



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

The Bail Jurisprudential Paradox of Bail

TANYA HARI GUPTA

Abstract

The dogma beatified in Indian jurisprudence “bail is the rule, jail is the exception”¹ — stands in between conflict to the observational reality of pre-trial captivity. Here the article questions the constitutional, policy aspect of bail, with current jurisprudential asking whether the current framework innate a systemic violation of Article 21² (right to life and personal liberty) by training liberty on economic capacity. The examinations reveals that 75%³ of the Indian prison population undergo under trail, many captive stay in the prison for period exceeding the maximum sentence send in prison upon conviction, thereby converting the bail tyranny into a mechanism of de facto punishment without adjudication⁴.

Introduction: The Jurisprudential Tension Between Doctrine and Reality

At its core, bail is essentially about allowing someone who has been charged with a crime to remain free while awaiting trail as provided as they provided as they provide some sort of security, like as money or a bond to ensure that they will appear in court⁵. The fundamental legal tenet that everyone is innocent until and until proven guilty is a major component of the entire concept⁶. This means that the accused should be treated legally like any other innocent person unless a judge orders differently⁷.

¹ [State of Rajasthan v. Balchand alias Baliya](#) in 1978

² Article 21: Right to life and personal liberty (includes right to speedy trial and presumption of innocence)

³National Crime Records Bureau (NCRB). *Prison Statistics India 2021*. "76% of the prison population comprises undertrial prisoners"[dakshindia](#). "Average rate of pretrial detention in India is 20 per 100,000 of the general population, which is less than half the global average. However, as of 2013, the number of pretrial detainees as a proportion of all prisoners is 67.6% — over twice the global average"[proquest](#)

⁴ Singh, A. (2024). *VICTIMS OF PROLONG INCARCERATION: UNDERTRIAL PRISONERS IN INDIA* (pp. 103–112). Iterative International Publishers Selfypage Developers Pvt Ltd. <https://doi.org/10.58532/v3bkso5p2ch2>

⁵ Qualegal India, *The Bail Process in India, 2023*

⁶ Id.

⁷ Id,

Now, the Supreme Court of India hasn't exactly been subtle about this. Over the years, it's driven the point home: bail is supposed to be the default, and jail the rare exception⁸. It's a principle that sounds almost philosophical — pre-trial detention should feel out of the ordinary, not just business as usual⁹. But when you look at the data, the reality feels completely flipped. About three-quarters of people locked up in India are just waiting for their trials, not serving time for any conviction.

This stark gap between what the law says and what actually happens raises a big question. Is the way bail is handled right now — where your freedom basically depends on how much money you have, not how dangerous or flight-risky you are — actually violating the constitutional right to life and liberty under Article 21?¹⁰¹¹

The Constitutional and Statutory Architecture of Bail

Article 21 of the Constitution says nobody can lose their life or personal freedom unless it's done according to the law¹². The Supreme Court cranked up the meaning of that in *Maneka Gandhi v. Union of India* (1978), making clear that the presumption of innocence and the right to a speedy trial are core to real liberty¹³. After that, courts said locking people up before trial with no solid reason actually breaks Article 21—because it's punishing someone before they've even been found guilty¹⁴. The baseline, especially where the death penalty isn't on the table, should be bail, not jail¹⁵.

Law-wise, the Code of Criminal Procedure (CrPC), sections 436 to 450, lays out bail rules. Now, the BNSS from 2023 started to pick up some of that¹⁶. The CrPC splits up offences into bailable and non-bailable¹⁷. If it's bailable (section 436), you're entitled to bail. Just pay up, and you're out. For non-bailable stuff (sections 437–439), it's up to the court—they'll grant bail unless you seem likely to run or fiddle with evidence¹⁸.

