
LIBERTY IN THE SHADOW OF GRAVITY: A CONSTITUTIONAL CRITIQUE OF BAIL JURISPRUDENCE IN INDIA

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ABSTRACT

This paper critically examines the jurisprudence of pre-trial detention in India, focusing on the constitutional challenges posed by the 'gravity of offence' as a consideration in deciding bail applications. It argues that the undue reliance on this criterion, codified in the Bharatiya Nagarik Suraksha Sanhita (BNSS) and often applied in judicial practice, operates as a form of punitive detention, undermining the core constitutional principles of the presumption of innocence and the right to personal liberty enshrined in Article 21. By analyzing landmark judicial pronouncements, this analysis demonstrates how the bail system has deviated from the foundational dictum that "bail is the rule and jail is the exception." A comparative study of the bail systems in the United States, the United Kingdom, and Canada illustrates how a more structured, risk-based approach can better balance individual rights with legitimate state interests. The paper concludes by recommending legislative and judicial reforms to reframe the bail test, shifting the focus from the unproven severity of a charge to a rational assessment of flight risk and danger to the community. Such a reform is essential to ensure that the process does not become a punishment and to uphold the constitutional promise of equal justice.

Introduction: The Delicate Balance of Liberty and Justice

The jurisprudence of pre-trial liberty in the Indian criminal justice system lies at a point where two countervailing forces are at work: the duty of the state to maintain public order and the fundamental right of the individual to his personal liberty. The paper traces the development of Indian bail jurisprudence through landmark judicial pronouncements such as *Gudikanti Narasimhulu* and *State of Rajasthan v. Balchand*, which collectively articulated the doctrine that “bail is the rule, jail is the exception” an adage which makes the liberty of the individual a “priceless treasure” and securely situates it within the constitutional guarantee of Article 21. Yet, the Delhi High Court's recent judgment in *Sharjeel Imam & Ors. v. State of NCT of Delhi*¹ has brought into glaring focus a disturbing reality: this foundational philosophy in the bail adjudication process is, in practice, a forgotten ideal, systematically undermined by one of the most crucial factors in bail adjudication: ‘nature and gravity of offence’.

This paper argues that the uncritical and often the sole reliance on the gravity of an alleged offence as a ground for denial of bail, more importantly in cases of Delayed trial, is a form of pre-conviction punishment, thereby violating the constitutional guarantees of personal liberty, due process and the presumption of innocence. When the seriousness of an allegation, one yet to be proved in a court of law, becomes the primary factor in determining the incarceration of an individual, it turns a pre-trial safeguard into de facto pre-conviction punishment, as a direct attack on the constitutional promise of liberty for the alleged offender. This analysis is set to trace the development of the jurisprudence of bail in India, undertake a critical analysis of the constitutional fallacies that are implicit in the prong of “gravity of offence” and suggest a framework for bail that is more aligned with the constitution and is informed by a comparative study of legal practices across the globe.

The Constitutional and Statutory Framework of Bail in India

The Cornerstone of Liberty: Article 21 and the Presumption of Innocence

The right to personal liberty is the foundation of the Indian constitutional order. Article 21 is a provision with the widest amplitude and protects the freedom of an individual from physical restraint and includes the right to live with dignity. Woven into the very fabric of this right is the principle of the presumption of innocence, which says that an accused person is presumed

¹ *Sharjeel Imam & Ors. v. State of NCT of Delhi* 2025:DHC:7632-DB

innocent until proven guilty beyond a reasonable doubt. This principle is not explicitly codified in the Constitution but is deeply ingrained in India's common law heritage, deriving its constitutional force from Article 21² and Article 20(3)³, which prohibits self-incrimination. The Bharatiya Sakshya Adhiniyam, 2023, reinforces this by placing the burden of proof squarely on the prosecution to prove the accused's guilt.⁴

The presumption of innocence is an important bulwark for the accused during the pre-trial phase. If bail is denied just on the basis of the gravity of an unproven charge, then it makes this pre-trial shield null and void. For when the gravity of an allegation as opposed to the quality of the evidence becomes the standard for punishing an individual in the form of pre-trial detention, such a departure from this constitutional tenet constitutes a fundamental departure. As the Supreme Court affirmed in the landmark case of *Hussainara Khatoon v. Home Secretary, State of Bihar*, indefinite detention without trial is inconsistent with the presumption of innocence and procedural fairness.⁵ The essence of this jurisprudence is that an individual should not be deprived of liberty based on what they are *accused* of, but only on what the prosecution can *prove* in a court of law.

