
BAIL: EVOLUTION FROM STATUTORY RIGHT TO CONSTITUTIONAL RIGHT

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ABSTRACT

Bail is the cornerstone of a criminal legal system that preserves personal liberty and weighs against the interest of justice; therefore, it occupies a significant importance in any given criminal legal system. The concept of bail is undergoing contextual evolution, shaped by the shifting socio-legal imperative of diverse jurisdictions over time. Similarly, the notion of bail has undertaken a paradigm shift in the Indian criminal jurisprudence, expanding from a statutory inception, to constitutional relevance and secured to the constitutional values and principles of liberty, dignity, and fair trial. This research paper unearths the growth of bail principles in India, examining its evolution from the colonial-era statutory framework to its current constitutional footing. The study observes how, by judicial interpretation, Article 21 of the Constitution has raised bail from a procedural defence to an integral element of the right to life and personal liberty. The paper studies various landmark judicial decisions, including *State of Rajasthan v. Balchand*, *Maneka Gandhi v Union of India*, and *Hussainara Khatoon v. State of Bihar*, which have shaped the constitutional scope of bail. By adopting an interdisciplinary methodological approach which combines doctrinal examination, jurisprudential construction, and constitutional interpretation, the research paper explains how the judiciary has revolutionarily raised the maxim 'bail is the rule, jail is the exception' heretofore confined to statutory requirement to the level of a constitutional right protected mechanism. The findings illustrate that bail was initially codified as a statutory right in the Criminal Procedure Codes enacted by the British Government India(Criminal Procedure Codes of 1872,1882, 1898) as well as the Indian parliament (as recommended by 41st Law Commission Report CrPC 1973 and BNSS 2023), and the action of the judiciary through a judicial intervention in the guise of affirmative interpretation has interpreted it as an fundamental right under Article 21, thus supporting the beacon of personal liberty and human dignity.

Keywords: Bail, Constitutional Right, Article 21, Statutory Right, Judicial Evolution, Personal Liberty, Criminal jurisprudence.

1. Introduction

Bail serves as the foundation of the criminal justice system, balancing the rights of an accused with the interests of justice and society. It ensures that no person should get convicted unless he is proven guilty. The term bail is derived from the French verb *baillier*, meaning to give or deliver.¹ The term bail has not been defined in any of the Criminal Procedure Codes, which were enforced in India from 1872 to 1873, but the term bail has been used in various CrPC codes several times and grouped them in different sections. It is only 2023 in BNSS under section 2(1) (b),² the term bail has been statutorily defined, therefore, bail remains one of the vital concepts of the criminal justice system, in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution, along with the protection of human rights as prescribed under international treaties and covenants.³ Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing such a person from tampering with evidence or witnesses.⁴ In India, in criminal jurisprudence, bail is a doctrinal hinge balancing personal liberty of the individual and societal security. In the Indian legal system, the evolution of bail jurisprudence is paradigmatic, and therefore, it moves beyond the colonial statutory standpoint and acquires constitutional importance by virtue of judicial activism under Article 21 of the Constitution.⁵ Hence, this revolutionary approach highlights one of the most significant progresses in Indian criminal jurisprudence, highlighting the judiciary's commitment to balancing personal liberty while simultaneously safeguarding the effective administration of justice.

The evolution of bail from a statutory right into a constitutional right is more a revolution because it comprehends of the definition of freedom, liberty and state authority rather than a technical novation of the law. This revolution is achieved through judicial activism, which has construed Article 21 beyond the literal meaning of its original scope so that it could accommodate a category of criminal procedural rights, such as bail. The origin of bail dates back to medieval times, when the first known drafted constitution came to be enacted in the year 1215 by King John of England and was referred to as "Magna Carta" as we know it today.

¹ Shivani & Seema Devi, *The Law of Bail in India: An Analytical Judicial Perspective*, 11 Int'l J. Creative Res. Thoughts e954 (2023).

² Bharatiya Nagarik Suraksha Sanhita, § 2(b) (2023)

³ Id at 2

⁴ Subhagya Manuj Kumar Dubey & Priya Ranjan, *Revisiting the Efficacy of Bail Provisions in India: Empirical Exercise to Assess the Ground Realities of Bail Jurisprudence*, 24 Supreme Amicus 1 (2021)

⁵ India Const. art. 21

The genesis of the bail can be extracted from the clause 39 of Magna Carta, the simple translation of which reads as “No free man shall be seized or imprisoned, or stripped of these rights or possessions or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him or send others to do except by the lawful judgment of equals or by the law of land”⁶ idea of bail is traceable to the English legal system under colonial rule. On a careful scrutiny of this clause, we can relate this provision to various provisions of bail as provided in the different Criminal Procedure Codes of 1861, 1872, 1898, and 1973, which have made bail a mere procedural tool intended to secure the presence of the accused at trial proceedings. The colonial legislations treated bail as an honour and not a right⁷, and with limited judicial discretion in its grant or denial

In the post-independence period, particularly after the enactment of the Constitution of India in 1950, the notion of bail witnessed a steady change. The Indian Constitution provided a conducive atmosphere for the growth of bail jurisprudence in the Indian legal system. The insertion of Article 21 in the III parts of the Indian constitution, which guaranteed the right to life and personal liberty, laid down a constitutional foundation for re-visioning bail as a fundamental right rather than a statutory provision enacted by the colonial enactment. Thus, we see a transformative shift under Article 21 of the Indian Constitution for the understanding of bail jurisprudence. The original scope of Article 21, limited to protection against arbitrary executive actions, however, this limited approach underwent substantial expansion through judicial underpinnings, finding its culmination in the historic judgment in *Maneka Gandhi v. Union of India*,⁸ this landmark judgment legitimized the principle that the procedure established by law must be just, fair, and reasonable⁹, thereby paving the way forward for constitutional scrutiny of criminal procedure.

