Journal for Re Attach Therapy and Developmental Diversities
eISSN: 2589-7799
2022 November; 5 (2): 711-717
DOI: 10.53555/jrtdd.v5i2.3741

Bail Jurisprudence In India And A Comparitive Analysis With UK And USA- Preserving The Balance Of Justice

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Abstract

The criminal justice system of **India, the United Kingdom, and the United States** share a common legal lineage through the common law tradition, yet each has evolved differently in response to its own societal and institutional demands. While all three systems proclaim a commitment to justice and fairness, significant variations exist in the **speed, consistency, and effectiveness** of their bail processes. India's bail system, in particular, has drawn sustained criticism for **judicial delays, overuse of discretion, and an overburdened judiciary**, which contrast sharply with the comparatively swifter mechanisms in the UK and the USA. Studying these jurisdictions together provides valuable insights into how far legal safeguards in bail are either upheld or compromised. This paper specifically examines how **delayed or denied bail** impacts both the administration of justice and the fundamental liberty of the accused.

The argument advanced here is that, despite strong normative claims to protecting rights, the **practical operation of bail laws** frequently falls short because of **excessive criminalization, inconsistent judicial practice, and inadequate institutional reform**. A reassessment of bail from a **rights-based and evidence-driven perspective**, grounded in constitutional principles, comparative jurisprudence, and international human rights obligations, is therefore essential. Only then can bail be restored to its true purpose: **a safeguard for liberty rather than an instrument of punishment**.

Keywords- Bail; Constitution of India, 1950; Code of Criminal Procedure, 1973; Bail Act, 1976 (UK); Bail Reform Act, 1984 (USA).

Research Questions

- What is the extent to which existing bail procedures in India align with the constitutional guarantees of liberty and fair trial rights?
- How do the statutory provisions and legal principles governing bail in India compare with those of developed jurisdictions such as the United Kingdom and the United States?
- What reforms are required in India's bail laws to ensure that pre-trial detention does not operate as a form of punishment?

Hypothesis

It is hypothesized that the existing bail framework in India, though constitutionally grounded, does not adequately safeguard the rights to liberty and fair trial when compared with the more structured systems in the United Kingdom and the United States. The broad judicial discretion, frequent delays, and socio-economic barriers in India's bail regime often transform pre-trial detention into a form of punishment rather than an exception. If India incorporates clear statutory guidelines, periodic review mechanisms, and stronger legal aid provisions, bail can be restored to its intended role as a protector of personal liberty in line with international human rights standards.

Objectives of the Study

- To examine whether India's current bail procedures are consistent with the constitutional guarantees of liberty and fair trial.
- To analyze the statutory provisions and judicial practices governing bail in India in comparison with the United Kingdom and the United States.
- To identify the key challenges in India's bail system, including judicial discretion, procedural delays, and socio-economic inequalities.
- To evaluate how international human rights standards influence bail jurisprudence and whether Indian law aligns with these principles.
- To propose reforms aimed at ensuring that pre-trial detention remains the exception and that bail functions as a true safeguard of liberty rather than a punitive mechanism.

Legal Systems of India, the UK and the USA

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India, the UK, and the US follow legal systems that share common law roots but differ significantly in structure and constitutional foundations. India has a common law system inherited from British colonial rule, but unlike the UK, it is governed by a written Constitution that is the supreme law of the land and provides for judicial review, fundamental rights, and separation of powers. The UK, on the other hand, operates under an unwritten constitution, relying on statutes, conventions, and judicial precedents, with parliamentary sovereignty as the ultimate principle. Courts interpret and develop the law, but Parliament remains supreme. The United States also follows a common law system, yet it is distinguished by its written Constitution—the oldest still in force—which is supreme over legislation and interpreted through judicial review by the Supreme Court. It further operates within a federal structure, dividing powers between the national and state governments. Thus, while all three nations share a common law heritage, India emphasizes constitutional supremacy, the UK prioritizes parliamentary sovereignty, and the US focuses on constitutional federalism and strong judicial oversight.