The Code of Criminal Procedure, 1973 (CrPC) and the New BNSS, 2023

The statutory framework for bail in India is primarily governed by the Code of Criminal Procedure (CrPC), 1973, with the new Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, now taking its place. This statutory regime is built upon a fundamental dichotomy, classifying offences into either bailable or non-bailable categories. For bailable offences, enumerated in the First Schedule of the CrPC, bail is a matter of right for the accused, as provided under Section 436 of the CrPC and its corresponding provision, Section 478 of the BNSS.⁶ Conversely, for non-bailable offences, bail is not a right and is subject to the court's discretion (Section 480 of the BNSS).⁷

The judicial discretion to grant or refuse bail in non-bailable cases is guided by various factors, including the "nature and gravity of the offence". Section 437 of the CrPC (now Section 482

² India Const. art. 20(3).

³ India Const. art. 21.

⁴ Bharatiya Sakshya Adhiniyam, No. 24 of 2023, § 104 (India).

⁵ *Hussainara Khatoon v. Home Secretary, State of Bihar* AIR 1979 SC 1369 (India).

⁶ Bharatiya Nagarik Suraksha Sanhita, No. 45 of 2023, § 478 (India).

⁷ Bharatiya Nagarik Suraksha Sanhita, No. 45 of 2023, § 480 (India).

of the BNSS) outlines specific grounds for refusal, such as when the court has sufficient grounds to believe the person is guilty of an offence punishable by death or life imprisonment, or has a history of prior convictions for serious crimes. While Section 437 gives the power to subordinate courts, Section 439 (now Section 483 of the BNSS) grants special, and often broader, powers to the High Court and the Court of Session to grant or deny bail.

Landmark Judicial Pronouncements on Bail

The jurisprudence of bail in India is strongly influenced by a powerful metaphor - personal liberty is a "priceless treasure" and can only be curtailed by procedure established by law which must be Just, Fair and Reasonable. This phrase, far from being a mere rhetorical flourish, is an expression of an underlying philosophy of the Constitution that sees the freedom of the individual as a fundamental value of any civilised society. The concept establishes a basic principle that informs the whole structure of the law of pre-trial detention. The landmark judgment in *Gudikanti Narasimhulu v. Public Prosecutor, A.P.*, has been the direct source of this judicial philosophy. The case was a bail petition of people who was acquitted by a court of trial but was later convicted by the court of appeal. Accused was under bail for his trial and was later on parole and wanted bail pending a statutory appeal to the Supreme court. The Court in its decision permitted the bail application. In a paragraph that has since become one of the most cited in Indian bail jurisprudence, Justice Iyer articulated the profound value of liberty. He asserted that the deprivation of personal freedom, whether temporary or long-term, is a "great trust" that the curial power must exercise with lively concern for the cost to both the individual and the community.⁸

While it was *Gudikanti Narasimhulu* provided the philosophical foundation for protecting liberty as a "priceless treasure," it was in the companion case of *State of Rajasthan v. Balchand* that Justice Krishna Iyer famously reduced this philosophy into a practical legal maxim. In that 1977 judgment, the Supreme Court granted bail to an accused person who had been convicted by the trial court, acquitted by the High Court of Rajasthan and was released on bail but state's appeal against the conviction was pending before the Supreme Court. The Court laid down the doctrine that "the basic rule is bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of

⁸ *Gudikanti Narasimhulu v. Public Prosecutor, A.P.* (1978) 1 SCC 240.

repeating offences or intimidating witnesses".⁹

These two judgments are not independent of one another but mutually reinforcing pillars of one judicial philosophy. *Gudikanti* gives a high-level constitutional justification as it roots the importance of liberty in Article 21 and the wider social and economic context. Balchand reduces this abstract principle to an operational rule, which offers a very clear criterion for the courts to follow when deciding on bail applications. The philosophical position of the value of personal liberty as a priceless treasure is the immediate source for the practical doctrine that bail should be the rule. This coherent approach guarantees that the denial of bail will not be an act of casualty but a rare occurrence and used for situations in which the integrity of the judicial process or the safety of the community is demonstrably in danger. This ruling stressed the importance of personal liberty, and ordered that bail should be granted unless there is a substantial risk that the accused will abscond, tamper with evidence, or intimidate witnesses.

In a key paragraph of that judgment, the Court addressed the very argument that the gravity of a crime should be a decisive factor. Justice Krishna Iyer, while acknowledging that *"It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of jail. So also the heinousness of the crime,"*¹⁰ immediately balanced this with other critical considerations. The Court emphasised that the prior conducts of the accused while on bail, his social circumstances and the fact that there was no indication that he was a "desperate character or unsocial element" were equally, if not more, important. The determination of the court to grant bail to the petitioner in this instance was not on the basis of discounting the seriousness of the offence, but on a consideration of the nature of the offence and balancing it against a proven history of not abusing the trust of the court and the absence of risk factors, relating to flight or intimidation of witnesses. This subtle approach, therefore, laid down that while the gravity and heinousness of a crime are relevant factors, they can never be the sole or sufficient grounds for denial of bail, especially in situations where there are other circumstances pointing towards a different conclusion, such as prolonged period of pre-trial detention.