The codification of the Code of Criminal Procedure, 1973, which was enacted by the recommendation of the 41st Law Commission Report¹⁰, ushered in a paradigm shift alongside the reformation of bail laws in India. The Code of 1973 inserted several liberal provisions, including anticipatory bail under section 438, thus providing a more liberal approach towards personal liberty, which assisted the judiciary in developing a more extensive understanding of

⁶ Supra at 2

⁷ Kellen R. Funk & Sandra G. Mayson, “*Bail at the Founding*,” Harvard Law Review, Vol. 137, p. 1816 (2024)

⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

⁹ Id. at 264

¹⁰ Law Commission of India, 41st Report: The Code of Criminal Procedure, 1898 (1969)

bail as a constitutional right.

All individuals are entitled to life and freedom, an unalienable right as firmly stated in the U.S Declaration of Independence (1776).¹¹ Thus, the ancient concept, "bail is the right jail is an exception," eloquently stated by Justice V. R Krishna Iyer in *Balchand's*¹² In this case, it squarely falls under the rubric of the right to life as a basic or fundamental right; hence, the principle of bail goes hand in hand with the right to life and not just a legislative right. The overuse of pre-trial detention, more vividly among undertrials, highlights a systematic flaw, with 70% of India's prison population comprising undertrials as per the National Crime Record Bureau (NCRB) data from 2023.¹³ This has necessitated judicial intervention by progressive judgments and protection under Articles 19, 21, and 22 of the Indian Constitution. This scenario makes the bail provisions in India, in reality, flawed with procedural inequalities, arbitrariness, socio-economic disparities, and selective judicial discretion. Further failure of Indian legislation to define a comprehensive definition of "bail" in legal terms has resulted in reliance on judicial interpretation and discretion.

Because there aren't any clear norms for how bail should be decided by the courts, as a result, courts across the country handle bail cases differently, more vividly when it comes to serious and financially related offences. These limitations in Indian legislation have led many individuals to be chained in jail for long periods even before their trial, which has resulted in prison overcrowding and weakened the basic idea that everyone is innocent until proven guilty.¹⁴

Therefore, this research paper studies how bail has evolved from a statutory provision enacted in colonial times to a constitutionally protected right, analysing its historical roots, procedural inequalities, arbitrariness, socio-economic disparities, and inconsistent judicial discretion. It addresses three research questions: How has bail transformed from a statutory right under colonial criminal procedure codes to a constitutionally protected fundamental right under Article 21 of the Indian Constitution? What role has judicial interpretation played in shaping the constitutional implications of bail in Indian criminal jurisprudence? What are the contemporary challenges and limitations in implementing bail as a constitutional right within

¹¹ *The Declaration of Independence* para. 2 (U.S. 1776).

¹² *Balchand v. State of M.P.*, (1977) 4 SCC 198, 200

¹³ National Crime Records Bureau, *Crime in India – 2023* (Ministry of Home Affairs, Govt. of India 2023)

¹⁴ Dr. Rubina Khan & Shivanshu Katare, *Towards A Uniform Bail Code: The Role Of New Guidelines In Shaping A Balanced Indian Criminal Justice System*, INT' L J. LEGAL & L. RES. (2023)

India's criminal justice system? The research objectives are: Analyse the evolution of bail from a statutory mechanism to a constitutional entitlement in Indian jurisprudence. Examine landmark judicial decisions that delineate bail's constitutional dimensions. To evaluate contemporary challenges in implementing constitutional bail rights and assess the balance between individual liberty and societal interests.

This research adopts doctrinal legal research with systematic analysis of constitutional provisions, statutory enactments, and judicial precedents, supplemented by historical analysis of colonial and post-colonial jurisprudential leanings and detailed case law analysis of the Supreme Court. The scope covers bail jurisprudence from the colonial period to the present day, encompassing constitutional provisions and landmark judicial decisions. Limitations include a research focus on Indian Jurisprudence with limited comparative studies and an emphasis on appellate court decisions over trial court practices.

2. LITERATURE REVIEW

1. Reen Vikramjit, *Proof of Innocence before Bail: Amendments required (1995)*¹⁵

The author, in the article, adopts the principle “Bail not Jail” to prove his point that presumption of Innocence, especially in NDPS, TADA, and Terrorist Special courts, in granting bail. The author's main emphasis is on how to bridge the gap regarding the stringency and flexibility of bail under section 437 CrPC in special cases. The author mainly grapples with the concern of how to reconcile statutory stringency and Constitutional concerns, thus linking the provision of bail to Article 21 of the Indian Constitution. The author apprehends a violation of fundamental special rights to life and liberty due to the stringency in granting bail in special cases. The author also highlights that if there is no reform in the field of granting bail in special cases, which eventually results in a risk of misuse and arbitrariness, it limits judicial discretion. Therefore, the author strongly proposes an amendment to bail provisions in order to establish his principle, that is, the presumption of innocence, by focusing on criminal associations and past conduct. The author adopts a doctrinal method that lacks empirical data and a comprehensive understanding of bail provisions in special cases. Though the author cries for legislative amendments, but does not suggest any concrete reform ideas to be adopted in reference to the bail provisions in special cases. The author concludes, expressing his

¹⁵ Vikramjit Reen, *Proof of Innocence Before Bail: Amendment Required*, 37 J. Indian L. Inst. 256 (1995)

apprehension which affects the very fabric of society with regard to the arbitrariness and misuse that is involved in granting bail in special cases, and calls for upholding constitutional values, which are enshrined in the Indian Constitution.

2. Sing Pradeep Kumar, Bail in Socio-Economic Crimes and Criminal Justice in India, (2020)¹⁶

The author in the article *Bail in Socio-Economic Crimes* tries to analyse critically the bail jurisprudence adopted by the Indian Criminal System in Socio-Economic Crimes. The author predominantly puts forth the view that, in case granting bail in Socio-Economic crimes, courts should not adopt the traditional way of granting bail. The objective of the author is to prove that bail is the rule, jail is the exception, is inadequate for socio-economic cases. Therefore, the author vehemently suggests that since such crimes seriously challenge the finances, health, and life of the members of society and society at large, the accused should not be released on bail very straightforwardly. The author points out crucial issues involved in Socio-Economic cases such as lack of availability of evidence, fear of abscondence, tampering with evidence, obstruction of investigation because of the status of the person. The author postulates a systematic bail legislation to curb the menace caused by socio-economic crimes. The author adopts a doctrinal method. The author proposes some reforms, such as specialized investigative agencies, stringent bail conditions, and speedy trials. The author in the article predominantly fails to consider the life and liberty mechanisms guaranteed by Article 21 of the Indian Constitution. The author concludes by calling upon the legislatures and judiciary to invent the right policy mechanism to curb the menace caused by the socio-economic crimes.

