
INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH

WHY INDIA NEEDS BAIL REFORMS?

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Abstract

Bail is the basic right for a prisoners where it ensures that they are not detained unnecessarily unless of their background. In India we have seen a number of authorities misusing of power due to biasness, arbitration, etc where it leads to the unsystematic way of solving the problems/crimes or even the trials we may say. In some cases, due to the rich families background, high profile, etc of the accused, they got bail while the poor and helpless people are still detained. The main desire of this paper is not a stipulation that the underprivileged people must also get bail like how the high profile accused got bail but to show that exonerations are really important before granting a bail to the accused and the law must also strictly abide to all the citizens despite of their backgrounds so that a fair and conclusive trial must be done in order to prevail justice in India. Now it is the crucial time to exploit all this inequity and mend the rights of the prisoners. Beyond everything the prisoners must also get their fundamental rights like Article 21(right to life and personal liberty) and strengthen legal system in India.

Introduction: Need for Progressive Bail Reforms

“Supreme Court is pressing the need for bringing reforms due to tedious bail processes”.

This is the tagline of a recent case, in January, where supreme court once again has highlighted the issues with current bail laws in India. One of judges, Justice Kaul, stated that if all the case are just fought on basis of bails and government does not thinks out of the box and restrict itself

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from fighting every case on bail, it would take courts 300 to 700 years to clear up the backlog of cases lying in the courts.

Justice Kishan Kaul explained how every case of bail is being challenged by the other party which goes on till the case reaches Supreme Court, this consumes a lot of time.

Increase in backlog cases is just a small problem within the bail laws in India, the major argument still is how liberty has been affected by current bail laws and reforms are needed to mitigate the ill-effects of currently existing bail laws in India.

How do we re-imagine a law? With respect to bail law there is a need to first re-examine the exact nature of what is causing this large-scale incarceration with respect to undertrials due to such tedious bail reforms. This assessment needs to be based on multiple parameters and we have no real empirical evidence on how each of these impacts the issue. What proportion of undertrials are applying for bail? What proportion of bail applications are accepted or rejected, and on what grounds? Is bail compliance a far bigger problem than denial of bail? These are some fundamental empirical questions which need answers. An effective bail law must be based on the correlation of these answers with variables such as the demographics of undertrials, category of offences and timelines for bail, and also address socio-economic and structural barriers.

There is a serious need to act on the Supreme Court's recommendation that India needs a comprehensive bail legislation and suggestions can be taken from UK Bail Act. Around 70% of the prison population is awaiting trial, the most of whom are poor and hence unable to secure monetary bail. The Supreme Court took note of the BNSS's continuing colonial prejudices- police are fast to arrest individuals, which puts poor and uneducated people at a great disadvantage because they are unable to take advantage of the legal system, unlike those with education, money, and power. **Only progressive bail reform can help to mitigate this disparity.** Let's see how

The term Bail has been defined in Black Law Dictionary as a security form, required by court to make sure that the person will be released on a condition that he/she must appear before the court in future whenever called upon. In the case of Sanjay Chandra vs CBI, the court stated the object of bail is neither to act as a punitive measure or a preventive measure but to ensure attendance of the person (accused) and a reasonable amount is to be imposed as a

condition for release. But Indian Bail law is not able to fulfill this object without committing gross human rights violations which take place in form of 'conducting investigations' and along with that there are several system failures.

- **Indian Bail Laws: Detaining the Poor**

As far as I remember, it was the case of Manu Sharam, a murder convict, who was given parole and Bail was given to accused in the 2G Spectrum case, which highlighted the failures of Indian bail law. The concern which such cases raise again and again is the 'plight of poor undertrial prisoners who are spending their years in jail without even been convicted of any offence and because they don't have access to bails and bonds, their situation worsens leading to several human rights violations. Though, Supreme Court have several times recommended amendments to Bharatiya Nagarik Suraksha Sanhita (BNSS) to improve the conditions of poor but these are only for name- sake and no effective implementation is done². The paper focuses on section 478 to 496 of BNSS and need of reforms in the same.