A more contemporary and critical precedent is the *Sanjay Chandra v. CBI* case, which involved a multi-crore economic offence. The Delhi High Court had initially denied bail, largely on the

⁹ State of Rajasthan v. Balchand AIR 1977 SC 2447.

¹⁰ *Id.* at 8.

basis of the "magnitude of the offence" and the resultant public uproar.¹¹ The Supreme Court, in a landmark reversal, granted bail, asserting that pre-trial detention cannot be used as a punishment and that the investigation was already complete, thus minimizing the risk of tampering. The decision underscored that liberty should not be curtailed solely on the basis of a charge's severity.¹²

However, despite these foundational rulings, the principle of "bail is the rule" appears to be systematically eroded in practice. The proliferation of special laws, such as the Unlawful Activities (Prevention) Act (UAPA)¹³, the Narcotic Drugs and Psychotropic Substances Act (NDPS)¹⁴, and the Prevention of Money Laundering Act (PMLA)¹⁵, has introduced explicit provisions for denial of bail based on the nature and severity of the charge, effectively reversing the presumption of innocence.¹⁶ This, combined with judicial pronouncements that the Balchand principle "does not apply to hardened criminals and gangsters," creates a legal landscape where the exception is increasingly becoming the rule.¹⁷ The "gravity of offence" serves as a de facto tool for expanding this exception into general criminal law, causing the foundational ideal to be turned on its head.

The POCSO Act's stringent framework paradoxically jeopardizes the very principle of innocence it was designed to protect. Section 29 establishes that an accused person is presumed to have committed the offence once a charge is framed, unless they can successfully rebut this presumption.¹⁸ Similarly, Section 30 presumes a culpable mental state on the part of the accused for certain offences.¹⁹ This statutory presumption of guilt, coupled with Section 42A, which gives the POCSO Act precedence over the Code of Criminal Procedure (CrPC), effectively reverses the burden of proof.²⁰ The accused is now tasked with proving their innocence even before the trial begins, creating an "uphill task" for them to secure bail. Karnataka High Court

¹¹ Bhandari, Vrinda. "Inconsistent and Unclear: The Supreme Court of India on Bail." NUJS Law Review 6, no. 3 (2013): 549–558. <https://nujlawreview.org/.../07vrindabhandari.pdf>.

¹² Sanjay Chandra v. CBI AIR 2012 SC 830.

¹³ Unlawful Activities (Prevention) Act, No. 37 of 1967, § 43D(5) (India).

¹⁴ Narcotic Drugs and Psychotropic Substances Act, No. 61 of 1985, § 37 (India).

¹⁵ Prevention of Money Laundering Act, No. 15 of 2003, § 45 (India).

¹⁶ Chitkara, Radhika (2024) "The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws," National Law School of India Review: Vol. 35: Iss. 1, Article 8. DOI: 10.55496/RUWG4640 Available at: <https://repository.nls.ac.in/nlsir/vol35/iss1/8>.

¹⁷ Bail Not a Right for Hardened Criminals, Clarifies Top Court, Times of India (Sept. 5, 2025), <https://timesofindia.indiatimes.com/india/bail-not-a-right-for-hardened-criminals-clarifies-top-court/articleshow/118224787.cms>.

¹⁸ Protection of Children from Sexual Offences Act, No. 32 of 2012, § 29 (India).

¹⁹ Protection of Children from Sexual Offences Act, No. 32 of 2012, § 30 (India).

²⁰ Protection of Children from Sexual Offences Act, No. 32 of 2012, § 42A (India).

in *Mohiddin v. State of Karnataka*, denied bail despite significant delays in recording the victim's evidence. The court's rationale was that a mere procedural delay could not diminish the seriousness of the allegations or override the legal presumptions established by the POCSO Act.²¹

This trend of stringent application of bail provisions in cases involving grave offences which involves concerns related to security of state such as in the cases involving the charges of offences under special laws such as UAPA, PMLA, NDPS is further cemented by the Supreme Court's decision in *Gurwinder Singh v. State of Punjab & Another* (2024), which dealt with charges under the Unlawful Activities (Prevention) Act (UAP Act). The Court, in this case, upheld the rejection of a bail application, noting that the principle of "bail is the rule, jail is the exception" does not apply to UAP Act cases. Instead, the Court found that the bail provision under UAP Act Section 43D(5), with its "*shall not be released*" clause, indicates legislative intent for bail should be the exception and gaol should be the rule. The Court held that in such cases, the primary test is whether there is a justification to reject bail, which is satisfied if the court concludes that there are reasonable grounds to believe the accusations are *prima facie* true, and that this test is of a "*lighter*" standard than the "*strong suspicion*" required for a discharge application. Critically, the Court held in paragraph 33 of its judgment that the "*Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail*".²² This judgment reinforces the idea that in cases of grave offences, particularly those under special acts like the UAPA, the gravity of the offence and the *prima facie* suspicion of the accusation can be a sufficient ground for denial of bail, irrespective of the accused's period of incarceration.