3. Kumar Bhupinder & Makkar Ashok Kumar: The Law relating to Bail in India: A Critical Analysis, (2021)¹⁷

The author in this article provides a general outline of the concept, history, types and judicial approaches to bail jurisprudence in the Indian criminal legal system. The objective of the author is to provide how the personal liberty of the accused is protected in Indian bail jurisprudence by referring landmark judgment of the Supreme Court. The main themes that are dealt by the author in this article are a historical perspective on bail, the types of bail with statutory

¹⁶ Pradeep Kumar, *Bail in Socio-Economic Crimes and Criminal Justice in India*, 6 Athens J.L. 225 (2020)

¹⁷ Bhupinder Kumar & Ashok Kumar Makkar, *The Law Relating to Bail in India: A Critical Analysis*, 12 Int'l Res. J. Mgmt. Social. & Human. 141 (2021)

provisions and judicial precedents, and the judicial interpretations of bail. The author expresses his regret that the execution of bail in the Indian legal system is inadequate, uncertain and unsatisfactory, thus calling for reform in bail jurisprudence, specifically in protecting the life and liberty promised by the Indian constitution. The author has adopted a doctrinal approach but limits his engagement with empirical data; the author fails to provide a comprehensive analysis of how the socio-economic factors affect bail access. The author raises the concern regarding arbitrary detention but does not provide any preventative measures that are required to safeguard the rights of individuals. The author focuses on monetary assurance in granting bail, but does not address the issue of non-monetary bail conditions. The author's call for reform lacks specific recommendations. The author concludes by calling for reform in Indian bail jurisprudence.

4. Rani Madhu & Parveen Rana: Right to Bail as a Constitutional Right (2022)¹⁸

The author of this article predominantly tries to establish that the right to bail is a fundamental right, pointing out its roots to Articles 19, 21, and 22 of the Indian Constitution and section 167(2) of the Criminal Procedure Code 1973(CrPC). The objective of the author is to prove that bail is a constitutional right through judicial precedents. The author valuably contributes to the concept of personal liberty, speedy trial, and free legal aid as a Constitutional right. The author highlights the importance of the judiciary in addressing agony faced by the indigent undertrials by analysing the landmark judgments pronounced by the courts (Hussainara Khatoon, M.H. Hoskot, Maneka Gandhi, Moti Ram). The article touches on five important issues surrendered around the concept of bail firstly bail as a constitutional right articles (19,21, and 22), second the historical development of bail in ancient civilization like Greek and Roman empires and its further evolution in India and its final climax in the Crpc 1973, thirdly, types of bail and the statutory framework, fourthly connection of the bail, and free legal aid and its socio economic challenges with a special attention on article 21 and 39A here the author points out issues such as high proportion of undertrials special reference to Bihar prisons, lastly the critically analysis section 167(2) Crpc its effectiveness in realising speedy justice. The author tries to bring out socio-economic concerns that are attached to the provision of bail. The author lacks empirical research and comparative analysis on the topic of bail as a constitutional right. The author lacks novelty in presenting bail as a constitutional right, such as historical

¹⁸ Madhu Rani & Rana Praveen, *Right to Bail as a Constitutional Right*, 5 Int'l J.L. Mgmt. & Human. 352 (2022)

analysis, peer-reviewed journals, and contemporary scholarship. The author does not provide clear mechanisms to how to overcome the bail inequalities that are prevalent in Indian bail jurisprudence. The author concludes by emphasising the necessity of constitutional and statutory instruments in delivering justice to the marginalized section of society.

5. Sharma Prerna, Misuse of Bail Provisions in India, (2023)¹⁹

The author in the article analytically demonstrates the complexity that is attached to the bail jurisprudence in India. The objective of the author is to identify various misuse patterns from evidence tampering to political interference. The author points out the intricacies that are involved in balancing the right of the accused to protect his liberty guaranteed under Article 21 of the Indian Constitution and to safeguard societal interest as envisaged by the criminal code. The author provides a wide range of misuse of bail provision in India, beginning from the accused, the police personnel, the executives, the judicial officers, and the politicians. The author demonstrates this fact by giving apt case laws pronounced by the Indian Courts. At the end, the author provides a number of recommendations for reform in bail provision in Indian Criminal Jurisprudence, such as special bail legislation for checks and balances with regard to the accused, the Police Personnel, the Judicial Officers, the Politicians, the Advocates, and the monetary aspect of the bail bond. The author adopts a doctrinal method. The author lacks a non-empirical approach, and the reform proposals proposed are vague in nature, fails to provide an in-depth exploration of judicial precedents. The author concludes the need for reform in the misuse of the bail provision for the protection of individual liberty.

6. Dubey Subhagya Manuj Kumar, Ranjan Priya: Revisiting the efficacy of Bail Provisions in India: Empirical Exercise to Asses The Ground Realities of Bail Jurisprudence (2024)²⁰

The authors in this article attempt to demonstrate the effect of bail provisions in India. The author's main objective is to create awareness of how the bail provisions are partially operative due to public unawareness, economic barriers, and systemic inefficiencies. The authors in the article attempt to provide a comprehensive reality of the bail system in India. The authors in this article delve into important issues like public unawareness of bail provisions and provide

¹⁹ Prerna Sharma, *Misuse of Bail Provisions in India*, 6 Int'l J.L. Mgmt. & Human. 874 (2023)

²⁰ Subhagya Manuj Kumar Dubey & Priya Ranjan, *Revisiting the Efficacy of Bail Provisions in India: Empirical Exercise to Assess the Ground Realities of Bail Jurisprudence*, 24 Supreme Amicus 1 (2021)

demographic insights into awareness deficiency, court accessibility, post-bail challenges, and socio-economic issues like poverty, occupation, and arbitrary arrest. Through this article, the author points out the requirement of a paradigm shift or reform that is required in Indian bail jurisprudence, mainly in terms of comprehensive bail provisions, court accessibility, legal costs, and awareness regarding one's right to life and liberty connected with bail. The author adopts a combination of doctrinal and empirical research, but lacks specificity while calling for reform; the article further lacks detailed policy recommendations and suggestions. The existing research often focuses on doctrinal aspects. The empirical data provided by the author seems to be only awareness data rather than concrete data on real players (undertrials, judiciary) in connection with bail provisions. The author concludes by calling upon government and non-governmental agencies to create a robust system that facilitates the pursuit of justice, especially for marginalized communities in India.