The main aim behind providing a bail is to provide a person with liberty during a non-custodial trial. Otherwise, everyone would be held in detention/custody until the trial. There are two factors to consider before deciding on bail. One, the accused must be present for trial, which implies he must not flee away. Second, he must not tamper with the evidence. Conditions can be imposed on the accused to achieve both these requirements. And if both these requirements are not met, the court that is granting bail has the authority to cancel bail. But these requirements have become a lot stringent which affect the poor people.

In the famous case of **Babua Tazmul Hossain vs. State of Orissa**³, Supreme Court stated that pre-trial detention should not be treated as a measure of giving punishment. Bail granted should serve as a means for the accused to defend his case considering 'Bail as a Law and Jail as an exception, until and unless the court in question firmly believes that accused cannot defend himself/herself at the trial or granting bail to

² R V Kelkar, Criminal Procedure (EBC Publishing, 2014).

³ Special Leave Petition (crl.) 2866 of 2000

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accused is against the interest of society. A serious need of bringing reforms to bail laws in India arises due to unequal application of bail laws on different sections of society.

- **Pre-Trial Detention: Bail laws leads to over-crowding at prisons**

We all know that bail is a type of security provided to accused so that he/she can be released on bail when the trial or investigation is still pending. Supreme Court in many cases have focused upon stating the importance of bail because unnecessary detention of any person leads to violation of rights, specifically liberty. Supreme Court has stated that when a court in doing interpretation of bail section, specifically 480 and 482 of Bharatiya Nagarik Suraksha Sanhita (BNSS)⁴, and also while making arrest, the authorities should be respecting the liberty of the person in question as provided by constitution unless ‘detention becomes a necessity’⁵.

According to NCRB report of 2019, there are 1350 prisons in India which are accommodating 478, 600 prisoners and average is 118.5 % (occupancy). This Percentage shows that how prisons in some states are over-crowded than the others. Like, Delhi has occupancy rate of 174.9 %, Uttar Pradesh has 167.9 % and Uttarakhand has 159.0 %. With such overcrowding, specially after covid times, risk of health diseases increases. Prisoner’s have several rights in the prison like Article 21 of Indian Constitution provides right to health care to all, irrespective of their status, whether he is innocent, a convicted or even an undertrial prisoner⁶. Article 6⁷, 9⁸ and 10⁹ of International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, social and Cultural Rights (ICESC) and the Nelsen Mandela Rules also provides rules to avoid discrimination amongst prisoners¹⁰. Mandela Manual

⁴ Sanjay Chandra v Central Bureau of Investigation (2012) 1 SCC 40

⁵ Dataram Singh v State of Uttar Pradesh (2018) SSC 22; Jeetendra V State of Madhya Pradesh (2020) 12 SSC

⁶ Parmanand Katara v Union of India AIR 1989 SC 2039

⁷ Article 6(1) of the ICCPR states that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life

⁸ Article 9 of the ICCPR states that everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law

⁹ Article 10 of the ICCPR states that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person

¹⁰ Re: Inhuman Conditions in 1382 Prisons (2017) 10 SCC 658

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on Prison 2016 provides steps to be taken for safety and shelter of prisoners but overcrowding in prison says other things and this is majorly because of failure of justice system to ease their bail laws and even after covid¹¹.

Indian justice system failed to transform or revolutionize their bail laws and there was failure to ensure the rule that- “Bail is the rule and Jail is an exception”.

“Now I will tell you why India needs major bail reforms with help of a step taken by SC in releasing prisoners on bail but they failed to due to harsh bail laws of India.”

