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JUDICIAL SHIFT TOWARD BAIL OVER JAIL

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INTRODUCTION

The backbone of the criminal justice system relies on the principle – “innocent until proven guilty.” This natural justice and constitutional law principle states that an accused, prior to their trial, holds the right to liberty just as any other individual does. Therefore, making bail the norm, and jail, the exception.¹ However, looking at India’s legal history, it can be said that the approach to bail has been conservative, resulting in extended pre-trial detention.

The concept of bail is based on Article 21 of the constitution² that defines the fundamental right to life and personal liberty.³ It aligns with the principle of presumption of innocence until guilt is proven beyond a reasonable doubt.⁴ Recently, the Indian judiciary has strived towards a more liberal approach to bail, resulting in a decrease in indiscriminate arrests and overcrowding of prisons, thereby trying to uphold the principles of justice.

This judicial shift is a response to the sad systemic realities. By the end of 2022, 75.8% of the total prison population in India, were pre-trial detainees, which in numbers is 434,302 prisoners out of a total of 573,220.⁵ The history of this restricted approach to bail, has not only resulted in overburdening of courts, but also in misuse of arrest powers by law enforcement such as – arbitrary arrests and not informing arrested individuals of their rights. Therefore, despite the modern changes, this issue looms large in the Indian judiciary system today and requires thorough discussion.

This article aims to explore the legal framework and the evolving jurisprudential trend with regard to bail in India. It also discusses the modern-day challenges that are faced by this liberal bail regime. In addition to this, it highlights how individual liberty and procedural fairness of the justice system go hand in hand and cannot prevail without one another.

¹ State of Rajasthan v. Balchand alias Baliya, 1977 AIR 2447.

² INDIA CONST. art. 21.

³ Sahara v. SEBI, AIR 2012 SC 3829.

⁴ Woolmington v. DPP, [1935] UKHL 1.

⁵ World Prison Brief (last visited July 8, 2025), <https://www.prisonstudies.org/country/india>

BAIL AND ITS LEGAL FRAMEWORK IN INDIA

Bail is “*the process by which a person is released from custody.*”⁶ The provisions for bail are governed by the Code of Criminal Procedure (CrPC), 1973, specifically under Sections 436-450.⁷ Although, CrPC does not explicitly define bail, offences under it are categorized as bailable and non-bailable.⁸ It is mandatory for the court to grant bail to a person who is arrested for a bailable offence without a warrant, so long as they are willing to provide the sureties.⁹ This right is absolute and inalienable.¹⁰ Even in a non-bailable offence, the court has the power to grant bail to an accused.¹¹ However, this power is discretionary and ensures that bail is not denied as a means of punishment.¹² In special cases¹³, High Courts and Sessions Courts are empowered to grant anticipatory bail for non-bailable offences, if a person is able to apprehend arrest prior to it actually happening.¹⁴ Section 436A limits the period of detention, stating that an undertrial prisoner cannot be kept in jail longer than the maximum punishment for the offence they are accused of.¹⁵ It mandates their release on bail in case they have already spent more than half of the maximum punishment in jail.

Bail also has constitutional backing in India, mainly under Article 21, a fundamental right which upholds the rule of law.¹⁶ It makes it the responsibility of the judiciary to ensure personal liberty to every individual regardless of if they are accused of a crime and observes that if there are no reasonable grounds for refusing bail, it would be a deprivation of this right not to grant it.¹⁷ Thereby, clarifying that bail indeed is the rule, and jail is the exception.

The Law Commission, in its report, has stated that the bail system in India is greatly influenced by socio-economic factors and is unfavourable to the poor and illiterate. The rich are more likely to receive bail as they can easily pay their sureties, whereas the poor find it comparatively difficult as the set bail bonds might be beyond their ability to pay. The Law Commission, while highlighting that over 70 per cent of undertrial prisoners are illiterate or semi-literate, has urged the government to remedy this biased system by amending CrPC.¹⁸

⁶ GOVE, P.B, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (Merriam-Webster 1993).

⁷ Code of Criminal Procedure (CrPC), 1973, No. 2, Acts of Parliament, 1973 (India)

⁸ The Code of Criminal Procedure, 1973, § 2(a), No. 2, Acts of Parliament, 1973 (India).

⁹ The Code of Criminal Procedure, 1973, § 436, No. 2, Acts of Parliament, 1973 (India).

¹⁰ Rasiklal v. Kishore s/o Khanchand Wadhvani AIR 2009 SC 1341

¹¹ The Code of Criminal Procedure, 1973, § 437, No. 2, Acts of Parliament, 1973 (India).

¹² Bansi Lal v. State of Haryana, 1978 Cr LJ 472.

¹³ Balchand v. State of M.P., AIR 1977 SC 366.

¹⁴ The Code of Criminal Procedure, 1973, § 438, No. 2, Acts of Parliament, 1973 (India).

¹⁵ The Code of Criminal Procedure, 1973, § 436A, No. 2, Acts of Parliament, 1973 (India).

¹⁶ I.R. Coelho v. State of T.N., AIR 2007 SC 861.