⁸ Drishti Judiciary. 2024. *Concept of Bail Under CrPC*. Available at: <https://www.drishtijudiciary.com/to-the-point/bharatiya-nagarik-suraksha-sanhita-&-code-of-criminal-procedure/concept-of-bail>

⁹ Drishti Judiciary, *Concept of Bail Under CrPC*, 2024

¹⁰ Supreme Court Observer. 2025. *Article 21 remains a divided promise in the Supreme Court's bail jurisprudence*. Available at: <https://www.scobserver.in/journal/article-21-remains-a-divided-promise-in-the-supreme-courts-bail-jurisprudence/>

¹¹ Oxford Human Rights Hub (OHRH). 2025. *Reforming Bail Jurisprudence: An Imperative for India*. Available at: <https://ohrh.law.ox.ac.uk/reforming-bail-jurisprudence-an-imperative-for-india/>

¹² Supreme Court Observer, *Article 21 remains a divided promise in the Supreme Court's bail jurisprudence*, 2025

¹³ Oxford Human Rights Hub, *Reforming Bail Jurisprudence: An Imperative for India*, 2025

¹⁴ JL Jharkhand, *JAIL IS THE RULE AND BAIL IS A VERY RARE EXCEPTION*, 2025

¹⁵ Qualegal India, *The Bail Process in India*, 2023

¹⁶ id

¹⁷ Delhi Lawyers, *Types of Bail in India and Their Conditions*, 2024

¹⁸ iPleaders, *Provisions relating to Bail: Overview and Analysis*, 2019

LEGAL HIGHLIGHT

- Section 436(2): If you can't arrange bail soon enough for a bailable offence, they keep you in¹⁹.

- Section 436A: If you're behind bars as an under trial and you've already served half the max possible sentence, you should walk free on personal bond unless the court says otherwise²⁰.

- Default bail (section 167(2)): If the police don't finish their investigation and file charges in 60 days for minor offences or 90 days for serious ones, you automatically get the right to bail²¹.

Pre-trial detention has turned into a stand-in for punishment.

Look at the numbers from the National Crime Records Bureau—75% of India's prisoners are under trials. People locked up waiting for their day in court. It's more than just a statistic—it's evidence that the bail setup is failing.

A lot of these folks end up spending more time in jail than the max sentence they'd get if they were convicted. The average trial drags on for three years or more. Minor crimes—things like property theft, small drug cases, or minor assaults—can mean sitting in jail anywhere from one to five years, sometimes without a verdict.

Let's look at cash. Bail is a game for citizen who can afford it. Courts might set bail at anything from ₹10,000 to ₹5,00,000. If you're a student or a worker scraping by, forget it. On top of that, you often need someone willing to vouch for you—someone who has money or property. Most poor people don't have those connections. And even if you make bail, the conditions can be tough: curfews, travel bans, regular check-ins. It's less freedom than it sounds.

In the end, bail often hinges on your wallet, not on whether you're a flight risk. It's a way to discriminate by class.

The Supreme Court says "bail is the rule, jail is the exception." Nice idea. But here's reality: The courts are overloaded—more than 50 million cases stacked up; trials can take three to five years. Legal aid? Only 15–20% of under trials get solid lawyers. Bail conditions? Sometimes so strict they're not about actual public safety at all. Investigations drag on; charges sometimes aren't filed for years.

Section 167(2) CrPC says if police blow their deadline to file charges, you get default bail. But most people don't know about it, and their lawyers hardly ever bring it up. Even if you try to claim it, judges still deny bail, often pointing to how "serious" the crime is—even when the law says you have the right.

¹⁹ Code of Criminal Procedure, 1973, Section 436(2)

²⁰ Code of Criminal Procedure, 1973, Section 436A

²¹ Code of Criminal Procedure, 1973, Section 167(2)

So, the right to bail is written into law, but for most people, it's out of reach.

how things could change:

1. **Presumptive Bail for Long-Term Under Trials:** If someone's already spent half their max possible sentence in jail, let them go on personal bond—unless it's clear they'll run. Make prosecutors actually justify keeping someone locked up.
2. **Abolish Money Bail for Poor Defendants:** Scrap cash bail. Try other options: community guarantees, electronic surveillance, regular check-ins. Courts need to check if people can actually pay before they set bail.
3. **Fast-Track Courts for Under Trials:** Launch special court for undertrial cases and enforce deadline which'll help speeding things up so nobody spends years waiting for justice. Then bail bond procedure may take place by actual protecting liberty, not just shuffling paperwork, and making a difference for everyone. In the Constitutional Imperative the Malimath Committee on Reforms of the Criminal Justice System recommended balancing state interests with individual liberty. However, implementation remains weak²². The constitutional imperative is clear the Article 21 guarantees liberty as a fundamental right, then the bail regime must be restructured to ensure that liberty is not contingent on wealth.

