century, King Charles I faced backlash for imprisoning individuals indefinitely without trial. The Petition of Right in 1628 asserted that the King violated the Magna Carta by detaining people unjustly.

Bail aims to balance personal liberty with the necessity of justice. It ensures that a detained individual’s freedom is preserved until proven guilty. A robust legal system could eliminate bail if every accused person was tried immediately after arrest or provided proper accommodation. A less efficient system accepts the need for bail and bases decisions on the crime's nature, the likelihood of guilt, or the authority behind detention.<sup>4</sup>

The main purpose of bail is to ensure that a person who has been accused of a crime will appear for their trial if released after arrest. Bail aims to remove the harsh effects of pretrial detention by placing the accused in the custody of a surety or by allowing them to provide a bond. It is important to note that the goal of bail is not to punish the accused before a conviction.

Immediate justice after a crime is often not possible due to the lengthy processes of investigation and trial. Since the law presumes that an accused person is innocent until proven guilty, they

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<sup>3</sup> Bahul Kumar Shastri, "Bail and Judicial Discretion" Vol. 1 Pragmaan : Journal of Law 50 (2012)

<sup>4</sup> M.R. Mallick, *Bail Law and Practice 2* (Eastern law house, Kolkata 5th ed. 2014)

cannot be deprived of their right to personal freedom simply because they are charged with a crime. Moreover, the judicial system frequently struggles to provide timely trials, making it unfair to keep an accused person in jail without bail for extended periods. Detaining a person without a speedy trial goes against the fundamental principle of human freedom, a basic human right. The value of personal liberty is acknowledged under Article 21 of the Constitution, and the power to deny bail must be used sparingly and with care. Indian courts have established that granting bail is standard practice, while refusing it is an exception. The long-term consequences of pretrial detention for those presumed innocent can be severe.<sup>5</sup>

In bail applications, it has traditionally been recognized that bail's purpose is to ensure an accused person's appearance at trial without being punitive. It is contrary to the concept of personal liberty to punish someone not convicted of a crime or to deny them freedom solely based on the belief that they might influence witnesses. While personal liberty is critical, it must balance against societal safety.

Bail also allows the community to participate in justice and secure the appearance of the accused. Pretrial detention can have serious consequences, including job loss and strain on the accused's family. Thus, an accused person, presumed innocent, has the right to freedom and should be able to defend their case actively if granted bail.

Despite claims that bail is the norm and jail is the exception, the reality often contradicts this. The right to personal liberty is vital and can only be limited by just laws. After a liberal phase following an emergency, courts shifted to favor the state, leading to longer detentions without bail. In 1997, the court acknowledged serious human rights abuses during investigations but maintained that individual freedom must sometimes yield to state security needs. The current restrictive bail conditions ignore the essence of personal liberty, resulting in delays and a lack of priority for bail requests. Long adjournments for bail and habeas corpus undermine the right to liberty.<sup>6</sup>

## **II. STATUTORY PROVISIONS RELATING TO BAIL**

The Law Commission of India, in its 78th report, outlines the essential norms governing bail laws. It states that bail should be granted as a right for bailable offenses, while for non-bailable offenses, it is at the discretion of the authorities. Specifically, bail cannot be granted by a magistrate if the offense is punishable by death or life imprisonment, although Sessions Courts and High Courts have broader authority to grant bail in such cases.

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<sup>5</sup> Asim Pandya, *Law of Bail Practice and Procedure* 7 (lexis nexis, haryana 2013)

<sup>6</sup> Bail, available at: <https://byjus.com/free-ias-prep/bail-upsc-notes/> (last visited on December 10, 2024)

Offenses are divided into bailable and non-bailable categories, as defined in section 2(a) of the Code. Section 436 addresses bailable offenses, allowing individuals accused of such offenses to be released on bail as soon as they express a willingness to provide it. The section insists on the mandatory nature of bail in these cases, stating that anyone wrongly detained without a warrant and willing to provide bail must be freed. If a person cannot furnish surety due to financial constraints, they may be released on a personal bond. Additionally, the law presumes that someone unable to secure bail within a week of arrest is likely indigent.

For non-bailable offenses, section 437 specifies when bail may be granted. If someone is accused of a non-bailable offense and is apprehended without a warrant, they may only be released on bail if there is no strong evidence that suggests their guilt, particularly if the crime is punishable by death or life imprisonment. Special rules apply if the accused has prior convictions or if they were involved in a serious cognizable offense. However, individuals under sixteen, women, or those who are sick or infirm may be considered for bail.

Importantly, the law states that just because an accused needs to participate in identification during the investigation doesn't mean they should be denied bail if they're otherwise eligible and agree to court conditions. Section 437 requires a public prosecutor to be heard before granting bail in serious cases, and the officer or court must assess whether sufficient grounds exist to believe the accused committed a non-bailable offense. If the inquiry reveals insufficient evidence, the accused must be released on bail, pending further investigation.

The law also includes provisions for bail to be canceled, mandates that reasons for granting bail be documented, and specifies that an accused person awaiting trial cannot be held in custody beyond sixty days unless there are justifiable reasons recorded by the magistrate. Finally, if a trial concludes with the court believing the accused is not guilty, it must release the individual from custody while allowing for a personal bond. Thus, section 437 offers a balanced approach to managing bail in non-bailable offenses.

