



Research Paper

Bail is the Rule, Jail is the Exception: Contemporary Judicial Approach in India

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Abstract

This article analyzes the "bail is the rule; jail is the exception" concept in the context of Indian criminal law. In line with Article 21 of the Indian Constitution and the presumption of innocence, this rule holds that the authorities have to have concrete reasons, in the form of legal justifications, for detaining someone before the trial; therefore, pre-trial detention cannot be used as an immediate consequence of arrest. This article traces the development of this concept through a number of Supreme Court cases and highlights the important role played by Justice V.R. Krishna Iyer in establishing the key formulations of bail law in India. It also considers the conflict between the "bail is the rule; jail is the exception" concept and the special laws, such as the UAPA, PMLA, and NDPS Act, which require extremely restrictive bail provisions and thus violate the presumption of innocence. In addition, the paper will discuss the problems related to undertrial prisoners in India, the effects of the Bharatiya Nagarik Suraksha Sanhita of 2023, and other important issues.

Keywords: Bail Jurisprudence, Personal Liberty, Undertrial Prisoners, Presumption of Innocence, Special Laws

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I. Introduction

"There is a saying that keeps on recurring in the Indian courts; 'Bail is the rule and jail is the exception'... Judges quote this principle, lawyers quote this principle and even the books dedicated to bail jurisprudence discuss this rule... This statement appears to be a mere theoretical expression for all those thousands of undertrials languishing in the overburdened prisons of our country, most of whom do not even have the means to arrange sureties... Some of these men are arrested for committing offences that deserve punishment of only petty fines."

The principle of "bail is the rule, jail is the exception" is a foundational tenet of India's criminal justice system, emphasizing the presumption of innocence and the safeguarding of personal liberty. This doctrine was firmly established in the landmark 1977 Supreme Court case, *State of Rajasthan v. Balchand*, where Justice V.R. Krishna Iyer articulated that bail should be the norm, and incarceration the exception, unless compelling reasons suggest otherwise, such as the risk of the accused fleeing justice or tampering with evidence.

Despite this guiding principle, the current state of India's criminal justice system reveals a disconcerting reality. A significant number of undertrial prisoners, many of whom are economically disadvantaged, remain incarcerated for extended periods due to systemic delays and stringent bail conditions. Challenges such as the inability to furnish sureties, lack of proper identification documents, limited access to legal representation, and minimal family support exacerbate their plight.

Article 21 of the Indian Constitution guarantees the right to life and personal liberty, asserting that no person shall be deprived of these rights except according to a procedure established by law. This provision has been expansively interpreted to encompass the right to a fair and speedy trial, and by extension, the right to bail. The Supreme Court has reiterated that prolonged pre-trial detention without just cause infringes upon this fundamental right.

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A careful analysis of the Indian bail jurisprudence reveals that the gap between what the law prescribes and what actually happens to an individual in the criminal justice process is very vast indeed. On one hand, there is the statutory recognition of the personal freedom of an accused person and his presumed innocence unless his guilt is established and lastly, the necessity of reasonable cause as a prerequisite for his detention prior to trial. On the other hand, there lies the harshness of a stringent bail policy which treats bail as something earned not something owed.

It is very important to understand the development of the Indian courts' thinking on the issue. This is not only in terms of academic study, but also because of what this means for people's lives.

Conceptual Framework of Bail in India

'Bail' connotes the process of procuring the release of an accused charged with certain offences by ensuring his future attendance in the court for trial and compelling him to remain within the jurisdiction of the court³. A definition of same notion has been inculcated in the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter as BNSS) which exhaustively defines bail "as release of person accused or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or court on execution by such person of a bond or a bail bond". The old Code that is to say the Criminal Procedure Code, 1973 (hereinafter as the CrPC) did not explicitly define bail rather it used to define the nature of the offences as 'bailable offence' and 'non-bailable offence', its meaning and scope has been derived by the courts in various judicial precedents⁴. the motive behind arrest or detention is to deliver justice to individual or society, if motive can be fulfilled without arrest then bail can be granted to the accused person.