7. Shivani & Seema Devi, The Law of Bail In India An Analysis of Judicial Perspective, (2024)²¹

The authors of this article, demonstrate the law of bail with the judicial analysis. The author's main objective is to resolve two conflicting issues revolving around the concept of bail, that is, an individual's right to liberty and his right to be presumed to be innocent until proven guilty, against society's interest in maintaining law, order, and security. The author tries to adopt reformative theory in dealing with bail provision by basing himself on the cardinal maxim of bail jurisprudence promulgated by the great judge and jurist Justice Krishna Iyer, "Bail is the rule, Jail is the exception". The authors establish this principle by relying on numerous landmark judgments by the higher courts. The author points out current challenges- the disparity that exists in obtaining and granting bail (rich and poor) Media Trials, Undertrial Prisoners, overcrowded prisons and bail in case of continuing offenses. The author recommends separate bail legislation aimed at uniformity and judicial discretion, reorienting police practice NIC's (National Informatics Centre) E-Prison software for flagging/ reminder in execution of bail and building up new prisons to avoid congestion. The method that is adopted by the authors is a quantitative doctrinal method. The author lacks exhaustive empirical data, and the article overlooks the concept of default bail and lacks specificity in policy proposals. The authors conclude by calling upon us to maintain a balance between justice, individual

²¹ Shivani & Seema Devi, *The Law of Bail in India: An Analytical Judicial Perspective*, 11 Int'l J. Creative Res. Thoughts e954 (2023).

liberty and societal interest.

8. Dixit Nishant &Yadav Jyoti: Judicial Review of An Analytical Study of Bail Jurisprudence and the Discretionary Power of the Court relating to Bail in India (2024)²²

The author presents a doctrinal analysis in its statement of the problem, which is *An Analytical Study of Bail Jurisprudence and the Discretionary Power of the Court relating to Bail in India*. The author's main impetus is to show how the court manifests its discretionary power in granting and denying bail. The main issues dealt with by the author in this article are the doctrinal foundation rooted in the CrPC with regard to bail, especially sections 436, 437, and 167, the discretionary powers exercised by the courts, and the author specifically refers to lower or trial courts in their inconsistent use of discretionary power. Deprivation, socio-economic effects of the bail jurisprudence, and its access to justice for the marginalized communities, the author calls for reforms like electronic monitoring and pre-trial detention alternatives. The author, by linking to Article 21 of the Constitution, provides a holistic understanding of the bail jurisprudence. The author highlights the judiciary's evolving approach in balancing individual liberty with societal interests with a number of landmark case laws. Though the author tries to provide a holistic approach to the concept of bail provisions, it lacks empirical data, oversight of lower courts, and limited exploration of available documents. The author does not provide what are contemporary mechanisms that the court should adopt while using its discretion. The author concludes by reaffirming the need for transparency, fairness, and equity in bail adjudication.

9. Singh Yashasvi, Evolution of Bail Jurisprudence: In the Prospect of Constitution and New Criminal Laws (2024)²³

The author of this article comprehensively addresses the evolution of bail provisions alongside their constitutional and jurisprudential dimensions. The objective of the author is to integrate the historical evolution (Crpc 1973), constitutional analysis, and the impact of the new criminal law, Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS). The methodology chosen by the author is a doctrinal method. The author attempts to provide constitutional validity through a judicial precedent (the principle "Bail, not Jail" as laid down by the famous Judge of the Supreme

²² Nishant Dixit & Jyoti Yadav, *Judicial Review: An Analytical Study of Bail Jurisprudence and the Discretionary Power of the Court Relating to Bail in India*, 4 J. Human. Soc. Sci. & Mgmt. 112 (2024)

²³ Yashasvi Singh, *Evolution of Bail Jurisprudence: In the Prospect of Constitution and New Criminal Law*, SSRN (Aug. 2025), https://papers.ssrn.com/so13/papers.cfm?abstract_id=5012961 (last visited Jul. 5, 2025)

Court, V.R. Krishna Iyer in Balchand's case) to the concept of bail under Article 21 of the Indian Constitution, thus attempting to shape bail provision from a statutory right to a constitutional right. The author predominantly highlights the historical milieu in the development of bail provision from the CrPC to the BNSS. The author points out the challenges and difficulties in relation to granting bail provisions, the arbitrary conditions that are attached while granting bail, and the lacuna in the criminal system through concrete judicial pronouncements from the higher courts. Thus, he tries to become the voice crying in the wilderness, pointing out a real reformation in implementing the provision of the bail principle. The author has made use of multidisciplinary resources.' Though the author relies on multidisciplinary sources, he fails to engage with them in his research. The article lacks empirical research and data analysis, which is very much necessary to deal with current issues connected with bail provisions. The author concludes that the real essence of bail provision is achieved only when the right of individual liberty is protected as envisaged under Article 21, especially in the case of anticipatory bail provision, bereft of which the bail provision will remain a dead reality.