Section 436A was added to the code by the Criminal Procedure Code amendment Act of 2005. It states that if a person has been detained for up to half of the maximum imprisonment time for an offense (excluding death penalty offenses), the court must release that person on a personal bond, with or without sureties. However, the court may decide to extend detention beyond this period after hearing from the Public Prosecutor and providing written reasons.

Section 437A requires that before the trial ends or an appeal is resolved, the court must have the accused sign bail bonds to ensure their appearance before the higher court when summoned regarding an appeal or petition.

Section 438 of the Code of Criminal Procedure, 1973 discusses anticipatory bail for individuals fearing arrest. Though the term "anticipatory bail" is not used in the section, it indicates that bail is granted under the condition that if the person is arrested, they will then be released on bail. A person suspecting arrest for a non-bailable offense can approach the High Court or Session Court to obtain this assurance, considering factors such as the severity of the accusation and the applicant's past criminal history. The bail bonds are valid for six months.

Section 439 provides special powers to the High Court and Session Court to grant bail without restrictions, even for serious offenses. They can release individuals in custody on bail and modify any conditions set by a magistrate. It's important to use Section 438 only in special cases to prevent unnecessary disgrace.

### **III. BNSS AND BAIL**

The Bharatiya Nagarik Suraksha Sanhita (BNSS) provides definitions for bail, bail bond, and bond, which were not included in the Criminal Procedure Code (CrPC) of 1973. According to Section 2(1) of BNSS, "bail" refers to the release of a person accused or suspected of a crime from custody, subject to conditions set by an officer or Court in exchange for executing a bond or bail bond. A "bail bond" is an agreement for release with surety, while a "bond" is for release without surety.

The legislation distinguishes between the old CrPC and the new BNSS in its treatment of bail. Under the old CrPC, Section 436A allowed undertrial prisoners to receive bail after serving half of their maximum punishment, excluding those facing capital offenses. The BNSS introduces significant changes, particularly for first-time offenders, allowing bail for them after serving up to one-third of their sentence as undertrial prisoners. This is outlined in Proviso 1 of Section 479.

Additionally, the BNSS prohibits bail for individuals with multiple pending cases, as noted in sub-clause 2 of Section 479, which states that if any person is under investigation, inquiry, or trial for more than one offence, they cannot be released on bail. Furthermore, the new law places an obligation on the Jail Superintendent to submit a written application to the court for undertrial prisoners to be released on bail after serving either one-third or one-half of their sentence.

Regarding anticipatory bail, the BNSS allows individuals expecting arrest to apply for bail before custody, maintaining similarities with the CrPC. However, it imposes stricter restrictions by denying anticipatory bail for those accused of gang raping women under 18 years of age, which extends the previous limits present in the CrPC relating to younger minors.

The BNSS also modifies provisions concerning police custody. The old CrPC allowed prosecution to argue against bail because the accused might need to help identify witnesses. The new BNSS adds that the court can grant regular bail even if the identified witnesses might require the accused's presence for more than 15 days during investigations, as laid out in Proviso 3 of Section 482.

In summary, the BNSS makes important revisions to bail rules compared to the CrPC. Key updates include broader opportunities for bail for first-time offenders and stricter conditions for individuals with numerous charges. Additionally, anticipatory bail provisions now reflect stricter rules regarding sexual offenses against minors, ensuring fair treatment of undertrial prisoners while holding them accountable.<sup>7</sup>

#### **IV. BAIL AND HUMAN RIGHTS**

Article 3 of the Declaration of Human Rights 1948<sup>8</sup> affirms the right to life, liberty, and security of the person. Article 9(3) of the International Covenant on Civil and Political Rights (ICCPR) 1966<sup>9</sup> requires that anyone arrested must be brought before a judge quickly and can seek trial or release within a feasible timeframe. It asserts that detention should not be the norm before trial unless there are guarantees for the individual's appearance in court. Additionally, Article 10(2)(a) of the International Covenant on Civil and Political Rights (ICCPR) 1966 states that accused individuals should not be treated like convicted criminals and must be separated from convicted persons. Article 14(2) emphasizes the presumption of innocence until proven guilty, placing the responsibility on the prosecution to prove charges and ensuring the accused has the benefit of the doubt.

Human rights enforcement is fragile without a solid guarantee for a person's freedom and security. Reports from international monitoring bodies reveal that arrests and detentions often happen without fair cause or legal recourse for the victims. Criminal proceedings usually start with a police arrest, which is legally justified but can lead to arbitrary arrests commonly found in dictatorships. To protect rights, authorities must provide reasons for arrests and present individuals in court immediately. Pre-trial detention is a serious breach of the accused's rights, affecting their right to be presumed innocent, their liberty, and the right to a speedy and fair trial. International law recognizes the rights of pre-trial detainees and mandates that such

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<sup>7</sup> Bail under Bharatiya Nagarik Suraksha Sanhita, available at: <https://blog.finology.in/Legal-news/Bail-provisions-in-BNSS>

<sup>8</sup> Universal Declaration of Human Rights 1948, available at: [https://www.un.org/en/udhrbook/pdf/udhr\\_booklet\\_en\\_web.pdf](https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf) (last visited on December 15, 2024)

<sup>9</sup> International Covenant on Civil and Political Rights 1966



detention should only occur when absolutely necessary.