The concept of bail can be traced from old criminal law that is Cr. P.C., 1973, which provides information on the requirements and processes for granting bail. Judicial modifications have acknowledged and developed the legal gesture of bail, representing enormous and changing values regarding the granting or refusing of bail. The idea of bail was initially introduced in Sections 216 and 258, as well as Sections 156 and 212 of the Code Criminal Procedure of 1861. Additional parts were added in 1872. Sections 496 and 497 of the 1898 law addressed bail in instances that were subject to bail and non-bailable cases, respectively. Additional parts and revisions were added in 1973. Lastly, it has been one of the important part of new criminal law (of Bharatiya Nyaya Sanhita) too which provided justification for the criminal justice system's use of bail jurisprudence. It improved the provision's effectiveness and benefited the accused.

The idea of bail is also incorporated under Article 21 of the Constitution of India which talk about and right to personal liberty, so Bail is protection of fundamental right which is right to life and liberty for the person found accused. Bail is a right and delay in bail is violation of fundamental right of an individual. In *P Chidambaram v. Directorate of Enforcement* (2020), the court refused bail because the accusations were economic about corruption. However, in the appeal matter, the Hon'ble Supreme Court granted bail and rejected all other contentions. Therefore, Bail is a kind of procedure in which the Court sets a freedom to arrested person upon security. Delay in Bail sometimes violates of fundamental rights of the individual. Bail is a rule and jail is an exception is a true principle that needs to be followed. Reasons for delay in granting bail are: - Case complexity, pending investigation, opposition by prosecution, and some other legal formalities. In many cases, you may see that police fail to establish the cases and in other situations, police fail to ensure that prosecution witnesses turn up in time.

The Doctrine: "Bail is the Rule, Jail is the Exception"

In the year 1977 "Bail, not Jail was the rule". The doctrine of presumption of innocence was applied before accusing a person. The above-mentioned doctrine is genesis in the Universal Declaration of Human Right⁷, and the defendant is more appropriate than using prisoner or convict or accuse, which will indicate innocence⁸. The constitutional doctrine that "bail is the rule and jail is the exception," famously articulated by Justice V.R. Krishna Iyer in *State of Rajasthan v. Balchand* (1977), the respondent Balchand was convicted by the trial court under Section 452 of the Indian Penal Code (house trespass after preparation for hurt, assault, or wrongful restraint) and Section 323 (voluntarily causing hurt). Upon conviction, he filed an appeal before the High Court, which granted him bail. The State of Rajasthan challenged this order before the Supreme Court, arguing that since the accused had already been found guilty, bail should not be granted so readily, as individual liberty must give way to public interest in such circumstances. Justice V.R. Krishna Iyer, delivering the judgment, laid down a crucial principle in Indian bail jurisprudence bail is the rule and jail is the exception." He emphasized that the mere fact of conviction by the trial court does not automatically justify the denial of bail during the pendency of an appeal, especially when the sentence is not of a severe nature. This principle continues to hold relevance and is consistently echoed in contemporary judicial pronouncements, reaffirming the constitutional mandate to protect personal liberty under Article 21 of the Constitution of India. With the time has gradually lost its sheen over the decades. Despite this foundational principle in criminal jurisprudence, the prison population of undertrial inmates in India continues to escalate. This trend indicates a disconnect between

legal theory and judicial practice. However, the higher judiciary has consistently strived to restore the sanctity of personal liberty and correct the growing misuse of pre-trial detention.

In *Dataram Singh v. State of Uttar Pradesh* [(2018) 3 SCC 22], the Supreme Court reinstated the principle of "bail, not jail," emphasizing that granting bail is a fundamental tenet of criminal law. The Court lamented that this elementary safeguard has been overshadowed by an overemphasis on incarceration, often leading to prolonged and unjustified detention. The decision in *Uday Mohanlal Acharya v. State of Maharashtra* [(2001) 5 SCC 453] further reinforced the right to default bail. The Court held that once the stipulated 90-day period under Section 167(2) of the Criminal Procedure Code expires without the filing of a charge sheet, the accused acquires an absolute and indefeasible right to be released on bail. This interpretation has been reiterated in *Bikramjit Singh v. State of Punjab* [(2020) 10 SCC 616], where the Court clarified that the statutory right under Section 167(2) CrPC is intimately linked to Article 21 of the Constitution, which safeguards against arbitrary and illegal detention.