- **SC’s guidelines on formation of HPCs**

It was 23rd of March of year 2023 when Supreme Court India duly acknowledged that prisons in India pose several health risks and safety concerns for the prisoners which affects their liberty. So, SC gave directions to all the states, Union Territories etc., to constitute a High-Power Committee (HPC) and main work of these HPCs will be to ‘assess the situations of prisoners and determine the categories of prisoners who can be given interim bail by assessing the nature of offence, no of years they have spent in jail and no of years left and seriousness of the crime committed. With respect to these guidelines of SC, in total 68,264 prisoners were released from the jail until the end of year 2020¹². This was done to counter the effects of covid in prisons.

- **Failure of HPCs**

No bail given to certain categories of prisoners- Following is the category of prisoners who were excluded from granting interim bail as per HPCs assessment. Certain prisoners were refused the benefit of temporary bail because they posed a serious threat to society's law and order. In research done by an organization, it was discovered that prisoners arrested or convicted for violations of the Narcotic Drugs and Psychotropic Substances Act, 1985; the Protection of Children from Sexual Offences Act, 2012; the Prevention of Corruption Act, 1988; the Prevention of Money Laundering Act, 2002; the

¹¹ Dehadrai, ‘In the Time of Coronavirus, the Right to Bail is Part of an Undertrial’s Right to Life’, The Wire (March 2020) <https://thewire.in/law/in-the-time-of-coronavirus-the-right-to-bail-is-part-of-an-undertrial-right-to-life>.

¹² State/Ut Wise Prisons’ Response to The Coronavirus Pandemic in India (28 June 2021) <https://www.humanrightsinitiative.org/content/stateut-wise-prisonsresponse-to-covid-19-pandemic-in-india#Table%20G>.

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Unlawful Activities (Prevention) Act, 1967, and crimes against women were ineligible of getting bail. In addition, detainees suspected of rioting, waging war against the government, or counterfeiting cash were denied interim bail. Furthermore, the HPCs of 13 states barred foreign convicts/prisoners from being considered for release on interim bond, regardless of their criminal history¹³.

So, what happens to the undertrial prisoners who are excluded by the HPCs' criteria¹⁴? Does their exclusion from granting bail is in violation of Article 21 and 14 of Indian Constitution?

These questions are critical because these prisoners who are not even considered for granting bail have equal fundamental right to health. But just after the guidelines a Supreme Court judgment in the year 2020 case stated that every prisoner will not be entitled to interim bail after covid situations¹⁵. In this case, **National Alliance for People's Movement** challenged this criterion adopted by HPCs but SC uphold the criteria and held that "provision for interim bail during COVID-19 is not a statutory right but a human right to safeguard a prisoners' health." Just like how this case ignored rights of prisoners similar is done at all levels with respect to granting bails. Such cases and reports show how stringent bail laws limit the privileges available to prisoners and particularly in such case, the scope of interim bail is too narrow to protect rights of prisoners and instead Bail has become mere a tool of decongestion rather than being a tool of protecting and safeguarding rights of prisoners.

- **Proving Innocence Before Bail: Need for Reforms**

It is true that with time evolving, more and more heinous forms of crime are taking place and parliament, to counter these crimes, have come up with strict laws¹⁶. Punishments are becoming more and more severe and along with that 'pre-trial procedures' are becoming more and more stringent. Same goes for bail laws. Earlier Bail was the rule and 'No-Bail'

¹³ Commonwealth Human Rights Initiative, Responding to the Pandemic: Prisons and Overcrowding (2020) Vol II State Information Report

¹⁴ Parmanand Katara v Union of India AIR 1989 SC 2039.

¹⁵ National Alliance for People's Movements v State of Maharashtra (2020) 9 SCC 698.

¹⁶ H.R. Khanna "Some Reflection on Criminal Justice". 17 J.I.L.L. 505 (1975). The trend had started in the 1970s itself

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was the exception and today due to stringent bail laws, Bail is the exception and no bail has become the rule¹⁷.