The International Covenant on Civil and Political Rights also discusses non-discrimination in Section 26, which states that everyone is equal before the law and should have equal legal protection. This mandates that states must uphold human rights without distinguishing among individuals based on various factors, including race, sex, and religion. Any arrest made solely on a prohibited discriminatory basis is considered arbitrary and unlawful under international law.

International standards like the Universal Declaration of Human Rights and the ICCPR stress equal rights without discrimination. They affirm that individuals are entitled to equal treatment in judicial processes. Regional instruments like the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights also reinforce these principles, ensuring equality under the law without distinction based on race, sex, or other factors.

The American Convention on Human Rights (ACHR) states that all member countries must respect and guarantee human rights and freedoms without any discrimination based on race, color, sex, language, religion, political opinions, or other factors. The African (Banjul) Charter on Human and Peoples' Rights emphasizes that every individual is entitled to these rights without distinctions of any kind and affirms the equality of all individuals before the law. This Charter also highlights that all people are equal and possess the same rights.

The European Convention on Human Rights (ECHR) affirms that rights and freedoms must be secured without discrimination based on sex, race, color, language, religion, political opinions, or other characteristics. The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa stress the importance of equality in legal proceedings, ensuring that everyone has equal access to justice regardless of their background.

Discrimination is fundamentally prohibited by international laws, including Article 2 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), which mandates that all states respect and ensure the rights of individuals without discrimination. Article 26 of the ICCPR states that every individual is entitled to equal protection under the law and should not face discrimination.

The presumption of innocence is a crucial principle for those accused of crimes. It states that individuals should be considered innocent until proven guilty, and the burden of proof lies with the prosecution. This principle is established in various international documents including Article 11 of the UDHR, Article 10 of the ICCPR, and is reinforced in the rights of children as per the Convention on the Rights of the Child. It is also mentioned in the American Declaration

and the African Charter, which both assert the right to be presumed innocent until proven guilty. Overall, the key principles upheld in these conventions and charters include non-discrimination, equality before the law, and the presumption of innocence for accused individuals.

Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to the law. This principle also applies to children accused of a criminal offence, ensuring they are treated with additional guarantees of innocence. The Supreme Court of the United States emphasized this presumption of innocence in the case of **Coffin v. United States**<sup>10</sup>. It stated that this principle is fundamental to the criminal law system and highlights the importance of reasonable doubt in the trial process. The presumption of innocence serves as evidence for the accused, and it is essential for maintaining fairness in the administration of justice.

However, a defendant should not be seen as having to prove their innocence; they must maintain the right to stand before a jury innocent until the prosecution can prove guilt. The U. S. Supreme Court has interpreted the presumption of innocence in both restrictive and liberal ways. In the case of **Stack v. Boyle**<sup>11</sup>, it was recognized that this presumption would diminish if the right to bail before trial is removed. Conversely, in **Bell v. Wolfish**<sup>12</sup>, the right to be presumed innocent may not apply during bail consideration. Similarly, in **United States v. Salerno**<sup>13</sup>, the Court clarified that detention before trial could be justified only when there is a threat to community safety.

According to General Comment No. 32 by the Human Rights Committee, Article 14, paragraph 2, of the International Covenant on Civil and Political Rights (ICCPR) states that everyone charged with a criminal offence must be presumed innocent until proven guilty. This presumption requires the prosecution to bear the burden of proof, meaning no one can be considered guilty until the charges are proven beyond a reasonable doubt. It also guarantees that accused individuals should not be prejudged, treated as dangerous before trial, or shackled inappropriately. Furthermore, the length of pre-trial detention must not imply guilt.

The presumption of innocence is recognized internationally as a critical human rights protection within the criminal justice system. Additionally, the right to personal liberty is fundamental among all human rights, and protection from arbitrary detention is vital to this right. Arbitrary detention occurs when a person is arrested outside the recognized legal frameworks. It can

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<sup>10</sup> 156 U.S. 432 (1895)

<sup>11</sup> 342 U.S. 1,4 (1951)

<sup>12</sup> 441 U.S. 520,533 (1979)

<sup>13</sup> 481 U.S. 739 (1987)

violate personal liberty, even if detention is technically illegal without being arbitrary. Arbitrary detention exposes individuals to violations of their rights, such as torture and inhumane treatment. International laws, including the ICCPR and various regional human rights treaties, explicitly guarantee the right to liberty and security.

The protection of liberty and personal security is essential, as denying these rights often affects other rights. States must take steps to protect individuals from unlawful arrests. Detention needs to comply with both national and international laws and standards to avoid being deemed arbitrary.

The right to a speedy and fair trial is a fundamental human right acknowledged since 1948 in documents like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR). This right extends liberty and serves as a foundation for the presumption of innocence. Rights to a fair trial are universal and are not dependent on claiming such rights by the accused.

International standards specify that everyone has the right to a fair and public hearing by an impartial tribunal for any legal matters. Individuals arrested for a crime must be promptly brought before a judge and are entitled to a reasonable trial time or release. All persons are equal before courts and tribunals, with the right to a hearing without undue delay.