Is the bail system even constitutional? That's the real question here. Let's break it down: First, there's Article 14, which is all about equality before the law. But when you tie someone's freedom to their bank account, you end up punishing the poor and letting the rich walk free. That's not equality. Then there's Article 21 — it says everyone has the right to life and liberty, and that you're innocent until proven guilty. Still, courts send people to jail before they're convicted, just because they can't pay. In effect, this creates two kinds of justice: one for the rich, and one for everyone else.

The Supreme Court has already said that locking people up without good reason before trial breaks Article 21. And yet, nothing really changes. At this point, it's not a question of whether the bail system fits the Constitution — it's about why the courts and lawmakers haven't stepped up to fix something so clearly broken.

Article 21 of the Constitution says nobody can lose their life or personal freedom unless it's done according to the law. The Supreme Court cranked up the meaning of that in *Maneka Gandhi v. Union of India* (1978), making clear that the presumption of innocence and the right to a speedy trial are core to real liberty. After that, courts said locking people up before trial with no solid reason actually breaks Article 21—because it's punishing someone before they've even been found guilty. The baseline, especially where the death penalty isn't on the table, should be bail, not jail.

Law-wise, the Code of Criminal Procedure (CrPC), sections 436 to 450, lays out bail rules. Now, the BNSS from 2023 started to pick up some of that. The CrPC splits up offences into bailable and non-bailable: If it's bailable (section 436), you're entitled to bail. Just pay up,

²² Comm. on Reforms of Criminal Justice Sys., Ministry of Home Affairs, Gov't of India, Report: Volume I 45 (2003), mha.gov.in

and you're out. For non-bailable stuff (sections 437–439), it's up to the court—they'll grant bail unless you seem likely to run or fiddle with evidence

Here's how things could change:

1. Presumptive Bail for Long-Term Under Trials: If someone's already spent half their max possible sentence in jail, let them go on personal bond—unless it's clear they'll run. Make prosecutors actually justify keeping someone locked up.

2. Abolish Money Bail for Poor Defendants: Scrap cash bail. Try other options: community guarantees, electronic surveillance, regular check-ins. Courts need to check if people can actually pay before they set bail.

3. Fast-Track Courts for Under Trials: Launch special courts just for under trial cases and enforce deadlines—speed things up so nobody spends years waiting for justice.

That's what bail reform should look like: actually protecting liberty, not just shuffling paperwork, and making a difference for everyone.

i

ⁱ References

I. Statutory Provisions

1. The Code of Criminal Procedure, 1973 (CrPC)
 - Section 436: Bail in bailable offences
 - Section 437: Bail in non-bailable offences (police station and court)
 - Section 439: Special powers of High Court and Court of Session regarding bail

- Section 436A: Maximum period of detention for undertrials
- Section 167(2): Default bail (failure to file chargesheet within 60/90 days)
- 2. Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023
 - Partially replaces CrPC provisions on bail (effective from July 1, 2024)
- 3. The Constitution of India
 - Article 14: Right to equality before law
 - Article 21: Right to life and personal liberty (includes right to speedy trial and presumption of innocence)

II. Supreme Court Judgments

1. Maneka Gandhi v. Union of India (1978) 1 SCC 248
 - Established that Article 21 encompasses the right to a speedy trial and presumption of innocence
2. Satender Kumar Antil v. Central Bureau of Investigation (2022)
 - Held: "The jails in India are flooded with undertrial prisoners though the rate of conviction in criminal cases in India is abysmally low" (para 5 and 67)
 - Urged the Government of India to draft specific bail legislation
3. Guddal v. State of Karnataka (2022)
 - Addressed bail conditions and their impact on undertrials
4. State of U.P. v. Amarmani Tripathi (2005) 8 SCC 697
 - Discussed principles for granting bail in non-bailable offences
5. Sanjay Chandra v. Central Bureau of Investigation (2012) 1 SCC 40
 - Held that bail should not be denied merely because the offence is serious
6. Hussainara Khatoon v. Home Secretary, State of Bihar (1979) 1 SCC 240
 - First major judgment on undertrial detention violating Article 21
7. Raghubir Singh v. State of Bihar (1986) 1 SCC 648
 - Addressed the right to speedy trial as part of Article 21
8. Karan Singh v. State of Uttar Pradesh (2020) SCC OnLine SC 1143
 - Reinforced that "bail is the rule, jail is the exception"