We can see how there has been a shift from presumption of innocence to presumption of guilt and this has even started to affect the pre-trial procedures. The whole idea of bail was based on 'presumption of innocence' until guilt of accused is proved. But stringent bail laws say otherwise. The restriction on freedom of an individual on the basis of guilt which has not yet been proven by prosecution is highly unjustified and can result in abuse of power. When a bail is rejected, the defenses taken by the opposite party are social factor defences such as fear that the suspect will tamper with evidence and the court process or flee justice. As a result, the two ideas or doctrines of "presumption of innocence" and "bail as the rule" become whole as they are interdependent on each other. When one is interfered with, the other also gets disturbed.

Such stringent bail laws have put harsh conditions on accused and some of the examples are: section 37 (b) of Narcotic Drugs and Psychotropic Substances Act (NDPS), Section 20 (8) of Terrorist and Disruptive Activities Prevention Act (TADA) etc., in such sections the stringent sections have been drafted without due care and this often results in arbitrary actions which results in violation of Liberty and freedom rights of accused¹⁸.

So, first part of this chapter will deal with the problems which the author found in the grounds on which the court decides whether bail is to be given or not.

- **Analysis of Grounds of Bail: Before Bail can be Granted**

The provisions which we discussed above require a hearing before bail is granted. There is a public prosecutor who is present to oppose the grant of bail to the accused and court gives a decision based on two grounds which are as follows:

- There has to be a preliminary belief that the accused is not guilty on basis of reasonable grounds

¹⁷ See; s.20(8) (fc), TADA Act, s.37(>), NDPS Act and s.15(5). Terrorist Affected Areas (Special Courts) Act 1984

¹⁸ Anti-terrorist legislation must scrupulously conform to constitutional standards. See, Vikramjit Reen. "The Place of Anti-Terrorist Legislation under the Indian Constitution.

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- A belief that the accused will not commit offence while on bail

When heinous crimes are in question like provisions of NDPS Act and TADA Act are applied, the second ground and its stringent application is a worrying concern for accused and their rights. Courts, usually are involved in a careful scrutiny process because they have to ensure that the accused is not likely to commit an offence and also under above mentioned acts long remand periods are also provided so this results in a harsh bail application consideration process.

These grounds though have been challenged constitutionally at times but courts have most of the times left it open. However, like in the case of **Kartar Singh vs. State of Punjab**¹⁹, SC stated that grounds are valid and not unreasonable. The court did not look into the bail issue in deep and just gave a decision in one line as done in the case of Sanjay Dutt vs. State. As the author also said earlier, presumption of innocence, bail right and right to fair trial, these all three are to be interpreted as a whole and if one these elements is abused or tampered then this will also affect other 2 elements.

“The presumption is done away with and a belief on reasonable grounds that the accused is 'not guilty' and is not likely to commit any offence”²⁰. This affects the right to bail in India and supports our idea that Bail has become a changing concept now. Because of this stringency in bail law the accused, in heinous crimes scenarios, find it very difficult to get a bail. Such provisions like of NDPS Act and TADA result in very absurd situations. Example, if the FIR registered by the police and other case diary with the police or investigating officer do not provide anything which could establish a connection between the accused and the crime committed, in such case only ground one, that is ‘there has to be a preliminary belief that the accused is not guilty on basis of reasonable grounds’ can be established and court cannot answer on the ground two, that is ‘the accused will not commit offence in future’ this is purely a prediction so how can a court answer this ground?

This results in denial of bail to the accused because of stringency present in ground two alone. An innocent accused is then dependent for mercy on public prosecutor or

¹⁹ 1994 SCC (3) 569, JT 1994 (2)

²⁰ Bhandari, V. Pretrial Detention in India: an Examination of the Causes and Possible Solutions. *Asian Criminology* 11, 83–110 (2016). <https://doi.org/10.1007/s11417-015-9218-x>

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police²¹. Predicting a human outcome is very difficult in such case which makes bail process harsh for innocents.