Detained individuals must have the opportunity to be heard by a judicial authority, and they have the right to defend themselves or to have legal assistance. Judicial authorities must swiftly review the legitimacy of detention and ensure no one remains detained without appropriate judicial orders. Detained individuals also have the right to be tried within a reasonable time or released while awaiting trial.

Pre-trial detention should be used only when absolutely necessary in criminal cases, considering the needs of the investigation, society, and victims. Alternatives to detention should be utilized as early as possible. Detention should not exceed what is necessary, should be humane, and respect human dignity. Offenders have the right to appeal against their pre-trial detention to a competent authority.

According to the American Declaration of the Rights and Duties of Man, anyone deprived of liberty has the right to have the legality of their detention quickly determined by a court and the right to a trial without undue delay or to be released. The American Convention on Human Rights states that detained individuals must be quickly presented to a judge and are entitled to a trial within a reasonable time or to be released. Similarly, the European Convention on Human Rights emphasizes the right to be promptly brought before a judge and to a timely trial or

release.

The right to a trial without undue delay aims to protect individuals from prolonged uncertainty and ensure that any detention for trial does not last longer than necessary. This assurance applies to all case stages and is measured by the case's complexity, the accused's conduct, and the judicial process. Swift trials help prevent the use of pre-trial detention, reduce anxiety for the accused, and ensure fair defense opportunities.

The law regarding bail and habeas corpus emerged as a response to the injustices faced by ordinary citizens from those in power. These laws serve to protect individuals who lack power and authority against tyranny. Justice V. R. Krishna Iyer actively worked to address these inequalities, gaining recognition for his efforts with the Padma Vibhushan award. He famously stated during the Balchand case that the guiding principle should be "bail, not jail." Following the pandemic, both the Supreme Court and the Prime Minister expressed concern about the high number of undertrial prisoners in India. The Prime Minister emphasized the need for legal authorities to take action to ensure justice for these individuals.

Former Chief Justice N. V. Ramana highlighted the idea that merely participating in the legal process can serve as punishment, a viewpoint echoed by Professor Malcolm Feeley. The criminal justice system is meant to protect personal liberties and provide access to justice, but the situation has been deteriorating despite constitutional guarantees of life and liberty. In 1987, the Law Commission proposed increasing the number of judges per million people, but by 2021, the ratio remained low at 21. The number of undertrial prisoners was over 4.27 lakh, with many convicts waiting for their appeals. This judge-to-prisoner ratio affects the speed of trials and appeals, leading to a collapsing system despite attempts to create special courts for faster proceedings.

The Supreme Court recently noted that appeals before the Allahabad High Court could take 35 years to resolve, leaving convicts in jail without bail. The denial of personal liberty during pre-trial and post-conviction stages is alarming, as courts are overwhelmed with a backlog of cases. The issue is further complicated by strict conditions that can prevent bail. The misuse of laws like the Terrorist and Disruptive Activities (Prevention) Act (TADA) has been previously noted, where authorities sometimes unfairly deny bail to accused individuals. The punitive measures have extended to less severe offenses, causing concern about their implications for business and investment in India.

As the nation observes its 75th anniversary of independence, there's a call to reaffirm the principle of "Bail, Not Jail," recognizing that the focus of the criminal justice system should be

on trials and preserving the presumption of innocence. To address the crisis of prolonged detention, immediate bail for those awaiting trial or appeals is essential. The Supreme Court is urged to release inmates, as previously done in TADA cases, to refocus efforts on meaningful trials and uphold the rule of law.

Amendments have been made for mandatory bail for undertrials who have served half their sentence, but there is a need to reassess if they should wait for this period when trials are delayed. Bail should only be denied if there is non-compliance with the triple test, if the accused is a habitual offender, or if there is a crucial need for investigation. The Satender Kumar Antil case (2022) is a positive step, but effective implementation is essential. Justices D. Y. Chandrachud and Indira Banerjee emphasized that bail is crucial for upholding the presumption of innocence and that pre-trial punishment is unjust if a trial cannot be provided.<sup>14</sup>

## V. CONSTITUTIONAL ISSUE RELATING TO BAIL

The instinct for liberty and freedom in humans is widely recognized and protected by civilized nations. Every person has inalienable human rights that start at birth and are inherent to all individuals. In **Maneka Gandhi v. Union of India**<sup>15</sup>, Justice Bhagwati highlighted the importance of these rights as they protect individual dignity and allow personal development. The respect and protection of human rights are key indicators of societal civilization. The right to personal freedom is guaranteed by the Constitution in many countries, including India, where Article 21 affirms fundamental human dignity. This text will discuss constitutional issues related to bail laws.

The right to life and personal liberty is the most important of all rights, as all other rights rely on life itself for their significance. In the Indian Constitution, Article 21 states that no person shall be deprived of their life or personal liberty except through legal procedures. This right is not just about existing; it means living with dignity. Initially, "personal liberty" was understood as freedom from physical restraint, but it has expanded to include various rights beyond those outlined in Article 19.