10. Sing Parth, Social Justice and Judicial working of Bail Decisions in India: On the Legacy of Dr. B. R Ambedkar (2025)²⁴

The author, having once been the Judicial Law Clerk at the Supreme Court and a practicing advocate, attempts to provide a comprehensive understanding of bail jurisprudence in India. The author mainly stresses the judicial decisions on bail provisions within the ambit of the constitutional framework. The objective of the author is to expand the interconnection that exists between judicial discretion, duration of judicial custody, the stage of trial, and constitutional mechanisms provided by the Indian Constitution, such as liberty, equality, and justice. The author advocates the constitutional philosophy of Dr. B. R Ambedkar, which is social justice, equality, and human dignity. Thus, he visualizes a greater reform in Indian bail jurisprudence, not only from the point of view of constitutional theory but also the real application of these principles in the context of reality. The author emphasises the role of the judiciary to be consistent in fulfilling the doctrine of Ambedkar that bail is not a mere procedural instrument but a vessel of constitutional promise. The Author, from his first-hand experiences with emphasis on duration of custody and trial stage in bail decisions, calls for

²⁴ Parth Sing, *Social Justice and Judicial Working of Bail Decisions in India: On the Legacy of Dr. B.R. Ambedkar*, Papers.com (Aug. 2025), https://papers.com/so13/papers.cfm?abstract_id=4786218 (last visited Jul.8, 2025)

systematic reforms in bail jurisprudence in order to protect the rights of undertrial prisoners languishing in prisons. The method adopted by the author doctrinal method. The method adopted by the author doctrinal method. The article adopts a scholarly approach rather than an empirical approach, such as statistical trends on bail grants, rejections, and undertrial populations. Further, the author mainly emphasises the Supreme Court and High Court, overlooking the role of lower courts. The adaptations of the philosophy of Ambedkar are not very convincing in concrete reality, it seems to be overlapping. The author concludes the importance of balancing individual liberty with societal interests in granting bail.

3. Historical Arc: Bail's transition from Imperial Control to Democratic Safeguard.

The modern bail concept has evolved since ancient times, and its roots can be traced to different civilizations across the globe, which suggests that the notion of bail is not new to any legal system. It has evolved from its rudimentary form to its modern form. Similarly, India is a land that was ruled and invaded by various Kingdoms and regimes; therefore, India's bail system has experienced a great amount of historical evolution and has been influenced by numerous legal systems over time. The concept of bail can be traced back to ancient Hindu law, where it was referred to as "nantana", which means taking security. Islamic law, which was brought to India by the Mughal Empire, accepted the idea of bail as well.²⁵

The British landed in India in 1608 under the East India Company. They maintained the status quo in the matter of administrative justice. With the changed time and administration, the colonial government brought changes through regulations. There was no uniform law of criminal procedure; rather, there were separate procedures in Presidency Towns and different provinces. For the first time, the Criminal Procedure Supreme Court Act of 1852 consolidated the Acts in presidency towns. Later, this Act was replaced by the High Court Criminal Procedure Act 1865. The beginning of modern bail provision in India can be traced to the Code of Criminal Procedure 1861, which introduced for the first time systematic bail provisions in sections 216, 258, 156, and 212. These statutory provisions were enacted during colonial times, which reflected the English legal tradition while attempting to address the specifics of the Indian condition. Later, the Criminal Procedure Code of 1861 was replaced by the 1872, which had additional sections 128, 194, 204, 388, 389, and 393, which provided a more detailed

²⁵ Aadithya R. Chandran, *An Analysis of the Bail System in India: Challenges and Prospects*, 2 LEX IS US L.J. 78, 78–85 (2023)

procedure for bail administration. These sections reflected evolving colonial understanding of criminal procedure and the need for more comprehensive legal reform. However, this fundamental conceptual framework remained unchanged; as a result, bail remained as a discretionary power of the courts rather than a right of the accused. The interesting point is that the 1872 amendment did not provide any room for the constitutional principle of liberty; rather, it was only meant for procedural clarity and administrative purposes. This code was replaced by the Criminal Procedure Code of 1882 which was enacted with a uniform criminal procedure for the whole Indian Presidency, Towns, and Province and these codes were further supplemented by the code of Criminal Procedure of 1898, this code represented a more significant approach to the growth of bail provisions, which formerly introduced distinction between bailable and non-bailable offences in sections 496 and 497. This classification continues to influence the Indian bail Law till today, which created a structured approach to bail determination based on the nature and severity of offenses. Section 496 addresses bail in bailable cases, establishing it is a matter of right for certain categories of offences, while Section 497 deals with bail in non-bailable cases, leaving room for the discretion of the judge. This dichotomy reflects colonial administration's attempt to reconcile competing interests, which ensures the accused's availability for trial while recognizing certain fundamental notions of liberty. The 1898 code established a principle to guide bail decisions, which includes seriousness of the charge, nature of evidence, severity of punishment, and character of the accused²⁶. This principle continues to influence contemporary bail jurisprudence. While going through all these codes in detail, which are mentioned above, one can see a similar silver lining that has passed through all these codes. They regard bail provision as a procedural mechanism designed primarily to ensure the attendance of accused persons during trial proceedings.²⁷ This approach reflected the colonial administration's emphasis on maintaining order and ensuring the smooth functioning of the criminal justice machinery rather than protecting individual rights.

The British idea of bail was essentially utilitarian, used for a colonial administrative convenience that was meant to balance the administrative and practical difficulties of maintaining large prison populations with the need to ensure that accused persons remained available for trial. This utilitarian approach, through statutory provisions that made no

²⁶ *Supra*, at 18

²⁷ Criminal Procedure Code, 1898, § 496-497.

reference to constitutional principles or fundamental rights, instead operated within a framework that prioritized administrative efficiency and state control over individual liberty.²⁸

The adoption of the Indian Constitution in 1950 shaped a new legal landscape that eventually transformed the concept of bail in Indian criminal jurisprudence. The Indian Constitution did not explicitly mention bail as a fundamental constitutional right. Article 21's guarantee of life and personal liberty provided the conceptual foundation for future progress. The constituent assemblies' decision to adopt a procedure established by law rather than the due process of law initially suggested a more restrictive approach to fundamental rights.²⁹ However, this textual choice would later prove less determinative than initially anticipated, but the judicial interpretation expanded the scope of constitutional protection in terms of liberty, justice, and fairness.