This ground was considered unconstitutional in the case of **Bimal Kaur Khalsa vs Union of India**, where the court held that this ground provides no manageable standards for the judiciary. So, it is clear that stringent bail laws make it hard for accused under heinous crimes to get released on bail.

- **Bail Jurisprudence: is it really just?**

“Justice as we know was a right fundamental to all, but its fallacy is evident, as money now results in its fall”

When examined objectively, India's criminal jurisprudence is merely a reflection of British heritage. With the passage of time, just a few amendments have been made and that too has been done to calm down the pressure groups and for election purposes. Higher authorities have failed to consider whether these laws take in account the socio-economic conditions of 70% of population which is living in poverty and do not even understand what a crime really means. The author would like to explain how these bail laws are anti-poor with help of two famous cases.

- First case is of **Moti Ram and others vs. State of MP**- The accused, a poor mason, was found guilty. The Supreme Court issued order, directing it to the Chief Judicial Magistrate to put him on bail without specifying any sureties, bonds, or any other conditions. Chief Judicial Magistrate acquired complete power over the situation and set a surety and bond of Rs. 10,000, refusing Moti Ram's brother to become a guarantor because his property was in the same hamlet. Another appeal was filed with the Supreme Court, and Justice Krishna Iyer criticized actions of CJM and said that judges must be inclining towards bail and not the jail.
- In the case of **Maneka Gandhi vs Union of India**- Justice Iyer again spoke against the stringent bail laws and stated that bail has not been defined anywhere

²¹ Kuldip Chandra Shanna v. State (Delhi Administration), Criminal Petition No. 68 of 1993 pending the in Delhi High Court. S

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only the offences are categorized as bailable and non bailable, this gives a lot of discretionary power which can be abused sometimes. **Justice P.N. Bhagwati** has also said that bail laws of India are discriminatory and unfair for poor and marginalized sections as a majority of people who apply for bail are so poor that they can't arrange the amount which acts as a bond or surety. Supreme Court, at sometimes has taken steps to ensure that bail laws do not discriminate like recently in 2023, SC denied bail to Manish Sisodiya, Delhi Deputy Chief Minister, who was in custody for connection with excise policy case. Justice Sanjay Kishan Kaul stated that judges should ensure that poor are not discriminated when bail processes take place and he firmly believed that it the poor who has to spent years behind the jail but rich gets bail within few hours of their arrest. On this, NALSA chairman stated that "Detention today is viewed in the context of development. Extensive use of detention before conviction diverts criminal justice resources and exerts financial and employment burden on the accused and their families"²².

Author here would like to point a fact that India has also given its commitment to Access to Justice, 2030 agenda for sustainable development which will help India in recognizing the long- lost link between Access to Justice and capability of people to receive equal treatment so that their rights epically liberty and freedom are protected.

- **Money Bail: leads to discrimination**

Money Bail system is anti-poor since a poor individual cannot provide bail because he lives in poverty. Even in cases where the accused is entitled to bail, for bailable offences, as a matter of right, the court will not grant bail unless the defendant is able to arrange a surety. The poor do not have enough money to pay bail. They are unable to obtain surety. As a result, they are unable to get bail in order to be released. In some cases, they have been detained for even longer durations than the maximum term of imprisonment prescribed by the relevant penal statutes, without their trial having begun. This stands against the principles in the famous case of **Hussainara Khatoon vs Home Secretary**.

²² <https://www.hindustantimes.com/india-news/poor-people-are-more-prone-to-detention-says-supreme-court-justice-sk-kaul-101695126186565.html>

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- **Bail Law: need to think on presumption of innocence doctrine with MIS-Minimum Interference Standard**

We have already discussed doctrine of presumption of innocence in earlier chapters this chapter will provide what kind of reform can be brought in bail laws in India. First part of this head will focus on Liberty aspect

- **Bail Laws and Deprivation of Liberty**

Can an individual be deprived of liberty? Both the crime model and due process model answer it differently. Answering this question in Indian context gives us the answer that yes, an individual can be deprived of liberty only through procedure established by law. According to this, rejecting a bail to an accused which happens through judicial discretion is in accordance with procedures established by law. But is this process fair, reasonable and just? This is an important question to be answered.