The interpretation of "procedure established by law" has changed over time. The Supreme Court ruled that for a law to be valid, it must be enacted by a competent authority and must not violate fundamental rights. A law that is arbitrary or oppressive cannot be considered a proper procedure, as it would infringe on Article 14. The case of **Kartar Singh v. State of Punjab**<sup>16</sup>

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<sup>14</sup> Bail, a human right, available at: <https://www.thehindu.com/opinion/op-ed/bail-a-human-right/article65909155.ece>

<sup>15</sup> AIR 1978 SC 597

<sup>16</sup> (1994) 3 SCC 569

emphasized the significance of life and liberty, stating that justice, equality, liberty, and fraternity are foundational to Indian democracy, and that the right to life with human dignity is essential for every citizen's pursuit of happiness and excellence.

Personal liberty is understood broadly, encompassing various rights beyond just freedom from physical constraints. It forms a balance with individual duties towards society. Article 21 protects the rights of all individuals, regardless of their legal status. Its purpose is to prevent unauthorized invasions of personal liberty, and it safeguards against punitive detention. Bail is a crucial aspect of the criminal justice system, based on the principle that a person is presumed innocent until proven guilty. Denying bail can severely impact the personal liberty of an accused person, so refusing bail without just cause is viewed as an infringement of Article 21.

The Code of Criminal Procedure classifies offenses into bailable and non-bailable categories. Accused individuals have the right to bail for bailable offenses, while the court decides on bail for non-bailable offenses based on established guidelines. Courts must consider constitutional values and human rights when deciding on bail, ensuring that all legal safeguards are followed meticulously whenever personal liberty is at stake. In the case of **Gudikanti Narasimhulu v. Public Prosecutor**<sup>17</sup>, the Supreme Court noted that personal liberty is a critical element of the constitutional system protected under Article 21. Refusing bail, which deprives an individual of this liberty, is a significant responsibility that should not be taken lightly. The Court stressed that deprivation of liberty must be reasonable and aligned with the community's welfare and State necessity outlined in Article 19. The aim of refusing bail should not be punitive but should consider justice for both the individual and society.

The term 'deprived,' as discussed in Gopalan's case<sup>18</sup>, indicates a complete loss of liberty, which does not apply to limits on the right to move freely, covered under Article 19 (1)(d). 'Personal liberty' was originally defined in Gopalan's case as freedom from physical restraint. However, in later decisions, the Supreme Court expanded this definition to include various rights contributing to personal liberty not already specified in Article 19.

In Maneka Gandhi's case<sup>19</sup>, it was highlighted that arbitrary and oppressive procedures violate Article 14, as reasonableness is intertwined with fairness under this Article. Pre-trial detention is discouraged, and courts can release individuals on personal bonds if they have strong community ties and are not likely to flee. Over the years, courts have repeatedly emphasized the importance of bail, following Justice Krishna Iyer's statement that "bail is the rule and jail

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<sup>17</sup> 1978 CrLJ 502

<sup>18</sup> A.K.Gopalan Vs. State of Madras (1950) SCR 88.

<sup>19</sup> Maneka Gandhi Vs. Union of India AIR 1978 SC 597

the exception." This tradition of bail law in India emphasizes that legal processes should focus on substantive rather than merely procedural matters.

The Supreme Court has ruled that personal liberty can only be deprived according to legal procedures established for the greater good of society. In the case of **Jogendra Kumar v. State of Uttar Pradesh**<sup>20</sup>, the Court stated that police arrests must be justified and not made based on mere allegations. Officers should investigate the legitimacy of a complaint adequately before making an arrest, as arresting someone without a valid reason can cause serious harm to their reputation and dignity.

Custody, arrest, and detention are closely linked to the concept of bail. Arrest serves the purpose of ensuring an individual's presence during investigations and trials. Bail provisions aim to balance personal freedom and the interests of justice, restoring individual liberty without compromising the investigation of the crime. Thus, granting bail protects the individual's freedom until proven guilty. In the case of **Satya Pal v. State of U. P**<sup>21</sup>, the Allahabad High Court emphasized the importance of personal liberty within the socio-political context. The founding fathers of the Constitution valued liberty highly, as they faced numerous restrictions under colonial rule. Therefore, Article 21 of the Constitution ensures that no person can be deprived of their personal liberty except by law. This implies that personal liberty can be limited by established legal procedures, such as the Code of Criminal Procedure 1973, which allows restriction of liberty for those seen as anti-social or anti-national. Article 22 outlines the responsibilities of authorities when arresting individuals accused of crimes.

If someone is detained unlawfully, they can seek a writ of habeas corpus to overturn the illegal detention and secure their release. If it is determined that the accused has been detained unlawfully, they may apply for bail as their right. However, if there is a valid order for detention at the time of a bail request, the accused cannot be released solely because there was an earlier invalid order.

The discussion highlights the balance between personal liberty and social security. The right to life and liberty must align with societal interest to be fair and just for all. The society has a significant interest in decisions about bail since criminal offenses are deemed against the state. Therefore, the law must balance the protection of individual liberties with society's right to safety, addressing the need to shield it from those who may repeat crimes.

The text outlines two aspects of liberty: negative and positive. Negative liberty pertains to

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<sup>20</sup> AIR 1994 SC 1349

<sup>21</sup> 1999 CrLJ 3709

actions taken freely, as long as they don't harm others, while positive liberty relates to the responsibility of individuals to act for the benefit of others. Thus, freedom requires both action and constraints. To maintain societal interests, the state must impose certain restrictions on personal liberty.