The tension between an accused's right to liberty and the gravity of their alleged offence was recently highlighted in the Supreme Court's split verdict in *Mohd. Tahir Hussain v. State of NCT of Delhi* (2025).²³ The petitioner, an accused in multiple Delhi riot cases, sought interim bail to campaign for an election. Justice Pankaj Mithal, in his opinion, rejected the plea, arguing that the right to campaign is neither a fundamental nor a statutory right and that granting bail for this purpose would open a "Pandora's box" and lead to a flood of litigation. He also reasoned that such a release could lead to witness tampering, as the alleged crimes

²¹ *Mohiddin v. State of Karnataka* 2017 SCC OnLine Kar 5687.

²² *Gurwinder Singh vs. State of Punjab and Ors.* 2024 INSC 92.

²³ *Mohd. Tahir Hussain v. State (NCT of Delhi)*, 2025 SCC OnLine SC 135.

occurred in the locality where the petitioner was campaigning, and that long incarceration is a consideration for regular bail, not a temporary one.

Conversely, Justice Ahsanuddin Amanullah's dissenting opinion granted interim bail, emphasizing that the "*magnitude and gravity of the offence alleged are not grounds, in and by themselves, to deny bail,*" especially when the trial is prolonged.²⁴ He relied on the jurisprudence of the Supreme Court in *Union of India v. K.A. Najeeb* and *Javed Gulam Nabi Shaikh v. State of Maharashtra*, which held that statutory bail restrictions do not oust the power of constitutional courts to grant bail on grounds of infringement of the right to personal liberty under Article 21.

Hon'ble Supreme Court, in *Union of India v. K.A. Najeeb*, created a crucial judicial exception to the UAPA's bail restrictions. The Court held that a constitutional court retains the power to grant bail if a person's fundamental rights are being violated, for instance, due to prolonged incarceration and the lack of a speedy trial. This principle gives accused persons in cases of special law a legal hook to seek relief on a human rights basis so that the statutory rigours of laws such as the UAPA are "melted down".²⁵ The application of this principle was recently observed in *Javed Gulam Nabi Shaikh v. State of Maharashtra*, where the Supreme Court granted bail to an accused under the UAPA who was in jail for four years with no progress in the trial. The Court reiterated that if the state cannot ensure speedy trial there should not be any opposition to the grant of bail on the ground that the crime is serious, since Article 21 applies regardless of the nature of the crime.²⁶

The same jurisprudential conflict was most recently at the forefront of the judgement passed by the Delhi High Court in the case of *Sharjeel Imam & ors. v. State of NCT of Delhi*. In its decision, the court refused bail to Sharjeel Imam, Umar Khalid and other co-accused in Delhi riots case, expressly holding that the long period of incarceration of the accused was not sufficient to seek bail in a case of such "gravity, severity, and the magnitude of the conspiracy." The court concluded that the allegations against the appellants, including delivering "inflammatory speeches on communal lines to instigate a mass mobilization," were "prima facie grave in the entire conspiracy." It also dismissed the plea of parity with other co-accused who had been granted bail, asserting that the role of the appellants was "distinct" and "prima

²⁴ *Id.* at 22.

²⁵ *Union of India v. K.A. Najeeb*, (2021) 3 SCC 71.3

²⁶ *Javed Gulam Nabi Shaikh v. State of Maharashtra*, (2024) 9 SCC 813.

facie grave".²⁷ The judgment, therefore, serves as a contemporary example of how judicial discretion, when faced with an offence of perceived high gravity, can justify prolonged pre-trial detention and override the principle of liberty as the rule, despite the long incarceration period of the accused and the pending status of the trial.

The 'Gravity of Offence' Prong: A Jurisprudential Critique

The Constitutional Fallacy: Punishment Before Conviction

The primary constitutional flaw in the "gravity of offence" prong is its direct link to a presumptive finding of guilt.

Under the Code of Criminal Procedure (CrPC), the default legal position is a strong presumption of innocence. This is articulated by the maxim, "bail is the rule, jail is the exception". In cases of bailable offenses, bail is a matter of right for the accused. Even in non-bailable offenses, which constitute the majority of serious crimes, courts retain discretion to grant bail based on a variety of factors, including the nature of the offense, the criminal history of the accused, and the likelihood of witness tampering or absconding. The primary purpose of pre-trial detention under this regime is to secure the accused's presence for trial, not to inflict punishment.