Bail not Jail

Pre-trial freedom exists at the crossroads of constitutional liberties and the operation of the criminal justice system. It embodies a key dedication to assuming innocence, which is a foundational principle of democratic legal practices. In principle, those charged with offenses are considered innocent until established guilty. Nevertheless, this assumption is frequently undermined by an overdependence on pre-trial incarceration, particularly impacting individuals who are economically or socially marginalized. Bail functions as an essential legal instrument that permits an accused individual to stay at liberty while they await trial. Ideally, it should harmonize two conflicting goals i.e. guaranteeing the accused's attendance at court and maintaining their freedom. However, in various jurisdictions, the execution of bail has uncovered significant systemic issues. The distinction between protecting public safety and infringing upon individual rights has become increasingly indistinct.

As per International Human Rights Standards, the right to liberty and the presumption of innocence are enshrined in a range of international human rights instruments. These standards establish pre-trial detention as an exceptional measure and underscore the obligation of states to ensure fair, timely, and non-discriminatory access to bail. However, the gap between international norms and domestic implementation remains significant in many jurisdictions, including India, the United Kingdom, and the United States.

Article 9 of the Universal Declaration of Human Rights (UDHR) states that "No individual shall be subjected to arbitrary arrest, detention, or exile," while Article 11 affirms that "Everyone accused of a criminal offense is entitled to be considered innocent until proven guilty." Although the UDHR does not possess legal enforceability, it serves as a crucial document for the evolution of international law and the constitutions of various nations.

The ICCPR[1] is a binding treaty that has been ratified by both India and the United Kingdom, although the United States has only partially adopted it. This treaty presents the most definitive legal structure concerning rights related to bail: "It shall not be the general principle that individuals awaiting trial are to be kept in custody."[2], and article 14 reinforces the presumption of innocence.

The UN Human Rights Committee (UNHRC) states that pre-trial detention ought to be regarded as an "exceptional measure" and should only be utilized when it is absolutely essential to avert flight risk, tampering with evidence, or the repetition of criminal acts.[3]

Bail Laws in India

Justice Dalveer Bhandari held that, "Every crime is considered an offence against society, so whether bail is granted or denied has a big impact on society. It is imperative to make a balance between person's liberty and the needs of the community".[4] The legal basis for bail is rooted in the Constitution of India which guarantees the right to life and personal liberty, establishing the essential right to request bail when held by any law enforcement agency. [5] The Universal

[1] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171

[2] ICCPR, art 9(3)

[3] UN Human Rights Committee, 'General Comment No 35: Article 9 (Liberty and Security of Person)' (16 December 2014) UN Doc CCPR/C/GC/35

[4] *S.S. Mhetre v State of Maharashtra* AIR 2011 SC 312.

[5] Constitution of India 1950, art 21.

Declaration of Human Rights states that bail, particularly anticipatory bail, is based on the presumption of innocence, which is a core principle expressed in the Universal Declaration of Human Rights.[6]

Offences are categorized for bail considerations into:

Bailable Offence: "bailable offence means an offence which is shown as bailable in the First Schedule, or which is made bailable by any other law for the time being in force;"[7] As outlined in Section 2(a) of the CrPC, Section 436 of the CrPC entitles suspects of these offenses to bail if certain conditions are met. Police may grant bail at the time of arrest or detention.

Non-Bailable Offence: "non-bailable offence means any other offence;" also outlined in Section 2(a) of the CrPC. Bail is not a right for certain serious crimes, as defined in Sections 437 and 439 of the CrPC. Judges play a crucial role in deciding bail for these non-bailable offenses, typically involving penalties of three years or more.

Bail is typically regarded as a temporary release of a person facing charges while awaiting a trial. The main aim is to guarantee that the individual will appear in court without needing to remain in custody.