The necessity for restrictions on personal liberty by the state is essential for a well-ordered society. The Supreme Court in **Kartar Singh v. State of Punjab**<sup>22</sup> noted that absolute liberty is not in favor of societal interests. Liberty must coexist with virtue, morality, law, justice, and responsibility. It should not be seen as unrestricted freedom, as that can infringe upon the rights of others. Hence, managing liberty within the bounds of law ensures social order and individual freedoms coexist for the common good. Civil liberty must adapt to societal changes while prioritizing the collective welfare and harmony. The Madras High Court in the case of **K. Muthuramalingam v. State**<sup>23</sup> stated that when there is a conflict between social security and individual liberty, society's security should not be sacrificed for individual freedom. While considering bail for an accused person before their trial starts, the Court must factor in the public interest and the state's needs.

In **Gudikanti Narasimhulu v Public Prosecutor**<sup>24</sup>, the Andhra Pradesh High Court highlighted that personal liberty is a fundamental right but can be restricted if necessary for the law. The ruling emphasized that any deprivation of personal freedom should be based on serious reasons related to public welfare as outlined in the Constitution. It noted that no state can guarantee absolute freedom, and social interest should be carefully evaluated as an exception for limiting personal liberty.

'Social interest' refers to concern for the well-being of others and a bond with society. All individuals can build social interests, which include traits like collaboration, empathy, and harmony with others. This understanding suggests that while personal freedom can be limited for social reasons, it must never be completely overshadowed by those interests.

In **Shahzad Hasan Khan v. Ishtiaq Hasan Khan**<sup>25</sup>, the Supreme Court revoked bail granted to a suspect in a serious crime. It affirmed the necessity of safeguarding citizens' liberties but noted that serious offenses, particularly murder, warrant careful scrutiny. The Court must balance the rights of the accused against the impact on victims' families and the community, ensuring trust in the justice system to prevent private vengeance.

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<sup>22</sup> (1994) 3 SCC 569

<sup>23</sup> 1997 CrLJ 3501 (Mad)

<sup>24</sup> AIR 1978 SC 429

<sup>25</sup> AIR 1978 SC 429



In **Jehangir Marzban Patel v. State**<sup>26</sup>, the Gujarat High Court said that granting bail is a discretionary power that must be exercised carefully, weighing individual liberty against societal interests. The Court must give clear reasons when bail is denied based on society's concerns. Factors like previous convictions, the seriousness of the charges, and the risk of tampering with evidence are all relevant when deciding bail.

Ultimately, while the nature of the charge and potential penalties are important in bail decisions, the Court should not deny bail solely due to community sentiments. Bail aims to relieve the accused from imprisonment while ensuring they attend court when required. One of the main goals of the criminal justice system is to ensure that criminal cases are resolved quickly, as long delays can prevent justice from being served. Speedy justice is considered essential for a well-organized society. While it is important to resolve cases promptly, it is equally important not to overlook the fundamental principles of justice, as the saying goes, "justice rushed, justice buried." There needs to be a balance between ensuring a fair process and a swift trial, as the legal system's primary goal is to provide complete justice to everyone. If a trial is delayed and the accused remains in jail, it can be viewed as punishment without a conviction. In such scenarios, allowing the accused to secure bail is viewed as fair and just.

The right to a speedy trial is considered an extension of the right to liberty and protection against arbitrary detention. This right is essential and does not depend on whether the accused has called for it. Accused individuals should be brought to court without unnecessary delays to determine if their detention was justified and whether they should be released on bail. It is established that an accused person has the right to a speedy trial, and the law demands a prompt judicial process to establish their guilt or innocence.

In India, speedy justice is a fundamental right under Article 21 of the Constitution. When trials and appeals in criminal cases are unnecessarily delayed, it grants the accused the right to apply for bail. The principle of a speedy trial is based on the idea that innocent individuals should not suffer for unreasonable periods within the legal system, and victims should receive justice as soon as possible.

The Supreme Court, in the case of **Hussainara Khaton v. State of Bihar**<sup>27</sup>, noted that a speedy trial is an essential part of the right to life and liberty as stated in Article 21. The Court emphasized that delays in the trial process severely deny justice to undertrial prisoners. It highlighted that even a one-year delay in starting a trial is serious, and longer delays are even

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<sup>26</sup> 2003 (2) GLR 1835

<sup>27</sup> AIR 1979 SC 1360

more problematic.

The Court also recognized that in the United States, speedy trials are a constitutionally guaranteed right. Further, in **Abdul Rehman Antulay v. R. S. Nayak**<sup>28</sup>, guidelines for ensuring speedy trials were laid down, emphasizing fairness, the need for quick resolution, and minimizing unnecessary detention for accused individuals. The factors to determine unreasonable delay include the length of the delay, justification for it, the accused's assertion of their right, and any prejudice caused by the delay.

It is the responsibility of the State to ensure speedy justice, especially in criminal law, and lack of funds or resources cannot justify denying the right to justice as guaranteed by the Constitution. The Rajasthan High Court stated that under Article 21, an accused has the right to a speedy trial, and delays should result in the accused being granted bail.<sup>29</sup> Similarly, the Allahabad High Court emphasized that authorities must comply with constitutional rights, and the right to a speedy trial protects the accused from lengthy pre-trial imprisonment, anxiety from unresolved charges, and the loss of evidence or diminished memories over time.<sup>30</sup>

The trend in judicial decisions shows that the right to a speedy trial includes timely decisions on bail applications, ideally on the same day. When this right is violated, the Court should intervene to release the accused on bail.