In *Supreme Court Legal Aid Committee v. Union of India* [(1994) 6 SCC 731], the Court addressed the plight of undertrial prisoners directly. Representing the interests of incarcerated individuals awaiting trial, the Supreme Court emphasized that no one should be detained indefinitely merely due to systemic delays. The judgment underscored that if the trial cannot be concluded within a reasonable timeframe, the accused should not be compelled to remain behind bars. The decisions in *Arnesh Kumar v. State of Bihar* [(2014) 8 SCC 273] and *Satender Kumar Antil v. Central Bureau of Investigation* [(2022) 10 SCC 51] represent crucial milestones in bail jurisprudence. In *Arnesh Kumar*, the Court laid down specific directives for law enforcement agencies to follow during and post-arrest, thereby seeking to curtail unnecessary detention. *Satender Kumar Antil* further expanded upon these guidelines and categorized offences to streamline bail processes and minimize judicial burden. These directions aim to reduce excessive bail applications and improve the conditions of undertrial prisoners significantly.

Collectively, these decisions reflect the judiciary's determined effort to realign criminal justice administration with the constitutional ethos of liberty and dignity. Through a series of progressive pronouncements, the Supreme Court continues to uphold the inviolability of personal freedom enshrined in Article 21, while attempting to mitigate the suffering endured by those languishing in pre-trial custody.

II. Analysis and Discussion

The Constitutional Backbone

Before moving ahead with the cases, one needs to comprehend from where exactly this principle emanates from. Well, it originates from the provisions of Article 21 of the Constitution of India: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Simple enough, but generations of cases in the Supreme Court have helped elucidate its meaning.

As per the Supreme Court, procedure under Article 21 has to be not only a 'law' but also just and fair; the law depriving a citizen of his liberty via an oppressive method could hardly claim protection under Article 21 of the constitution. This interpretation of Article 21 was arrived at via *Maneka Gandhi v. Union of India*.

The core of the law of bail procedure lies within the Code of Criminal Procedure, 1973 (CrPC) which is superseded, to a significant extent, by the *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS). Within the BNSS framework, offenses are classified as either bailable or non-bailable offenses. With bailable offenses, the grant of bail is a right that cannot be denied by the police or by the court. On non-bailable offenses, the granting of bail lies within the discretion of the court.

Justice Krishna Iyer and the Foundational Shift

Of all the judges who have made a mark on bail jurisprudence in India, Justice V.R. Krishna Iyer stands out above all others. In the 1970s, he authored several opinions that transformed the question of bail from a purely procedural one into a moral one grounded in constitutional principles.

Among the most cited cases authored by Justice Krishna Iyer is *State of Rajasthan v. Balchand alias Baliy*. As he put it plainly, "the normal principle" is bail rather than imprisonment "unless there are circumstances suggesting flight from justice, obstruction of justice or some other mischief including repetition of crime or victimizing witnesses." This has become the standard formulation in almost every bail judgment. The issue here is not whether a denial of bail is possible; this may certainly happen, depending on circumstances. Rather, it is about what the presumption is.

One year down the line, Justice Krishna Iyer in *Moti Ram v. State of M.P.*⁸ identified another practice of detaining people without justification. The court observed that imposing an unreasonably high amount of security was tantamount to refusing a person the right to bail. In cases involving minor offences, requiring someone to furnish a surety of tens of thousands of rupees amounted to outright denying the application for release on bail. Wealthier individuals would be able to comply whereas the less privileged would have no choice but to remain incarcerated.

The second milestone case to be mentioned from this time period is *Gurbaksh Singh Sibbia v. State of Punjab*. This is another judgment about anticipatory bail. However, this landmark case too echoed the same philosophy regarding bail. A Constitution Bench held that when considering applications for bail, judges should refrain from adopting an unthinking approach. The object of the law should dictate their actions and not punishment.