¹⁷ Babu Singh v. State of U.P., AIR 1978 SC.

¹⁸ *Law Commission Moots Easier Bail for Poor*, THE TELEGRAPH ONLINE (Jul. 9, 2025, 7:40 PM), https://www.telegraphindia.com/india/law-commission-moots-easier-bail-for-poor/cid/1520405?utm#goog_rewarded

EVOLVING JUDICIAL ATTITUDE: FROM CUSTODY TO LIBERTY

The judicial shift of the Indian judiciary towards granting bail more liberally as opposed to the critical historical trend of reluctance to grant the same, especially in non-bailable cases, can be analysed thoroughly through recent judgements and relevant instances.

Lower courts, most of all, have had a more rigid stance at this. They have time and again tried to avoid risk of flight, tampering of evidence, or made it about the seriousness of the charge, even in the matter of bailable offences. This had been taken into notice by the former CJI DY Chandrachud. He had emphasised that this “fear” gripping the lower courts, which handle the bulk of litigation in our country, has been costing the justice system greatly. To quote him – “*deprivation of liberty for even a single day, is a day too many.*”¹⁹ The intervention of the Supreme Court in condemning lower courts for “mini-trials,” which erode the very purpose of a bail hearing, has also helped.²⁰

After affirming that the right to apply for bail is inherently aligned with Article 21 in 1980,²¹ the Supreme Court reiterated its position on this bail vs jail debate three decades later. Denying the power of the state to arbitrarily control arrests and detention, the Supreme Court held that an individual’s liberty must be weighed heavily against societal issues.²² The Court has also observed that the object of bail is “neither punitive nor preventive.”²³ It is only “to secure the appearance of the accused at his trial,” and therefore denial of the same must not be used as a means to punish the accused.²⁴ Bail surely can be denied but on reasonable grounds such as interference with the investigation and not solely based on the gravity of the offence.²⁵

In March 2022, the Supreme Court criticized trial courts for avoiding the bail guidelines established by it and urged against routine detention, promoting judicial education and highlighting that a mechanical method in granting of bail curtails personal liberty of the individual and is not the right path to take.²⁶ On May 2, 2023, the Supreme Court with the help of the multiple illustration cases provided by Amicus Curiae Siddharth Luthra, identified a Sessions Judge in Lucknow and sent him to the judicial academy

¹⁹ *Bail not Jail, India’s constitutional courts’ bumpy ride towards personal liberty*, CITIZENS FOR JUSTICE AND PEACE (Jul. 9, 2025, 8:11 PM).

²⁰ Radhika Chitkara, *The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws*, 35 NLSIR, 139, 164-165 (2024).

²¹ Gurbaksh Singh Sibbia v. State of Punjab, 1980 AIR 1632.

²² Siddharam Satlingappa Mhetre v. State of Maharashtra, AIR 2011 SC 312.

²³ Bhumika Indulia, *Bail is the Norm, Jail Exception, Object of Bail is Neither Punitive nor Preventative*, SCC ONLINE TIMES (Jul. 9, 2025, 9:06 PM), <https://www.sconline.com/blog/post/2020/02/29/hp-hc-bail-is-the-norm-jail-exception-object-of-bail-is-neither-punitive-nor-preventative/>

²⁴ Sanjay Chandra v. CBI, AIR 2012 SC 830.

²⁵ Bhumika Indulia, *Gravity of offence not the sole decisive ground to deny bail – object of bail not punitive or, but to secure the presence of accused at trial*, SCC ONLINE TIMES (Jul. 10, 2025, 3:26 PM). <https://www.sconline.com/blog/post/2019/10/16/hp-hc-gravity-of-offence-not-the-sole-decisive-ground-to-deny-bail-object-of-bail-not-punitive-or-but-to-secure-the-presence-of-accused-at-trial/>

²⁶ Satender Kumar Antil vs Central Bureau of Investigation, (2022) 10 SCC 51.

<https://cjp.org.in/bail-not-jail-indias-constitutional-courts-bumpy-ride-towards-personal-liberty/>

for improving his judicial skills in delivering judgement.²⁷ This action was a result of the continuous failure of the trial courts in adhering to the bail guidelines and granting it. Their reluctance caused the Supreme Court to intercede with their process in bail matters.

In another case, a Kashmiri journalist Fahad Shah was granted bail by the Jammu and Kashmir High Court in November, 2023, after being detained for 21 months under Section 18 of the Unlawful Activities (Prevention) Act (UAPA), 1967.²⁸ He was accused of waging war against the country and abetting acts of terrorism.²⁹ However, the High Court subdued these charges and gave a similar ruling in another case, stating that it is the very job of journalists to criticise the government in order to hold it accountable, and they cannot be detained for doing the same. The court emphasized that UAPA and PSA (Public Safety Act), 1978, must be implemented in the right context and must not be abused for promoting arbitrary acts by the government.³⁰ The grounds for the detention of these journalists were unfounded and vague according to the court.