The enactment of the Code of Criminal Procedure, 1973, marked landmark movement in bail Jurisprudence, incorporating significant reforms based on the 41st Law Commission report.³⁰ This legislation retained the basic framework of the 1878 Code by introducing important innovations, most notably anticipatory bail under section 438. The Law Commission had recommended anticipatory bail in section 438 to protect individuals from false accusations and politically motivated arrests,³¹ which recognised that the power of arrest could be misused to harass and humiliate individuals. The inception of anticipatory bail in Section 438 of the Criminal Procedure Code recognized individual liberty rights, even though it was still conceptualized in a statutory framework rather than a constitutional footing.

Bhartiya Nagarik Suraksha Sanhita 2023 (BNSS); The BNSS, aims at refining Indian criminal law procedure by setting time bound investigation and trial of criminal cases and seek to ensure that justice is accessible to the concerned individual within time frame thus it intends safeguard the individual liberty as enshrined under Article 21 of the constitution so that the accused is not incarcerated for an indeterminate period without the conclusion of trial thereby upholding the constitutional mandate of personal liberty. BNSS provides a more structured framework for granting bail, ensuring that the accused person is released promptly if investigation delays occur. The BNSS aims to balance the right of the accused for personal

²⁸ David Arnold, *Police and Colonial Control in India* (Social Science Press, 2004).

²⁹ B.N. Shiva Rao ed., *The Framing of India's Constitution*, Vol. III, 523 (1967).

³⁰ Law Commission of India, 41st Report (1969).

³¹ *Supra* at 19

liberty and the right to a speedy trial to foster effective administration of justice regardless of the offences. One of the significant contributions BNSS with regard to bail is it provides a precise definition of bail in Section 2(b), stating: “Bail means the release of a person accused of or alleged of the commission of an offence from the custody of law upon certain conditions levied by an officer or court on execution by such person of a bond or bail bond”.³² This definition echoes the legislative recognition of bail’s constitutional significance. The BNSS further reduces the burden of jails by facilitating the release of undertrial prisoners underspecify conditions as mentioned under sections 290 and 479. The new law includes stricter conditions for those facing multiple charges aiming to prevent abuse of the bail system. The new lays down clear conditions for bail application, notably for habitual offenders and organized crimes, by introducing electronic monitoring in place of traditional sureties. Therefore, BNSS provides greater importance in protecting individual interests and ensuring accountability in bail decisions, possibly reducing the scope for judicial overreach.

4. JUDICIAL TRANSFORMATIONS FROM STATUTORY PRIVILEGE TO CONSTITUTIONAL RIGHT.

The principle of bail as a rule and jail as an exception, finds its very source from article 21 and Article 22 of the Constitution of India, and also from the well-known principle of “presumption of innocence, unless guilty” only because of person is accused to have a committed an offence, the state cannot endlessly take away his or her right of life and liberty as enshrined in Article 21 of the constitution of the India, unless that guilt is embellished beyond reasonable doubt. Article 21 of the Constitution of India lays down that no person shall be deprived of his life and personal liberty except in accordance with the procedure established by law, and the procedure must be just and reasonable. “The fiat of Article 21 is that any procedure which deprives a person of this life or liberty must be just, fair, and reasonable. Just, fair, and reasonable procedure implies a right to free legal service where he cannot avail them. It implies the right of speedy trial as provided under Article 39 of the Indian Constitution. It implies human conditions of detention, preventive or punitive.”³³

³² Supra at 3

³³ Kapil Chandna, *Bail Is the Rule, Jail Is the Exception*, <https://kapilchandna.legal/bail-rule-jail-exception> (last visited Sept. 18, 2025).

State of Rajasthan v Balchand³⁴

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*, the respondent Balchand was convicted by the trial court under Section 452 of the Indian Penal Code (house trespasses 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 courts 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 the 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 consistently strived to restore the sanctity of personal liberty and correct the growing misuse of pre-trial detention.

Maneka Gandhi v Union of India³⁵

In *Maneka Gandhi v Union of India*, the Supreme Court expanded Article 21 in its interpretation and held that every deprivation of liberty must meet the test of reasonableness and justice. This view has had significant implications for bail legislation, protecting detention without trial from becoming a means of oppression. The courts have also associated the right to bail with Article 14 by opining that laws governing bail need to be enforced alike and not whimsically. Bail refused on prejudicial grounds, such as social class, financial situation, or political affiliation, amounts to an infringement on the fundamental right of equality before the law.

³⁴ *State of Rajasthan V Balchand AIR 1977 SCC 2447*

³⁵ *Maneka Gandhi v Union of India AIR 1978 DC 597*

Sanjay Chandra v. Central Bureau of Investigation³⁶

The Supreme Court's decision in *Sanjay Chandra v Central Bureau of Investigation* marked another significant milestone in bail jurisprudence, particularly in the context of economic offenses. This case arose from the 2G spectrum allocation controversy and involved allegations of criminal conspiracy and corruption against a high-profile accused person. The Court in this case reiterated the fundamental principle that “bail is the rule, jail is the exception”, even in cases involving serious economic offenses. The judgment emphasized that pre-trial detention should not be punitive in nature and that the primary consideration for bail should be ensuring the accused’s presence during trial rather than pre-judging guilt. The court laid down comprehensive guidelines for the grant or refusal of bail, emphasizing factors such as the nature of the accusation, the severity of punishment, the character and antecedents of the accused, the possibility of fleeing from justice, and the likelihood of evidence tampering. The judgment clarified that while the seriousness of the offence is a relevant consideration, it should not automatically preclude the grant of bail.

Hussainara Khatoon v State of Bihar³⁷

In cases like *Hussainara Khatoon v State of Bihar*, where undertrials dragged on owing poverty rather than guilt. Justice Bhagwati connected the right to a prompt trial with the bail procedure, which resulted in the release of people who had been detained past the predetermined period.

Though *Hussainara Khatoon*, concerning undertrials it was seen that many were imprisoned because they were uninformed of their right to request bail or lacked the resources to do so. The current bail system seems to favour people who own property. Although there was no specific constitutional right to free legal aid for those who accused, Article 22(1) permitted consultation with a lawyer, and article 39-A established states obligation to offer such services at no charge. However, the Supreme Court creatively interpreted Article 21 to establish that disadvantaged accused people should receive legal aid from the state because they are unable to pay legal representation due to poverty. The Courts novel view further established that disadvantaged defendants have a constitutional right to free legal representation, in line with the concepts of justice and fairness.