III. Law Commission and Committee Reports

1. Malimath Committee on Reforms of the Criminal Justice System (2003)
 - Recommended balancing state interests with individual liberty
 - Suggested reforms to bail provisions to reduce undertrial detention
2. Law Commission of India, 268th Report (2017)
 - Recommended amendments to bail provisions to reduce overcrowding
3. Standing Committee on Home Affairs (various reports on Juvenile Justice Act amendments)

IV. Academic and Policy Sources

1. Daksh India (2023)
 - DAKSH High Court Database: Bail Case Dataset
 - "Prison Statistics of India 2021 reveal that a staggering 76% of the prison population comprises undertrial prisoners"
 - Available at: <https://database.dakshindia.org/bail-dashbboard/dakshindia>
2. TISS (2023)
 - *Experiences of Undertrial Prisoners Released on Bail: A Study*
 - TISS Report on socio-economic background of undertrial prisoners
 - Available at: https://tiss.ac.in/uploads/files/Bail_Study_Report_-_2023.pdf tiss.ac
3. Human Rights Watch (2025)
 - *Reforming Bail Jurisprudence: An Imperative for India*
 - Oxford Human Rights Hub (OHRH)
 - Available at: <https://ohrh.law.ox.ac.uk/reforming-bail-jurisprudence-an-imperative-for-india/ohrh.law.ox>
4. SC Observer (2025)
 - *Article 21 remains a divided promise in the Supreme Court's bail jurisprudence*
 - Supreme Court Observer
 - Available at: <https://www.scobserver.in/journal/article-21-remains-a-divided-promise-in-the-supreme-courts-bail-jurisprudence/scobserver>
5. Ipleaders (2020)
 - *Bail under the Indian legal system*
 - Available at: <https://blog.ipleaders.in/bail-indian-legal-system/blog.ipleaders>
6. Ipleaders (2019)
 - *Provisions relating to Bail: Overview and Analysis*
 - Available at: <https://blog.ipleaders.in/provisions-relations-to-bail/blog.ipleaders>

V. Statistical Sources

1. Daksh Database
 - *Bail Dashboard: Law of Bail in India*
 - Available at: <https://database.dakshindia.org/bail-dashboard/dakshindia>

VI. International and Comparative Sources

1. John Howard Society of Ontario (2022)
 - *Youth and bail in Ontario – more progress needed*
 - Available at: <https://johnhoward.ca/blog/youth-and-bail-in-ontario-more-progress-needed/johnhoward>
2. Sentencing Project (2023)
 - *Why Youth Incarceration Fails: An Updated Review of the Evidence*
 - Available at: <https://www.sentencingproject.org/reports/why-youth-incarceration-fails-an-updated-review-of-the-evidence/sentencingproject>
3. NCJFCJ (2025)
 - *Youth Justice Reform*
 - Available at: <https://www.ncjfcj.org/youth-justice-reform/ncjfcj>

Cornell Legal Information Institute (LII)

- *Bail | Wex | US Law*
- Available at: <https://www.law.cornell.edu/wex/baillaw.cornell>

Britannica

- *Bail | Definition, Process & Rights*
- Available at: <https://www.britannica.com/topic/bail-lawbritannica>

Merriam-Webster

- *BAIL Definition & Meaning*
- Available at: <https://www.merriam-webster.com/dictionary/bailmerriam-webster>

Wikipedia

- *Bail*
- Available at: <https://en.wikipedia.org/wiki/Bailwikipedia>

Drishti Judiciary

- *Concept of Bail Under CrPC*
- Available at: <https://www.drishtijudiciary.com/to-the-point/bharatiya-nagarik-suraksha-sanhita-&-code-of-criminal-procedure/concept-of-baildrishtijudiciary>

Bail Jurisprudence in India and A Comparative Analysis With UK and USA (2022)

- International Journal for Research and Publication (IJRPR)
- Available at: <https://jrtd.com/index.php/journal/article/view/3741jrtd>

Pre-trial Detention, Bail Denial and Socio-economic Inequality in India (2023)

- International Journal for Research and Publication (IJRPR)
 - Available at: <https://ijrpr.com/uploads/V6ISSUE11/IJRPR56339.pdfijrpr>
2. High Court's Power to Grant Bail Under Section 439 of Cr.P.C (2026)
 - Supreme Court Observer
 - Available at: <https://www.scobserver.in/supreme-court-observer-law-reports-scolr/high-courts-power-to-grant-bail-under-section-439-of-cr-p-c/scobserver>