In stark contrast, special criminal laws, designed to combat specific threats such as terrorism, drug trafficking, and money laundering, establish an antithetical bail regime where "jail is the rule and bail is the exception". The most prominent example is the Unlawful Activities (Prevention) Act, 1967 (UAPA), which creates a procedural architecture distinct from the CrPC.

The cornerstone of the UAPA's stringent bail regime is Section 43D(5), which acts as an effective bar to bail.⁴ This provision mandates that a court must refuse bail if it has "reasonable grounds to believe that the allegations against the accused are *facie* true".⁴ This *prima facie* standard represents a fundamental jurisprudential departure. It shifts the focus of the bail determination from the needs of the investigation and trial to a preliminary assessment of the accused's guilt. Similarly, the Narcotic Drugs and Psychotropic Substances Act (NDPS Act) imposes a stringent condition precedent for bail under Section 37, requiring the accused to

²⁷ *Id.* at 1.

satisfy the court that there are "reasonable grounds to believe that they are not guilty" and that they are not likely to commit another offense while on bail.⁸ This effectively reverses the burden of proof, compelling the accused to demonstrate their innocence at the pre-trial stage to secure their liberty.

These provisions reveals a fundamental contradiction at the core of bail jurisprudence: it allows a pre-trial belief in guilt to be the basis for a pre-trial denial of liberty. This practice has been noted to ignore the "cardinal principle that the offence is yet to be proved". When severity of the charge is the only or main reason to deny bail, then it is a de facto punishment before the actual trial is over.

The cornerstone of a just criminal justice system is individual liberty. This principle is put to the most stringent test in the case of grave offences where the state's interest in security of the state and public order and the accused's fundamental right to Liberty are in direct conflict. The central jurisprudential question is as to the degree to which pre-conviction incarceration may be justified, especially if it is prolonged, and whether the seriousness of the alleged offence may be a sufficient basis for such deprivation of liberty.

The right to a speedy trial has not been expressly mentioned in the Constitution of India, but has been firmly established as an integral part of the fundamental right to life and personal liberty guaranteed by Article 21. This expansive interpretation first took root with the Supreme Court's landmark decision in *Maneka Gandhi v. Union of India*, which held that any procedure for depriving a person of their life or liberty must be "*just, fair, and reasonable*".²⁸ This liberal approach paved the way for the recognition of a speedy trial as an implicit but vital constitutional right.

The true genesis of this right, and its link to pre-trial detention, can be traced to the seminal judgment in *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar*. In this case, the Supreme Court unequivocally declared that a speedy trial is "*of the essence of criminal justice*" and that any "*delay in trial by itself constitutes denial of justice*".²⁹ The Court reasoned that for a legal procedure to be considered fair under Article 21, it must ensure a "*reasonably expeditious trial*" to determine the guilt of an accused. This foundational ruling established that

²⁸ *Maneka Gandhi v. Union of India*, 1978 SCR (2) 62.

²⁹ *Id.* at 5.

the right to liberty is a constitutional obligation of the state and is not to be defeated by procedural inefficiency or prolonged delay.

This principle was further solidified and developed in *Abdul Rehman Antulay & Ors v. R.S. Nayak & Anr.* The Supreme Court in this case affirmed that the right to a speedy trial encompasses all stages of the criminal process, including investigation, inquiry, trial, appeal, revision, and re-trial.³⁰

The co-existence of these two bail regimes i.e. a regime where bail is the rule and jail is the exception and the other regime where jail is the rule and bail is the exception, creates a fundamental jurisprudential conflict. Although the Supreme Court has tried to harmonise these conflicting approaches, there is a functional dissonance. In *Satender Kumar Antil v. Central Bureau of Investigation* (2022), the Court categorized offences to streamline the bail process and, crucially, extended the constitutional mandate of a speedy trial to cases under special laws. The judgment explicitly linked the severity of the law to a heightened obligation for swift adjudication, stating that "*more the rigor, the quicker the adjudication ought to be*".³¹

However, the reality on the ground, as noted by the Punjab and Haryana High Court, is that lower courts often exhibit "*hesitation or reluctance*" in granting bail, even where it should be the norm, leading to a significant backlog of bail applications in higher courts.³² This shows a failure of the system whereby the fear of statutory prohibition and the seriousness of the offence often override the constitutional mandate of liberty. The two regimes instead of being distinct and parallel, are in a constant and unresolved tension. This turns the exercise of judicial discretion into a lottery, where a person's liberty is dependent upon the whim of a judge's interpretation of a law rather than a clear, consistent, legal standard.

While the gravity of an offence is a relevant factor, its use as the singular justification for prolonged, pre-conviction incarceration is a practice that subverts the foundational principles of justice. This approach gives rise to the "*process as punishment*" paradigm, where the legal process itself, through indefinite detention, becomes the penalty, regardless of the eventual trial outcome. This paradigm is best exemplified by the UAPA, which is infamous for its low

³⁰ Abdul Rehman Antulay & Ors v. R.S. Nayak & Anr., AIR 1988 SC 1531.