Twenty-First Century: The Principle Gets Tested

The bail rule as a matter of principle appeared settled until some time around the early 2000s. That was until a series of cases shook things up.

In the 2G spectrum scam prosecutions, people charged brought into courts were those who became notorious in public discourse. Implicit and even explicit pressures on denying bail arose from that reality. Sometimes, there may be the need to show commitment; other times, the public anger against the crime may pose political risks to the government if it accedes to a request for bail. In *Sanjay Chandra v. CBI*, the apex court held its ground. The object of bail is to ensure attendance at the trial of a case, nothing else. Even the seriousness of the accusations cannot take the place of a proper reason for detention.

The significance of the judgment in *Sanjay Chandra* lies not in its result but in its rationale. The bail rule must apply in its letter and spirit, not selectively depending on how much public interest there is in the case.

However, the most thorough analysis to have come up on this issue so far is the one made in *Satender Kumar Antil v. CBI*. Through this decision, the Court did a veritable audit of the degree of violation of the doctrine of bail. This decision, among other things, reviewed the existing state of the law, referred to the alarming number of undertrials in Indian prisons, emphasized that bail petitions should be disposed of expeditiously, called upon the legislature to correct the flaws in the system, and recommended categorizing offenses and applying varying standards for granting bail to those involved in them.

When Special Laws Change the Rules

That is where it really gets complicated because, even if the general bail structure of the CrPC—and the BNSS—is pro-liberty, there are several specialized laws that run counter to it.

Three such statutes are the Unlawful Activities (Prevention) Act, 1967 (UAPA), the Prevention of Money Laundering Act, 2002 (PMLA), and the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act). All three laws have special provisions to make the granting of bail exceedingly difficult.

Under Section 43D(5) of the UAPA, for instance, no bail can be granted if the court feels that the charge is *prima facie* true. On the other hand, under Section 45 of the PMLA, an accused needs to show not only his innocence but also that he will not repeat his crime if granted bail.

The criticism against these sections, however, is that they turn on its head the principle of presumption of innocence. Where the accused must prove his/her innocence in order to be granted bail, it means that detention will be the rule rather than the exception. The courts thus find themselves forced to make judgments regarding the guilt or innocence of the accused at the very outset before conducting any trial.

The Supreme Court of India, while dealing with this conflict between law and justice, gave a judgment in *K.A. Najeer* which stated that under the UAPA, the inherent power to grant bail in cases of denial of speedy trial under Article 21 still exists. No piece of legislation can claim for itself total exemption from constitutional scrutiny.

On the PMLA front, the landmark ruling of the Supreme Court in the case of *Vijay Madanlal Choudhary v. Union of India* affirmed the twin tests of Section 45 but made it clear that courts must not blindly rely on the twin conditions. Although the ruling received a lot of criticism for its overly conservative approach, it kept the hope alive for judicial scrutiny.

UAPA and Its Impact on Bail Jurisprudence

We know that the principle of “bail is the rule and jail is the exception” is a cornerstone of criminal jurisprudence in India, rooted in the broader constitutional guarantee of personal liberty under Article 21 of the Constitution. This principle is widely applied across general criminal laws, particularly under the Code of Criminal Procedure (CrPC), wherein bail is considered a right unless compelling reasons dictate otherwise. However, the application of this principle takes a significantly restrictive turn in the context of special statutes such as the Unlawful Activities (Prevention) Act, 1967 (UAPA). Unlike the general provisions of bail under CrPC, UAPA imposes stringent conditions under Section 43D (5), making the grant of bail considerably more difficult. This creates a sharp contrast between the treatment of accused persons under regular criminal law and those charged under special legislations like UAPA. While the former leans heavily towards safeguarding liberty, the latter often prioritizes national security and public order, thereby diluting the presumption of innocence and tipping the scales towards prolonged detention. This divergence raises critical concerns regarding the balance between state interest and individual freedoms, making it a vital area of legal scrutiny and reform.