The Criminal Procedure Code, 1973 (Cr. P. C. ) has provisions that protect the accused and ensure a speedy trial and swift investigations. Section 167(2)(a) states that no magistrate can authorize custody for more than 90 days for serious offenses or 60 days for less serious ones, leading to bail upon expiration. Section 173(1) requires investigations to be completed without unnecessary delay, while Section 309(1) mandates daily proceedings in inquiries or trials until all witnesses have been examined, particularly for certain sexual offenses which should ideally be completed within two months.

The right to a speedy trial is recognized as an inalienable right under Article 21 of the Constitution. If an under-trial prisoner is held indefinitely, it violates this right. Every detained person is entitled to a speedy trial. Prolonged detention without trial is not in the interest of justice.

In the case **Common Cause v. Union of India**,<sup>31</sup> the Supreme Court ruled that if criminal trials last for extended periods, it becomes oppressive. The Court ordered that for certain minor

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<sup>28</sup> AIR 1992 SC 1701

<sup>29</sup> Munna alias Mohendra v. State of Rajasthan (1989)1,RajLW 54

<sup>30</sup> Dr. Vinod Narain v. State of U.P 1996 Cr LJ 1309

<sup>31</sup> 1996 Cr.LJ 2380 (SC)

offenses, if trials exceed one year, the accused should be released on bail after being detained for six months. For offenses punishable by up to five years and pending for two years or more, and for those punishable by seven years or less if pending for one year or more, courts must similarly consider releasing the accused on bail under defined conditions.

The right to a speedy trial applies to all criminal cases, and courts must weigh circumstances to determine if this right has been denied.

The Right to Free Legal Aid emphasizes the State's duty to provide free legal assistance to people who cannot afford a lawyer, following the incorporation of Article 39-A into the Constitution. This article encourages the State to ensure free legal aid, addressing the needs of poor accused individuals. While it is not a fundamental right enforceable by courts, recent judicial interpretations have recognized the right to legal aid as implicit in Article 21, which protects personal liberty.

When an accused is first brought before a magistrate, their personal liberty is at risk, making this a critical moment for obtaining legal assistance. The Constitution obligates the State to provide legal services to the indigent not only during the trial but also when the accused is presented for remand. Prior to Article 39-A, Section 304 of the Cr. P. C. mandated that courts engage lawyers for accused individuals lacking financial resources.

Court decisions, such as in **Khatri v. State of Bihar**<sup>32</sup>, highlight the importance of legal counsel for a fair trial, particularly for those unable to afford legal representation. The courts are required to inform accused individuals about their right to free legal aid if they cannot hire a lawyer due to poverty. The Hussainara Khatoon case stressed that undertrial prisoners often remain unaware of their rights or unable to secure bail due to financial constraints.

Justice Bhagwati stated that free legal services are essential for a fair trial and that the State must provide legal representation to accused individuals unable to afford it, unless they object. This directive extends to ensuring lawyers are available on the next remand dates for those charged with bailable offences. Thus, failure to provide legal aid can undermine the fairness of a trial, emphasizing that this right cannot be denied, even if the accused does not actively request it.

Article 22 of the Constitution outlines the rights of individuals who are arrested. It states that anyone arrested must be informed promptly about the reasons for their arrest and has the right to consult a legal practitioner of their choice. Any person arrested must be brought before a

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<sup>32</sup> 1981 Cr.LJ 470 (SC)

magistrate within twenty-four hours of their arrest, excluding travel time; they cannot be held longer without a magistrate's approval.

Exceptions to these rights include enemy aliens and those detained under preventive detention laws. The Constitution guarantees that arrested individuals are informed of their arrest's grounds, allowing them to seek legal assistance quickly. This right is also included in the Criminal Procedure Code of 1973, but it does not encompass all the constitutional rights of arrested individuals.

According to the Criminal Procedure Code, the police must inform the arrested person about the reasons for their arrest and notify someone chosen by the arrested individual about the arrest and their location. Article 22 guarantees the right to consult and be defended by a legal practitioner of the arrested person's choosing. This is a clear fundamental right protected by the Constitution.

The second clause of Article 22 mandates that an arrested person must be presented before a magistrate within twenty-four hours of their arrest, a requirement that mirrors section 57 of the Criminal Procedure Code. However, Article 22 offers a stronger constitutional guarantee than the legal right found in the Code. Importantly, these rights do not apply to certain groups such as enemy aliens or those detained under preventive detention laws.

The Supreme Court has ruled that if the twenty-four-hour requirement is not met, the arrested person is entitled to immediate release. Additionally, vague communication regarding an arrest does not fulfill the requirements of Article 22. For instance, providing information in English to someone who does not understand the language is not sufficient notification.<sup>33</sup>

In the case of *re Madhu Limaye*<sup>34</sup>, the Supreme Court emphasized that informing the arrestee of the grounds for their detention is essential for them to seek bail or challenge their detention legally. However, this requirement does not apply to individuals arrested under a court warrant since the grounds are provided beforehand.