Taking author's money bail argument forward, the stringent conditions imposed goes against the very idea of giving the bail, this was also mentioned by law commission in its 268th report²³. Section 484 of Bharatiya Nagarik Suraksha Sanhita states that the amount in money bail can be reduced from case to case but in India, when bail amount is fixed, these elements are not considered and in most of the case 'Money Proportional to Gravity of Offences Approach' has been adopted and so poor people who are accused of grave offences are neglected²⁴. In the same report law commission also stated that these stringent bail results in strict scrutiny by courts which violated Article 21 and 14 of constitution.

- **Bail has idea of balancing interest of society and liberty of individual: is it really balancing?²⁵**

²³ Law Commission of India, Report No. 268, Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail (Mar., 01, 2021, 11:00), <https://lawcommissionofindia.nic.in/reports/Report268.pdf>.

²⁴ Rohan Joachim Alva, Between Poverty and a Hard Place in Prison: Bail and the Suffering Indigent, 1 NAT'L U. DELHI Stud. L.J. 124 (2012).

²⁵ Andrew Ashworth, Four Threats to Presumption of Innocence, 10 International Journal of Evidence & Proof 241279 (2006).

The Bail process in India has been developed through many tests and criteria as developed by the courts. But it has been seen that these test and criteria are conflicting and so broadly worded that a judge has to consider several factors which makes the process harsh for the accused. Different judgements have different considerations before giving the bail, from **Gudikanti case** to **Sanjay Chandra case and Paralad Singh Bhati vs NCT Delhi**, where the court laid down following factors to be considered:

Nature of the evidence in support thereof,

- the accused's character, behavior, means, and status and other circumstances particular to the accused
- reasonable apprehension of witness that evidence might be tampered the wider interests of the public or State, and similar additional considerations.

It can be seen that no uniform approach has been adopted by courts, this leads to situation where the judge uses his own discretion²⁶. One such example where power has been abused is the case of **Pokar Ram vs. State of Rajasthan**²⁶ where the high court clearly stated that the accused cannot be given anticipatory bail because he was charged with murder under section 302 of Indian Penal Code (IPC), this is in violation of principle of stare decisis as the case of **Gurbaksh Singh Sibbia vs State of Punjab**²⁷ has already stated that a single principle cannot be laid down by any court for granting anticipatory bail to the accused. Law Commission of India has also stated in its report that many of courts still decide the bail matters as per the decision laid in case of **Balchand**²⁸ and as against the ideals laid down in the Sibbia case.

Such vagueness in approach to be adopted for granting bail further complicates the process which can be reflected in the vague consideration given by judges in various judges. Often this leads to a situation where two different courts when decide on similar matter often give contradicting arguments because judges use different reasoning while deciding factors for

²⁶ Wendy R. Calaway & Jennifer M. Kinsley, Rethinking Bail Reform, 52 U. RICH. L. REV. 795-830 (2018)

²⁷ Gurbaksh Singh Sibbia v State of Punjab, 1980 AIR 1632.

²⁸ Balchand Jain v. State of Madhya Pradesh 1977 AIR 366.

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bails. An example for same is the recent **case of Disha Ravi and Safoora Zargar bail order** under UAPA²⁹.

- **Liberty and Article 21**

In 2015 case of **Vinod Bhandari vs. State of Madhya Pradesh**³⁰, the court was of view that they are acknowledging the fact that no trial has taken place for over a year and there is no chance of trial in near future too. But the court rejected the bail to the accused as he was charged for corruption in medical college as said that society would lose its trust and faith in this profession.