³¹ Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 5.

³² Pretrial Incarceration Cannot Be Replica of Post-Conviction Sentencing, Punjab and Haryana HC Says, The Hindu (Sept. 10, 2025), available at <https://www.thehindu.com/.../pretrial-incarceration-cannot-be-replica-of-post-conviction-sentencing-punjab-and-haryana-hc-says/article69004146.ece>.

conviction rates, yet achieves its objective of prolonged detention without a verdict. An analysis of the data reveals that in 2022, 98.78% of prisoners accused under UAPA were undertrials, signifying that they were effectively serving punitive detention without having been convicted. The law accomplishes this through its stringent procedural provisions, particularly Section 43D(5), which shifts the stage of guilt-determination from the trial to the pre-trial stage. This practice violates a "thick" conception of the presumption of innocence (PoI), which holds that PoI is not merely a rule of evidence for the trial but a fundamental principle that protects individuals from unjust deprivation of liberty throughout the entire criminal process. The UAPA's bail provisions, by creating a near-insurmountable barrier to bail based on a preliminary *prima facie* belief in guilt, violate this fundamental principle. Such a system allows the executive to justify detention based on a lowered standard of evidence, effectively circumventing the "*beyond reasonable doubt*" standard required at trial.³³

Furthermore, using the gravity and seriousness of an offence as the primary justification for prolonged incarceration often serves as a disguise for systemic inefficiency and prosecutorial delay. The fact that the Supreme Court has had to repeatedly intervene and grant bail due to inordinate delays, despite the seriousness of the charges, demonstrates that the state's inability to conduct a speedy trial is a greater injustice than the severity of the alleged crime. The gravity of the offence becomes a proxy for an unlimited detention period, effectively bypassing the constitutional mandate of a speedy trial and transforming the pre-trial phase into an indefinite punishment without conviction.

The Doctrine of Proportionality and its Violation

The application of the "gravity of offence" test can be comprehensively critiqued using the doctrine of proportionality, a principle that the Supreme Court has consistently applied to state actions that infringe on fundamental rights, as established in judgments like *K. S. Puttaswamy v. Union of India*. This doctrine requires state action to pass a four-pronged test: it must be sanctioned by law, have a legitimate aim, be proportionate to the need, and have procedural guarantees against abuse.³⁴

³³ Chitkara, Radhika (2024) "The Trials of Bail: Pre-Trial Presumption of Innocence Under the Unlawful Activities (Prevention) Act, 1967 and General Criminal Laws," National Law School of India Review: Vol. 35: Iss. 1, Article 8. DOI: 10.55496/RUWG4640 Available at: <https://repository.nls.ac.in/nlsir/vol35/iss1/8>.

³⁴ Justice K.S.Puttaswamy(Retd) vs Union Of India, 2019 (1) SCC 1.

The argument that the gravity of an offence is likely to induce an accused to evade justice and, therefore, must be a primary factor in a bail decision, is a common justification. However, this reasoning stands in direct conflict with Article 21 when the state fails to complete the trial in a time bound manner, specifically when pre conviction incarceration runs in several years. The Himachal Pradesh High Court and Bombay High Court has explicitly held that "gravity alone cannot be a decisive ground to deny bail" and that courts must balance competing factors.³⁵ The Supreme Court, in *Sanjay Chandra v. CBI*, reversed a High Court order that had denied bail largely due to the "magnitude of the offence," asserting that pre-trial detention could not be used as a punishment and that the investigation was complete, minimizing the risk of tampering. This judgment established that for a state action to be proportionate, it must be the "least restrictive means necessary" to achieve its objective. In many cases, less intrusive measures, such as passport surrender, reporting conditions, or imposing sureties, are sufficient to address legitimate concerns of flight risk, witness intimidation, or evidence tampering. When these alternatives are overlooked in favour of outright detention, the action fails the test of proportionality. This can be likened to using a "cannon to kill a swallow," a phrase that underscores the need for a balanced and measured approach.

Tracing its origins to the German constitutional courts in the 19th century, the principle was expressly recognized as part of Indian review jurisprudence in the celebrated *Puttaswamy* case. The doctrine's objective is to ensure that a public authority maintains a "sense of proportion" when determining the means to achieve a particular goal, and is aptly summarized by the comment that "the police may not kill a swallow with a cannon".