The foundation of assuming innocence highlights the significance of reducing detention prior to the trial.

Legal protections, including oversight by the judiciary, the right to have a lawyer, and the concept of proportionality, are essential components of this system. The Code of Criminal Procedure, 1973 uses the term Bail extensively but hasn't defined it. According to the Law Lexicon, 'bail' is defined as, "the amount of money provided as a security to the authorities on giving which he is released pending trial or investigation"[8]. As a result, bail is the process by which someone is freed from detention. It is claimed that "the word bail comes from the ancient French verb 'bailler,' which meant 'to give' or 'to deliver.' Additionally, it is thought to have originated from the Latin word 'baiulare,' which means 'to bear a burden.'"[9]

Necessity of Bail Provision under Indian Law:

The accused is 'presumed innocent until proven guilty'[10]. Accused suffer significant psychological and physical deprivation as a result of pre-trial incarceration. Due to this imprisonment, the imprisoned accused is unable to prepare for his defence, and the innocent family members are also affected. As a result, as per Article 21[11], Bail acts as the foundation of the Indian legal system and a method of protecting the life and freedom of the populace.

India's bail framework is regulated by the Criminal Procedure Code established in 1973. The sections 436 to 439 of the CrPC classify offences as either bailable or non-bailable. The Criminal Procedure Code, 1973 (CrPC) makes a distinction between these two categories. For bailable offences, individuals have a legal entitlement to bail as per Section 436 of the CrPC. Conversely, for non-bailable offences, the courts possess the authority to decide on bail according to Sections 437 to 439 of the CrPC. Nevertheless, this classification often results in varied interpretations and the misuse of judicial discretion, particularly in cases that are politically charged or draw significant media attention.

In spite of these legal protections, India's bail system is plagued by excessive incarceration, lengthy delays, and arbitrary bail rejections. Nearly 75% of the individuals in Indian prisons are those awaiting trial[12]. In India, the system for monetary bail is not highly formalized; however, the use of financial guarantees and personal sureties often creates situations where wealth impacts detention outcomes. Magistrates occasionally require cash deposits even for bailable charges, which contravenes established legal principles and undermines the right to liberty.

Judicial discretion regarding bail remains expansive and is often characterized by a lack of transparency. Although the Supreme Court has provided instructions, as seen in the case of Arnesh Kumar v. State of Bihar[13], that advise against the routine arrest of individuals for minor infractions, these recommendations are frequently overlooked by lower courts. In the case of Satender Kumar Antil v. CBI[14], the Supreme Court emphasized the necessity of minimizing unnecessary arrests and instructed the courts to follow procedural safeguards rigorously. Nonetheless, lower courts often vary from these guidelines, justifying their actions based on public opinion or the demands of ongoing investigations.

[6] Universal Declaration of Human Rights, art 11.
[7] Code of Criminal Procedure 1973, s 2(a).
[8] P Ramanatha Aiyar, *Advanced Law Lexicon – The Encyclopaedic Law Dictionary with Words & Phrases, Legal Maxims and Latin Terms* (6th edn, LexisNexis 2019).
[9] 'Bail' *Online Etymology Dictionary* https://www.etymonline.com/word/bail accessed 10 September 2022.
[10] Constitution of India 1950, art 20(5).
[11] Constitution of India 1950, art 21.
[12] National Crime Records Bureau (India), *Prison Statistics India 2022* (NCRB 2022).
[13] *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273.
[14] *Satender Kumar Antil v. CBI* (2022) 10 SCC 51.