³⁶ *Sanjay Chandra v. Central Bureau of Investigation* AIR 2012 SC 830

³⁷ *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369

Moti Ram v State Of Madhya Pradesh³⁸

The Supreme Court emphasized that the conditions of bail should not be too rigid and the courts have to look at the economic means of the accused while framing the conditions of bail. It condemned the tendency of imposing unrealistically excessive sureties, which disproportionately hit economically weaker segments of society keeping them out of bail despite their right to it under law. This verdict supported the notion that bail must be a reachable right and not a luxury for the rich.

P. Chidambaram v Directorate of Enforcement³⁹

This case involved P. Chidambaram, a senior Congress politician and former Union Minister, in an investigation into the INX Media corruption scandal. The Enforcement Directorate alleged Chidambaram's involvement in money laundering and corruption and faced imminent arrest. The Court rejected Chidambaram's application and held that due to the severity of the allegations and the need for custodial interrogation, granting anticipatory bail could impede the investigation. The denial of anticipatory bail in this case highlighted that the judiciary prioritizes investigative needs in cases of economic offenses. The decision reflected the court's inclination to balance individual rights with the integrity of the investigation.

Arnab Goswami v State of Maharashtra⁴⁰

In 2020, television journalist Arnab Goswami was accused of abetment to suicide in a 2018 case involving the death of an interior designer and his mother. The case was reopened, leading to Goswami's arrest. His advocate moved to the Supreme Court for anticipatory bail. The Supreme Court granted interim bail, understanding the importance of personal liberty and the protection of individual rights. The Court noted that the denial of bail to Goswami, given the available evidence, could amount to harassment. Emphasizing the fundamental rights of liberty and free expression, the court set a precedent in handling high-profile cases involving media personalities.

This case underscored the court's inclination to protect personal liberties where arrest appears excessive or politically motivated. The ruling reinforced the principle that anticipatory bail can

³⁸ Moti Ram v State Of Madhya Pradesh AIR 1978 SC 1594

³⁹ P. Chidambaram v Directorate of Enforcement AIR 2019 SC 4198

⁴⁰ Arnab Goswami v State of Maharashtra AIR 2020 SC 845

act as a shield against potential misuse of legal provisions in politically sensitive cases.

5. CONTEMPORARY CHALLENGES AND CONSTITUTIONAL BALANCE

Constitutional Basis and Challenges to Personal Liberty (Article 21)

The most significant constitutional challenges relate to the implementation of Article 21 of the Indian Constitution, which guarantees the protection of life and personal liberty⁴¹

1. Bail is the rule, jail is the exception: The foundational principle that “bail is the rule and jail is the exception.”⁴² It is constitutionally rooted in the right to personal liberty and the presumption of innocence.⁴³ However, basic principles of bail jurisprudence appear to have been lost sight of, leading to the current paradox where the system, designed to facilitate release, is often operating to deny it.⁴⁴

2. Deprivation of liberty as punishment: The denial of bail for an accused person whose guilt has not yet been proven constitutes a deprivation of liberty that must be treated as punishment.⁴⁵ Refusing bail as a mark of disapproval of former conduct or for the purpose of giving the accused “a taste of imprisonment as a lesson” is improper and contrary to the concept of personal liberty enshrined in the Constitution.⁴⁶

3. Delay and Incarceration of under-trials: The constitutional promise of liberty is severely challenged by the prolonged detention of UTPs who are too poor to afford bail or sureties.⁴⁷

Right to speedy trial: Article 21 is the source for the right to a speedy trial, and the Supreme Court has previously ordered the release of UTPs whose imprisonment exceeded the maximum sentence for the offenses they were charged with.⁴⁸

Inability to furnish bail: Prolonged custody for those who pose no flight risk or danger to society is an undue deprivation of liberty. The challenge of UTPs languishing in jail due to the

⁴¹ *Supra* at 17

⁴² *Supra* at 13

⁴³ *Supra* at 18

⁴⁴ *Ibid*

⁴⁵ *Supra* at 17

⁴⁶ *Ibid*

⁴⁷ *Supra* at 19

⁴⁸ *Supra* at 18

inability to furnish security or bail bonds highlights the failure to uphold Article 21⁴⁹

4. Balance between liberty and social interest: Bail is designed as a technique to synthesize the accused person's right to personal liberty according to the procedure established by law⁵⁰. A balance must be struck between the right to individual liberty and the interest of society, especially when dealing with serious crimes.

Challenges posed by Socio-Economic Crimes and Special Statutes

The Constitutional philosophy faces a significant challenge when addressing socio- economic crimes, which are treated as a class apart due to their systematic impact on society⁵¹.

1. Differing Constitutional approach: The normal rule of bail is a rule, jail is an exception, and it cannot be applied in the same manner for socio-economic crimes. For societal protection, some individual rights, even fundamental ones, may be curtailed.⁵²

2. Statutory stringency over constitutional guarantees: Special penal statutes often impose stringent conditions on bail, which prevail over the general provision of the Criminal Procedure Code⁵³

PMLA and NDPS Acts: Acts like the Prevention of Money Laundering Act 2002 and the Narcotic Drugs and Psychotropic Substances Act 1985 contain special provisions. (section 45 PMLA and section 37 NDPA)⁵⁴. These provisions require courts to be satisfied that there are reasonable grounds for believing the accused is not guilty and is not likely to commit any offenses while on bail.