The Supreme Court, however, has steadfastly opposed passing a bail order in a very cryptic and casual manner.³¹ The heinous the crime, the harder it is to secure bail.³² This perspective is not without reason, as the liberal reform toward bail is clearly not without its challenges. The bail provisions and prisoner rights can easily be manipulated by certain individuals for their misuse. For example, if the accused on bail tries to destroy key evidence or harm the prosecution witnesses to his case, his bail order can be revoked.³³ It is at the court's discretion that an accused gets bail in a non-bailable offence. It is certainly not a right and therefore must not be exploited.³⁴ Even in the case of bailable offences, if the accused tries to tamper with evidence, bail can be revoked.³⁵ First Deputy Chief Minister of Delhi, former Education Minister of Delhi, and Aam Aadmi Party leader Manish Sisodia was arrested by the CBI in February 2023 for taking bribe and trying to alter Delhi's excise policy. The following month, the Enforcement Directorate charged him under Prevention of Money Laundering Act (PMLA) and he was

²⁷ Amit Anand Choudhary, *Supreme Court Punishes Judge for Bail Denial, Sends Him to Judicial Academy*, TIMES OF INDIA (Jul. 10, 2025, 4:42 PM), <https://timesofindia.indiatimes.com/india/supreme-court-punishes-judge-for-bail-denial-sends-him-to-judicial-academy/articleshow/99945339.cms>

²⁸ Unlawful Activities (Prevention) Act, 1967, § 18, No. 37, Acts of Parliament, 1967 (India).

²⁹ *Kashmir journalist Fahad Shah tastes freedom after 21 months in jail*, THE HINDU (Jul. 10, 2025, 7:15 PM), <https://www.thehindu.com/news/national/kashmir-journalist-fahad-shah-tastes-freedom-after-21-months-in-jail/article67566939.ece>

³⁰ Bashaarat Masood & Arun Sharma, *Detaining govt critics is abuse of PSA: Jammu and Kashmir HC quashes journalist's detention*, THE INDIAN EXPRESS (Jul. 10, 2025, 7:28 PM), <https://indianexpress.com/article/cities/srinagar/detaining-govt-critics-is-abuse-of-psa-hc-quashes-jk-journalists-detention-9032704/>

³¹ Kamla Devi v. State of Rajasthan, 2022 LiveLaw (SC) 272.

³² Jameel Ahmad v. Mohammed Umair Mohammad Haroon, 2022 LiveLaw (SC) 222.

³³ A. K. Murumu v. Prasenjit Choudury, 1999 Cr.LJ 3460 (3468).

³⁴ State Vs. Pritam Dass AIR 1956 Bom 559.

³⁵ Madhukar Purshottam Mondkar and Another Vs. Talab Haji Husain, AIR 1958 SC 376.

finally released after 17 months of detention.³⁶ Supreme Court Justices Sanjeev Khanna and S.V.N Bhatti, failing to fully address procedural concerns and look into the matter with depth, had denied him bail.³⁷ This judgement set back bail jurisprudence remarkably, as Sisodia spent over a year without trial despite the clear lack of evidence against him. Other challenges are present as well, like political parties helping out their allies to secure bail for criminal acquaintances, in order to secure votes and get electoral support.³⁸

CONCLUSION

The concept of granting or not granting bail is not a black and white area. There has to be a balance between the two – protecting the rights of the accused as is our constitutional duty, as well as acting in the interest of the society as a whole, protecting it from the offences committed against it by certain individuals. In addition to this, though, we cannot turn away from the realities of the justice system today. The overflowing of the prisons and the overburden of courts has to be remedied and the way to that is to take a liberal stance on bail.

The cases discussed above clearly state that there still lie challenges in the proper implementation of the bail provisions and it requires rigorous and continuous effort, not just from the judiciary, but from the police and the government as well. Change cannot be made on just one level; contributions have to be made by all. It is not just the duty of the police officers to practice caution during arrests and investigate thoroughly before the arrest, but also the duty of the individual to know their rights and act carefully in such a situation. Ultimately, however, the burden falls heavily on the judiciary to take the necessary steps in applying the bail jurisprudence and deliver judgements working on the principles of natural justice and the rule of law, keeping the fundamental right to personal liberty under Article 21 in higher regards against the more conservative approach to the matter. Thereby, affirming the long-sought principle of “bail is the rule and jail is the exception” and the implementation of the same.

³⁶ Sahil Sinha, *Manish Sisodia out on bail 17 months after arrest in Delhi liquor policy case*, INDIA TODAY (Jul. 11, 2025, 12:17 PM) <https://www.indiatoday.in/india/story/manish-sisodia-bail-tihar-jail-supreme-court-delhi-excise-policy-case-aap-2579932-2024-08-09>

³⁷ *Supreme Court verdict on Manish Sisodia bail plea on October 30*, THE HINDU (Jul. 11, 2025, 12:43 PM) <https://www.thehindu.com/news/national/sc-verdict-on-manish-sisodia-bail-plea-on-october-30/article67470190.ece>

³⁸ Prerna Sharma, *Misuse of Bail Provisions in India*, 6 INT'L J.L. MGMT. & HUMAN. 1941, 1948-1949 (2023).