If an individual is presented before a magistrate and remanded to custody, they cannot seek release due to a violation of Article 22(2) after this point. The terms 'arrest' and 'detention' in Article 22 have been interpreted to refer to arrests made by non-judicial authorities for criminal accusations, meaning Article 22 does not apply to civil cases. For example, if someone is arrested for tax-related issues, Article 22 is not relevant. Art. 22 is also not applicable in deportation cases, but it does apply when someone is arrested for contempt as directed by a

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<sup>33</sup> *Hari Kisan v State of Maharashtra* AIR 1962 SC 911

<sup>34</sup> AIR 1969 SC 1014

legislative assembly speaker. Art. 22 (4-7) outlines rights against misuse of preventive detention, including a review by an Advisory board, communication of grounds for detention, and the right of representation for the detained person. Article 9 of the Universal Declaration of Human Rights states that countries should avoid arbitrary arrest, which is elaborated further in the International Covenant on Civil and Political Rights. A review of literature indicates that India's legal system aligns with these international laws.

The term "arbitrary" in Article 9 is not clearly defined and may refer to arrests that violate existing laws or principles of Natural Justice. The United Nations Human Rights Committee suggests a broad interpretation of "arbitrary," encompassing elements of wrongfulness, unfairness, and unpredictability. In India, "arbitrary arrest" has not been defined, nor has the judiciary often addressed it, but the illegality of arrest is acknowledged under Article 21, making illegal arrest a punishable offense in India.

In the case of *CBI v. Anupam Kulkarni*<sup>35</sup>, the Supreme Court stated that a judicial magistrate may permit police custody for up to fifteen days, after which only judicial custody is allowed. The Supreme Court also established guidelines in *Joginder Kumar v. State of U. P.* that must be followed in all arrest cases, emphasizing compliance with legal requirements and proper documentation of arrests.

In 2008, amendments were made to the CrPC 1973, incorporating guidelines from **D. K. Basu v. State of West Bengal**<sup>36</sup>. New provisions allow police officers to issue notices instead of making arrests and outline their duties during arrests. Special provisions were included to protect women, stating that they cannot be arrested at night unless by a female officer and with prior judicial permission. These measures aim to prevent the abuse of police powers against women, in line with Article 15(3) of the Constitution, which permits special provisions to promote equality for women.

## VI. CONCLUSION

Understanding a nation involves examining its jail system and how it treats its citizens, particularly the most vulnerable. Nelson Mandela highlighted this in 1995. In the context of our society, freedom is of great importance, as reflected in the Constitution, where Article 21 ensures that personal liberty cannot be taken away without proper legal procedures. This article seeks to prevent abuses of personal freedom by authorities unless they are legally justified. The Supreme Court has linked bail with the rights to legal procedure, support, and a timely trial,

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<sup>35</sup> (1992)3 SCC 141

<sup>36</sup> (1997) 1 SCC 416

emphasizing the need for proper legal and administrative actions to enforce these rights.

To tackle bail issues, international human rights principles should guide the laws. There should be a balance between individual freedom and the need to keep society safe from lawbreakers. Bail laws must uphold the presumption of innocence while ensuring public safety, following the rule that "bail is the rule and jail is the exception." Current bail provisions can be improved for more flexible approaches. Bail is a right for bailable offenses, but non-bailable ones must be considered carefully. Authorities should make wise decisions on bail based on experience and legal guidelines.

Bail should typically be granted if the accused is likely to attend court and not interfere with justice. The Supreme Court supports the idea of "bail not jail," unless there are significant reasons such as the possibility of fleeing or tampering with justice. When assessing bail requests, courts should examine case severity, evidence quality, penalties, and the accused's behavior while being mindful of valid defenses.

For serious non-bailable offenses, courts may set conditions for bail to ensure compliance. The authority to grant bail lies with various courts, including the Magistrate, High Court, and Court of Session, as specified in the Code of Criminal Procedure. Factors influencing decisions for non-bailable offenses must be carefully examined, even though some provisions do not apply to the Supreme Court.

Anticipatory bail aims to protect individuals from wrongful arrest, but should be granted cautiously. Courts can cancel this type of bail if serious reasons arise. Discretionary power for bail cancellation exists for Magistrates, but should only be used for justified reasons. Procedural gaps in canceling bail from appellate courts exist, prompting suggestions for the High Court to utilize inherent powers for necessary cancellations.

Unjustified detention undermines fair legal standards. Arrests should be based on reasonable justifications after thorough investigations, not mere suspicion. Current bail practices often rely on subjective judgments about defendants' likelihood to appear for trial, ignoring important factors about their background and financial capability. The burden on police to collect this information can lead to misleading assessments. Issues like professional bondsmen and high reliance on financial surety can create further complications, contributing to the overcrowding of jails, where many remain despite having bail orders.

The government has not acted on suggestions to penalize those who do not comply with bail conditions. This inaction leads to exploitation of poor detainees, perpetuating debts for release. The presumption of innocence, a fundamental legal principle, is often compromised. While bail

laws have seen amendments, clear guidelines are still necessary to prevent arbitrary court decisions. Courts should consider justice fairness, the nature of the offense, the offender, and the victim in bail decisions. However, the current framework does not sufficiently uphold the presumption of innocence, and many under-trial prisoners, primarily the poor, face injustice. The bail system in India requires reform to meet modern societal needs and address rising crime rates effectively.

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