In *State of Rajasthan v. Balchand*, where Justice V.R. Krishna Iyer emphasized the importance of personal liberty and the presumption of innocence pending trial. This principle is applied liberally under general criminal law governed by the Code of Criminal Procedure, 1973 (CrPC), where courts are generally inclined to grant bail unless specific risks—such as the likelihood of absconding, tampering with evidence, or threats to witnesses—justify denial. However, this liberal approach is significantly diluted under Unlawful Activities (Prevention) Act, 1967 (UAPA). Section 43D (5) of the UAPA creates a formidable threshold by mandating that bail shall not be granted if the court finds the accusations to be prima facie true, thus virtually reversing the presumption of innocence and placing a heavy burden on the accused to prove otherwise.

In contrast, even special statutes like the Prevention of Corruption Act or the Narcotic Drugs and Psychotropic Substances Act (NDPS)—though also imposing certain bail limitations—have seen courts carve out interpretative safeguards to uphold the balance between security concerns and fundamental rights. UAPA, on the other hand, leaves little room for judicial discretion, resulting in prolonged incarceration of undertrial prisoners, often without the commencement or conclusion of trial for years. The Supreme Court in *National Investigation Agency v. Zahoor Ahmad Shah Watali* upheld this restrictive bail provision, reinforcing the statutory intent of prioritizing national security over personal liberty in UAPA cases.

This disparity in the application of bail jurisprudence—between general criminal law and anti-terror legislation—raises pressing constitutional concerns under Article 21 of the Constitution which guarantees the right to life and personal liberty. The conflict between safeguarding public order and preserving civil liberties makes it imperative to re-evaluate the rigid bail framework under UAPA to prevent miscarriage of justice and uphold the foundational values of a democratic legal system.

Presumption of Innocence vs. Presumption of Guilt under UAPA

One of the biggest difference in application of the principal bail is rule and jail is exception between common laws and UAPA is the presumption of innocence which is a core principle of criminal jurisprudence and is intrinsically linked to Article 21 of the Constitution, which guarantees the right to life and personal liberty. However, under UAPA, particularly Section 43D(5), this presumption is overturned. This provision stipulates that bail shall not be granted if, upon perusal of the case diary or the report made under Section 173 of the Code of Criminal Procedure, there are reasonable grounds for believing that the accusation is prima facie true. Such a statutory scheme imposes a reverse burden on the accused and discourages courts from granting bail even before any trial has begun, often resulting in years of incarceration without conviction.

In the landmark case of *National Investigation Agency v. Zahoor Ahmad Shah Watali*,¹⁴ the Supreme Court held that at the bail stage under UAPA, the court is not required to meticulously evaluate evidence but must be satisfied that the case appears prima facie true. This interpretation has led to a situation where bail is almost routinely denied, irrespective of the strength or weakness of the evidence. This goes against the Supreme Court's earlier ruling in *State of Rajasthan v. Balchand*, where Justice V.R. Krishna Iyer famously stated, "The basic rule is bail, not jail," unless circumstances justify denial.

Over the past decade, there has been growing concern about the misuse of UAPA to curb dissent and stifle freedom of expression. The definitions of "unlawful activity" and "terrorist act" under Sections 2(o) and 15 of UAPA are vague and overly broad, allowing for expansive interpretation by the authorities. Numerous cases reveal a pattern of targeting dissenting voices, including:

- Dr. G.N. Saibaba, a disabled professor, who was convicted under UAPA for alleged Maoist links and has been denied proper medical treatment in custody.
- Father Stan Swamy, an 84-year-old tribal rights activist, arrested under UAPA in the Bhima Koregaon case, died in custody after multiple bail denials despite his fragile health.
- Umar Khalid, a former JNU student leader, remains incarcerated for over three years under UAPA, with bail rejected despite lack of direct evidence.

These instances illustrate how UAPA is used to punish before trial, exploiting its harsh bail conditions to keep accused persons in prolonged custody without adjudication.

The Undertrial Crisis: Numbers Tell the Story

All of this framework – the constitution, the guidelines laid down by the Supreme Court, and legislation – exists in the context of an Indian criminal justice system that is quite hard to reconcile with the notion of bail as a fundamental right. India's prisons are mostly occupied by prisoners who have not yet been convicted of any crime.