Similarly in the case of **Bishweshwar Ganjhu vs. State of Jharkhand**³¹, the court rejected the plea of bail of accused who was charged with the bribe of Rs 470 only and he had spent more than half of the maximum punishment, on ground that his application was rejected five times earlier too so he would not be given bail this time too. Both these cases how bail processes have been unfair, in violation of article 21 and against the presumption of innocence doctrine. Author, in next chapter is going to argue for how bail laws can be reformed considering liberty and freedom aspect and based on recommendations of law commission of India.

- **The Bail, The Poor and The Loss of Liberty: Need for Reforms**

The author argues that a Minimum Interference Standard (MIS) can be adopted by the judiciary with respect to bail laws in India. The only criteria for adjudication of bail using MIS should be “Whether the accused may make an attempt to flee away from justice and/ or whether he may influence the justiciability of the process. With regard to this point the author is arguing that both these acts (as discussed in above line) are: difficult for people detained to do³² and secondly, with respect to second point that

²⁹ Gautam Bhatia, Safoora Zargar & Disha Ravi: A Tale of two Bail Orders, Indian Constitutional Law & Philosophy (Mar. 01, 2021, 11:00)

³⁰ VINOD BHANDARI v STATE OF MADHYA PRADESH 2015 SCC Online SC 96

³¹ Bishweshwar Ganjhu v. State of Jharkhand (2007) 15 SCC 736.

³² Vignesh Radhakrishnan & Sumant Sen, 70% of prisoners in India are under-trials, The Hindu (Mar., 01, 2021, 4:45), <https://www.thehindu.com/data/data-70-prisoners-in-india-are-undertrials/article32569643.ece>. At the end of 2019, 3.28 lakh prison inmates were undergoing trial while 1.42 Lakh were convicted.

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whether the person can influence the justice system, the threshold should be high and this threshold should be fair.

Using this MIS, the courts should reject the bail only when it has become absolutely necessary in that particular case. It is also important to look into socio-economic condition of the accused while deciding on the bail and secondly it is also necessary to look at the means which the accused has to influence the process of trial. State should be using *carte blanche* in form of 'hinderance of justice; to deny the bail to the accused. Process of deciding the bail should be bases on a 'robust calculus of all competing interest' and must also depend from case to case as every case may bring forward some unique circumstance on part of accused which need to be considered.

Money is used as a requirement for granting the bail to the accused and this existence of it as a pre-requisite leads to injustice to those who cannot afford it. In the case of **Hussainara Khatoon vs State of Bihar**³³, though the court dealt with the problem arising in pre-trial procedures and under trial detention but the solution provided by the court could only remedy the symptom of the bigger problem and not for treating the problem itself and that problem is 'Money Bail'. This affects poor sections who cannot afford the bail due their incapability of arranging for bond, surety etc., and guarantee of bail under section 187 of BNSS is of no use in such cases.

We earlier also discussed how stringent bail law is also the reason for increased under-trial prisoners in India and how their rights are being violated by the system. Though the courts have introduced the right to a free and speedy trial under Article 21³⁴ but harsh bail laws prove to be an obstacle in delivering justice to people³⁵. Bail laws have changed presumption of innocence to presumption of guilt, as read in chapter 2 and there is a need to develop "trial as if person is innocent" and the author states that this would include a high threshold of deprivation of liberty of the individual unless and until it is necessary for having a fair trial or till guilt is established.

We can also take recent example from outside India like recently in 2021, the California Supreme Court in the case of **In Re Humphrey**, held that the bail given on cash is

³³ Hussainara Khatoon v Home Secretary, State of Bihar, 1979 AIR 1369

³⁴ Abdul Rehman Antulay v. R.S. Nayak AIR 1992 SC 1701.

³⁵ Aparna Chandra & Keerthana Medarametla, Approaches to Justice in India, Bail & Incarceration: The state of Under-trial prisoners in India 67-78 (Eastern Book Company 2017).