A significant evolution of this standard was delivered by the Supreme Court in the judgment of *Ramesh Chandra Sharma v. State of UP*, which, relying on *Puttaswamy* and *Gujarat Mazdoor Sabha v. State of Gujarat*³⁶, expanded the proportionality test to include a fifth prong: that the state should provide sufficient safeguards against the possibility of abuse of its rights-infringing interference.³⁷ In the context of bail, this principle is of paramount importance because it recognizes that abuse does not happen outside the law but can be "baked into" it,³⁸

³⁵ Rohit vs. State Of Himachal Pradesh, MANU/HP/1031/2020; Vikas Chandrakant Patil v. The State of Maharashtra 2025:BHC-AS:21768.

³⁶ Gujarat Mazdoor Sabha v. State of Gujarat, AIR 2020 SC 4601.

³⁷ Ramesh Chandra Sharma v. State of UP, 2023 SCC OnLine SC 162

³⁸ Lakra, Rudraksh, *Proportionality's Fifth Prong – A Reassessment* (Mar. 7, 2023), *Constitutional Law and Philosophy*, available at SSRN: <https://ssrn.com/abstract=5071376>; Gautam Bhatia, *Proportionality's Fifth Prong*, *Constitutional Law and Philosophy* (Feb. 23, 2023), <https://indconlawphil.wordpress.com/2023/02/23/proportionalitys-fifth-prong/>.

placing the burden on the State to affirmatively mitigate this potential for abuse within the legal framework itself.

Furthermore, the subjective nature of "gravity," often heavily influenced by the charge mentioned in the First Information Report (FIR), undermines the fourth prong of the test i.e. procedural guarantees. This subjectivity can lead to arbitrary outcomes, especially when a judge's mind is "weighed heavily" by the offence's nature, ignoring the cardinal principle that the offence is yet to be proven. The current system, therefore, risks blurring the critical distinction between bail and sentencing, inappropriately applying a sentencing consideration to a pre-trial determination of liberty. The Supreme Court has repeatedly emphasized that pre-trial detention should not be a punitive measure but rather a means to ensure the accused's appearance at trial.

A Comparative Analysis of Bail Systems

To understand the systemic flaws in the Indian model, it is instructive to compare its approach with those of other common law jurisdictions. While the consideration of an offence's gravity is a common factor in bail decisions globally, the method of its application varies significantly.³⁹

The Indian Model

The Indian model is characterized by its dichotomous classification of offences, a principle maintained in the BNSS, and the broad judicial discretion afforded to courts, which is heavily influenced by the "nature and gravity" of the offence. While the system seeks to uphold the "bail, not jail" principle, it is frequently criticized for its reliance on monetary sureties and bonds, which perpetuate socioeconomic disparities. This can lead to the disproportionate incarceration of poor and marginalized individuals who cannot afford to post bail. The system's primary critique is its failure to operationalize the Balchand dictum effectively, resulting in a high percentage of undertrial prisoners who are detained for reasons unrelated to genuine flight risk or danger.

³⁹ Parvinder & Dr. Ramveer Singh, *A Comparative Study Of Bail Jurisdiction In India, UK And USA*, 6 J. for ReAttach Therapy & Dev. Diversities 1006 (Aug. 2023), Available at: <https://jrtdd.com/index.php/journal/article/download/3050/2270/4549>.

The United States

The U.S. bail system operates under a dual federal-state framework, with the Eighth Amendment prohibiting excessive bail. The central debate revolves around cash bail and its disproportionate impact on the poor, a practice that has been widely criticized. While some jurisdictions still rely on a monetary system, a growing number are moving toward a risk-based assessment model that uses algorithms and other tools to evaluate a defendant's risk of flight or reoffending. This shift aims to mitigate the socioeconomic bias inherent in cash bail. Notably, empirical research has challenged the claims that eliminating cash bail leads to an increase in crime, finding such assertions "unfounded" and pointing out that non-monetary release is often only available for minor offences.

The Canadian Model

Canada's system is widely considered a more balanced and constitutionally aligned approach. Guided by the Canadian Charter of Rights and Freedoms, which guarantees the right to reasonable bail, and the Criminal Code, the system operates with three main purposes: ensuring court appearance, maintaining public safety, and maintaining public confidence. Canada employs the "ladder principle," which mandates that judges impose the least restrictive conditions necessary to address the risks posed by the accused.⁴⁰ While the gravity of an offence is considered, it is done within a structured framework that requires a "reverse onus" only for specific, serious crimes, shifting the burden to the accused to show why they should be released.

The United Kingdom

In the UK, the bail system is governed by the Bail Act 1976 and emphasizes conditional release pending trial.⁴¹ Similar to other jurisdictions, courts assess factors such as the nature and gravity of the offence, the defendant's criminal history, and the likelihood of reoffending or absconding. The UK has also promoted alternatives to pre-trial detention, such as electronic monitoring and community-based supervision, to reduce unnecessary incarceration.

⁴⁰ Fact Sheet: The Bail Process - Department of Justice Canada, accessed September 5, 2025, <https://www.justice.gc.ca/eng/cj-jp/bail-caution/index.html>.