It is estimated based on data collected by the National Crime Records Bureau that 70% to 77% of all prisoners are undertrials. Some of them remain in detention as they have been charged with petty crimes and cannot get bail. Others remain in detention simply because their cases have not been heard in months. There are also individuals who should have been released according to Section 436A of the CrPC for completing half of the maximum punishment but nobody told them.

The BNSS retains this section in Section 479 of its Constitution. Moreover, it allows first-time offenders the option to be released even when they have completed only one-fifth of the maximum punishment but it has been badly implemented.

Supreme Court of India suo moto noticed the matter of prison conditions in “Re: Inhuman Conditions in 1382 Prisons and passed a number of directions, including identifying undertrials that could be bailed out, giving access to legal assistance, and decongesting prisons. The implementation has not been satisfactory.

Anticipatory Bail and Emerging Trends

One such issue which has gained clarity in the law recently concerns anticipatory bail. There were doubts for quite some time on whether anticipatory bail could be granted without any time limitations, or whether it would lapse automatically once the accused surrendered before the court of trial. These issues were finally addressed by the Supreme Court in *Sushila Aggarwal v. State (NCT of Delhi)*. Anticipatory bail can be granted indefinitely and will not automatically lapse upon surrender or appearance of the accused in front of the court.

A developing area of jurisprudence is concerned with the nexus between the right to bail and the right to a fair and speedy trial. Where the courts have been unable to conclude the trial within a reasonable time, there have been more instances where bail has been granted despite special legislation. The rationale behind this is clear; the State cannot claim a justified detention on grounds of caution as long as it is unable to conclude the trial within a reasonable time. This principle was established in the case of *Vernon Gonsalves v. State of Maharashtra*.

The BNSS, 2023: A New Chapter?

Whereas the *Bharatiya Nagarik Suraksha Sanhita* was enacted on 1 July 2024, replacing the CrPC, it does not deviate too far from the bail framework established by it. Indeed, the fundamental concept of bailable and non-bailable offences persists. Courts still hold power according to provisions equivalent to the old Sections 436, 437, 438, and 439. Section 479 of BNSS replaces Section 436A with a novel clause providing for a lowering of the half-sentence period for new offenders, an undoubtedly laudable change.

Moreover, the BNSS allows for the imposition of electronic monitoring and other types of bail conditions instead of detaining the accused. This is indeed good news. Until recently, bail conditions were limited to providing a surety bond and appearing before the local police station.

The thing that has remained constant in all of this, however, is the structure of special laws. The PMLA, UAPA, and NDPS still function along with the BNSS, maintaining the tough bail provisions. The very dichotomy that exists between the basic concept of bail and the exceptions to that created by special laws has not been overcome.

III. Conclusion

"The bail is the rule, and jail is an exception," is such an often repeated phrase that there is the danger that it may lose its significance. However, the philosophy behind it is far from being mere rhetoric; rather, it is an inevitable corollary of the presumption of innocence, and the very notion that it should be the State which needs to justify deprivation of the liberty of a citizen, and not vice versa.

Indeed, Indian courts deserve praise for evolving the above principle of law in true spirit over the last five decades. It would not be an exaggeration to say that the evolution of the principle from the early formulations of Justice Krishna Iyer to a well-reasoned approach in the case of *Satender Kumar Antil* reflects deep concern for the pre-trial liberty of citizens.

But, in order to be objective in the evaluation, one needs to accept the reality. If three out of four Indians held in prison have not yet been convicted, there is an obvious problem that needs to be addressed. Whatever principles of justice, law, and due process can be quoted, they will amount to nothing if they do not ensure the freedom of real people. This means that it is necessary to have quick trials, access to free legal services, judges who are as strict about the presumption of innocence as the Supreme Court judges, and a system that treats the poor as well as the rich in this respect.

The history of bail in India may be characterized as an interesting combination of brilliant legal achievements and disappointing institutional failures.

Endnotes

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