Constitutional Scrutiny: The constitutionality of similar twin conditions in Section 45(1)(ii) of the PMLA was previously struck down by the Supreme Court in Nikesh Tarachand Shah v Union of India for violating Article 14 and 21 of the Constitution, although the provision was later amended.⁵⁵

⁴⁹ Ibid

⁵⁰ Supra at 17

⁵¹ Supra at 12

⁵² Ibid

⁵³ Ibid

⁵⁴ Ibid

⁵⁵ Ibid

3. Reverse Onus and Presumption of Innocence: In tackling socio-economic offenses, many special Penal acts provide presumption clauses and shift the burden of proof to the accused.⁵⁶ This challenges the foundational constitutional principle that the accused is presumed innocent until guilt is proven.⁵⁷

Challenges related to Equity, Due Process, and Judicial Discretion (Articles 14, 21, 22)

1. Inequality and Poverty nexus:

The bail system is plagued by the reality that justice differentiates between the rich and the poor. The majority of individuals surveyed who had experience with arrest belonged to the below poverty line segment.⁵⁸

The paper suggests that poverty and arrest have a close nexus, leading to the observation that people with fewer resources are prone to arbitrary behaviour from police agencies.⁵⁹

The system has been criticized for operating on a “property- oriented approach”⁶⁰, meaning that those who are poor or indigent cannot furnish bail and are subsequently denied their liberty.⁶¹

2. Lack of Legal Awareness (Article 22 and 39A)

Constitutional right is undermined by a lack of awareness among the general populace.⁶² A significant challenge is that most arrested individuals are unaware of their constitutional safeguards against arbitrary arrest (71.4% unaware in one survey). This vulnerability is compounded by the fact that most participants are unaware of the provisions for free legal aid and assistance from the state government.⁶³ The right to free legal assistance is an essential ingredient of the reasonableness, fair, and just procedure guaranteed under Article 21. Although Article 39A enacts a mandate for the state to provide free legal services, it is a Directive

⁵⁶ Ibid

⁵⁷ Ibid

⁵⁸ Supra at 17

⁵⁹ Ibid

⁶⁰ Supra at 14

⁶¹ Ibid

⁶² Supra at 16

⁶³ Ibid

Principle of State Policy and not an immediately enforceable constitutional right.⁶⁴

3. Arbitrary Detention and Judicial Discretion: Constitutional provisions, particularly Article 21 and the safeguards under Article 22, are challenged by arbitrary detention and inconsistent use of judicial power.⁶⁵

4. Checks on Police Power: The power of police officers to arrest and grant/refuse bail is often criticized for being misused for monetary gain or under pressure from powerful individuals.⁶⁶ The Constitutional courts are often faced with cases where an arrest is made in violation of the checks and balances mandated by the Supreme Court. (*Arnesh Kumar v State of Bihar*)⁶⁷

5. Inconsistency in Bail Orders: The constitutional rights of the accused are subject to inconsistency in bail orders given by courts.⁶⁸ While judicial discretion is necessary, the challenge includes judicial activism, judicial restraint, and the need for consistency.⁶⁹ Arbitrariness is seen when courts impose capricious bail requirements without exercising jurisdiction in a rational way. These constitutional tensions underscore the need for reform, including the reorientation of police approach toward the power of arrest, the appointment of more judges to handle case backlogs, and the potential enactment of a special law on bail to codify guidelines and reduce discretion⁷⁰.

6 SUGGESTIONS

Constitutional and Legislative Reforms

Constitutional Amendment: There should be a constitutional Amendment so that the right to bail in the Constitution is clearly highlighted and so that the uncertainty that exists between the statutory right and constitutional guarantees is eliminated.

Comprehensive Bail Legislation: Comprehensive bail legislation should be laid down to bring harmony between statutory provision and constitutional principle.

⁶⁴ Ibid

⁶⁵ Supra at 16

⁶⁶ Supra at 17

⁶⁷ Ibid

⁶⁸ Supra at 16

⁶⁹ Ibid

⁷⁰ Supra at 19

A systematic review of special statutes must be conducted so that stringent bail provisions are in consonance with constitutional requirements and Supreme Court jurisprudence.

Procedural and Administrative Reforms

Uniform Bail Procedures: The Indian Parliament has to enact a uniform bail procedure as that exists in the UK, USA, and Canada, which will ensure implementation of constitutional values so that certain efficiency and consistency in judicial determination can be achieved.

Alternative Bail Conditions: It is better to adopt alternative bail conditions so that reliance on traditional monetary bail conditions that exist for ensuring trial attendance can be avoided, instead of alternative bail conditions like electronic monitoring, community service of such nature can be implemented.

Bail Review Mechanisms: In order to prevent the possible violation of constitutional values, it is necessary to establish a systematic bail review mechanism so that prolonged pre-trial detention is regularly reviewed.

Capacity Building and Access to Justice

Judicial Training Programs: One of the contemporary challenges that affects bail provision is the varying discretion of judicial officers; therefore, it is necessary to implement judicial training programs that address the constitutional dimension of bail so that the decision may supplement emerging jurisprudential developments.

Legal Aid Enrichment: to achieve constitutional principals in bail proceedings it need of the hour to train legal aid lawyers in bail jurisprudence so that legal aid system is strengthened and effective representation is achieved in bail proceedings.

To strengthen the legal aid systems, to ensure that effective representation in bail proceedings, with particular focus on training the legal aid lawyers in constitutional bail jurisprudence.

Technology Incorporation: technology use in bail proceedings will improve bail processing proficiency, so that delays in granting bail are minimized and access to justice for the accused person in remote areas is enhanced.

Monitoring and Evaluation

Data Collection Mechanism: It is necessary to create a robust data collection mechanism that will monitor bail practice, identify disparities, and assess the effectiveness of constitutional protections.

Regular Review Mechanisms: In order to assess the effective implementation of constitutional bail rights and to identify areas that require reform or possible intervention, the establishment of a regular review mechanism is necessary.

7. Conclusion

The transformation of bail from a statutory right to a constitutional right ultimately reflects the broader constitutional aspiration of creating a just and equitable society where individual dignity and liberty are protected against arbitrary state power. The success of this transformation will be measured not merely by jurisprudential development but by the practical realization of constitutional protections for all citizens, regardless of their social or economic status.

As India's constitutional democracy continues to evolve, the experience of bail jurisprudence provides valuable insights into the capacity of constitutional interpretation to expand fundamental rights protection while addressing contemporary governance challenges. The constitutional evolution of bail stands as a testament to the enduring vitality of constitutional principles and their capacity to adapt to changing social and legal contexts while maintaining core commitments to human dignity and individual liberty.