⁴¹ Bail Act 1976, c. 63 (UK).

Policy Justifications and Practical Implications

The Policy Argument for Considering Gravity

Proponents of the "gravity of offence" as a primary factor for bail denial argue that it is a necessary tool to maintain public confidence in the justice system. The argument posits that releasing an individual accused of a heinous crime could erode faith in the state's ability to protect its citizens and administer justice. Furthermore, it is argued that a severe offence implies a higher risk of the accused absconding due to the potential for a lengthy prison sentence, or that the accused poses a continuing danger to the community. The Supreme Court, in cases involving "hardened criminals," has explicitly acknowledged that the "bail is the rule" principle may not apply, citing the genuine challenge of witness intimidation.

The Rebuttal: Social and Empirical Fallout

Despite these policy justifications, the practical implications of an overemphasis on a charge's gravity are severe. The data reveals a grim reality: nearly three-fourths of India's prison population consists of undertrial prisoners. This stark statistic provides compelling evidence that pre-trial detention has become the default, a direct refutation of the Balchand dictum. Furthermore, the argument that strict bail laws deter crime is not supported by empirical evidence. Research on bail reform in the United States, for instance, has shown that claims of increased crime rates following the adoption of cashless bail are unfounded, suggesting that punitive pre-trial detention is not an effective crime deterrent.

The undue reliance on the "gravity of offence" creates a vicious cycle of pre-trial detention that disproportionately affects the poor and marginalized. An individual from a vulnerable background, arrested on a serious charge, may be unable to afford the monetary surety required for bail. This prolonged detention, irrespective of the final verdict, can lead to financial strain, loss of employment, and profound social stigma. The process itself becomes a form of punishment, making it more difficult for the accused to prepare a defence and sometimes even leading to a coerced guilty plea just to secure release. This subverts the constitutional promise of equal justice and perpetuates a system where liberty is contingent on financial means rather than legal merit.

Recommendations for a Constitutional Bail Framework

The jurisprudence of bail in India requires a fundamental shift to align with its constitutional

principles. The following recommendations propose a more robust and constitutionally sound framework:

Legislative Reforms: Shifting from 'Gravity' to a Risk-Based Model

A key legislative reform would be to amend the CrPC and BNSS to reframe the "gravity of offence" from a standalone factor for bail denial to a contextual element within a structured risk-based assessment. Drawing inspiration from Canada's "ladder principle", the law should prioritize the least restrictive means of securing an accused person's appearance and ensuring public safety. The primary focus of a bail decision should be on the accused's risk of flight, witness intimidation, and reoffending, as opposed to the unproven severity of the crime itself. The law should mandate a holistic consideration of the accused's background, community ties, and past conduct.

Judicial Guidelines: Mandating Detailed, Rationalised Orders

The judiciary must be guided by a new set of principles that emphasize the mandatory recording of detailed and rationalised reasons for any bail denial. A court order denying bail should not simply cite the gravity of the offence but must explicitly justify why less restrictive conditions are insufficient and why the accused poses a substantial and demonstrable risk to the integrity of the judicial process or public safety. This would serve as a crucial procedural safeguard, mitigating the subjectivity that has led to arbitrary bail outcomes.

Procedural Safeguards

To prevent the process from becoming the punishment, as highlighted in *Hussainara Khatoon*, it is essential to institutionalize a system for mandatory and speedy bail hearings. This would ensure that an individual is not subjected to prolonged and unnecessary detention. Furthermore, the system should explore the expansion of non-monetary conditions for release, such as personal recognizance bonds, electronic monitoring, and community-based supervision. Such measures, as are being experimented with in other jurisdictions, can effectively manage risk without the punitive and discriminatory impact of cash-based bail systems.

Conclusion

The "gravity of offence" as a primary ground for bail denial is a relic of an outdated legal

mindset that undermines the very constitutional values it purports to uphold. It treats a mere allegation as a finding of guilt, transforming pre-trial detention into a pre-conviction punishment and disproportionately impacting the poor and marginalized. This practice stands in stark contrast to the core tenets of liberty and the presumption of innocence. While concerns for public safety and judicial integrity are legitimate, they must be addressed through constitutionally sound, proportionate, and risk-based measures.

The continued erosion of the Balchand dictum, coupled with the grim reality of India's undertrial population, necessitates a comprehensive overhaul of the bail system. The path forward lies in legislative reforms that replace a punitive focus on unproven charges with a rational, risk-based model. It also demands a more meticulous judicial approach that mandates transparency and accountability in every bail decision. Ultimately, ensuring that "bail is the rule, jail is the exception" is not just a legal ideal but a lived reality for all citizens is a constitutional imperative, and this requires a fundamental challenge to the uncritical application of the "gravity of offence" as a factor for the curtailment of liberty.