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unconstitutional and violates the substantive due process of law. (This substantive due process has been included in America's constitutional law which gives protection against right to liberty and any kind of arbitrary action)³⁶. Even D.Y. Chandrachud stated that, "writ of liberty runs through the fabric of constitution"³⁷ but India still has to go a long way bring Liberty under Article 21 of Indian constitution and Bail laws in harmony.

The Authors stance on whether India needs bail reforms or not is clear from reasons given in all the chapter, the author would also like to support arguments with help of 2020 law commission of India recommendations with regard to bail laws which are as follows:

Law commission made recommendation with respect to the conditions that are imposed on bails by taking a human rights perspective on the issue. It recommends that when the court has to determine 'whether the accused will abscond or not, the court should focus not only on monetary considerations which will restrict the accused in fleeing away from court jurisdiction, these other factors can be presence of a family job, roots in the community etc., the commission also recommended that the bail should not be rejected to an accused only because he is a migrant in the city where the offense was committed and has no relations with the community (local). In such cases help of police of ordinary reference of the person who can help in marking his appearance.

It has also to be seen in BNS that there are certain offences whose punishment does not match the gravity of the offence so commission has proposed modifications in classification in Schedule 1 of BNS as there has been inconsistency in offence and its punishment. For example, under section 85 and 86 of BNS, if a married women is treated with cruelty, it is a non- bailable offence and punishment is up to three years. Author finds such classification illogical and inconsistent and commission recommends to bring consistency in imprisonment terms of offences and classifying them as bailable and non-bailable offences.

- **Reforms in Anticipatory Bail, Economic Offences and Terrorism**

One important reform that is needed in Bail laws is retention of Proviso to section 482 of BNSS on anticipatory bail. Focus should be on granting anticipatory bail with more caution

³⁶ Kieran Correia, In Re: Humphrey – A Case against Cash Bail, Indian Constitutional law & Philosophy (Mar., 02, 2021, 10:00)

³⁷ Arnab Manoranjan Goswami v. The State of Maharashtra and Ors. 2020 SCC Online SC 964.

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and also for a limited time period. There is no argument against the fact that anticipatory bail is special and so chances of its misuse are more so proper reasoning should be provided by the authorities for rejecting or granting of the bail. Anticipatory Bail must be treated as “Extraordinary Privilege”.

There is need to lay down precise guidelines for anticipatory bail so that uniformity can be achieved.

With respect to economic offences, offences like counterfeiting currency, custom offences, black money etc., have forced us to change the approach of bail in such serious offences. A specific provision with respect to grant or refusal of bail under these economic offences has to be included in procedural laws of India. There is need to use factors like nature of offence, societal impacts and impact on market and amount of money involved etc. when bail grant or refusal is to be decided.

- **Treatment of Victims should be focus of Bail Jurisprudence: Public Prosecutor reforms**

Bail Jurisprudence should be focusing upon treatment of victims. One thing which can be done is preparing a ‘Victim Impact Assessment’ report which shall be consisting the records of victim with respect to physical, mental, societal impact of the crime and what impact the grant of bail will have on the victim should be included in the report. Here we can establish a model same as UK where prosecution is provided with all the relevant data for granting the bail.

Pre-trial risk assessment of accused (defendant)- investigation agency have to change their approach, behavior while making risk assessment of the accused.

The Commission addresses exceptions to bail regulations in its set of recommendations. These recommendations attempt to highlight a variety of rights of the accused which should be in harmony to modifications in bail law. According to the Commission, an "absolute restriction on granting of bail would undermine the right to liberty of the person accused of an offence." As a result, commission states that authorities must issue bail in cases when specific supervening and irreversible circumstances exist. It also suggests that the bail authorities should be giving bail to the accused if he or she is suffering from a serious illness and requires special medical care that cannot be made available in the jail.

Lastly, the author would like to say that there is a serious need to bring reforms in Bail laws in India because existing bail laws have become another tool for harassment of poor and innocent victims. Bail jurisprudence needs to be revisited.