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In India, bail includes four categories:

Regular bail, is provided post-arrest to guarantee presence at the trial. 'Section 437 of the CrPC allows the magistrate's court to provide regular bail for offenses that are usually non-bailable, while Section 439 of the CrPC broadens this authority to include the High Court or Sessions Court. Elements affecting bail choices comprise the crime's nature, evidence credibility, the accused's character, and community interest.'[15]
Statutory bail or default bail, 'is a case in which a police force does not make a report within a specified period in accordance with Sec 167(2) of the CrPC. The accused has an inherent right if the chargesheet is not submitted within the designated timeframe, applicable regardless of the nature of the offense, and can be granted by First or Second Class Magistrates.'[16]
An Anticipatory bail, 'is requested when an arrest for a non-bailable crime is expected. Sec 438 of the CrPC allows individuals to apply for bail before arrest for expected non-bailable crimes. Eligibility relies on elements such as the seriousness of the charge, the applicant's history, and the likelihood of inaccurate accusations.'[17]
An Interim bail, is for time being and is granted before regular or anticipatory bail hearings.
In India, the right to legal aid is promised by the Constitution (Article 39A), yet it is often unavailable in practice. Individuals held as undertrial prisoners frequently endure extended periods of confinement because they do not have proper legal representation or knowledge of their entitlements. The Supreme Court, in the case of Hussainara Khatoon v. State of Bihar[18], highlighted the necessity of swift trials as an essential right; however, many years later, delays in legal procedures continue to be widespread.

Bail in the United Kingdom

The Bail Act of 1976, governs the bail regulations in the UK, which includes a default position that favors granting bail. This framework is designed to maintain individual freedom while ensuring judicial oversight. Consequently, bail is considered a right unless certain legal exceptions are present, meaning that it can only be denied if the court has significant reasons to suspect that the defendant would commit a crime while out on bail, not appear for their court date, interfere with witnesses, or hinder the course of justice. The framework in the UK focuses on reasonable grounds and proportionality when refusing bail, with options for appeal.
The Bail Act 1976 states that, it is mandatory for judges to provide written explanations if they decide to deny bail. This requirement enhances accountability and facilitates the process of appellate review.[19]
In the UK, cash bail is rarely utilized; instead, the system predominantly focuses on conditional bail along with sureties. The primary concern is managing risks through various conditions, which may include curfews, mandatory reporting, or the use of electronic monitoring devices.[20]

In U.K. bail includes the following categories:
Police Bail (Pre-Charge Bail), in this Police may release a suspect on bail while they continue investigations, usually with conditions like reporting to a station or surrendering a passport. This prevents unnecessary custody while evidence is gathered.[21]
Court Bail (Pre-Trial Bail), when charged with an offence, defendants may be granted bail by the court until trial. Conditions can include curfews, residence requirements, or contact restrictions to ensure appearance and public safety.[22]
Conditional Bail, is a bail with specific restrictions to manage risks, such as electronic tagging, regular check-ins, or travel bans. It balances the presumption of bail with public protection.[23]

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[15] Code of Criminal Procedure 1973, ss 437, 439.
[16] Code of Criminal Procedure 1973, s 167(2).
[17] Code of Criminal Procedure 1973, s 438.
[18] *Hussainara Khatoon v. State of Bihar* (1980) 1 SCC 81.
[19] Bail Act, 1976, s 5(3).
[20] Bail Act 1976, s 5(3). 'Understanding UK Bail Laws: Preserving the Balance of Justice' *Criminal Practice Law SQE* https://criminal-practice-law-sqe.co.uk/understanding-uk-bail-laws-preserving-the-balance-of-justice/ accessed 4 September 2022.
[21] Police and Criminal Evidence Act 1984, as amended by the Policing and Crime Act 2017.
[22] Bail Act 1976, s 4.
[23] Bail Act 1976, ss 3–7.

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In an Unconditional Bail, the defendant is released without any restrictions except attending court at the set date. This is usually given in minor or low-risk cases.[24]
Post-Conviction Bail (Pending Appeal), is granted in cases where, a defendant who has been convicted may be granted bail while waiting for sentencing or appeal. This is less common and only allowed where justice clearly requires it.[25]
In the United Kingdom, legal assistance is more organized and supported by public funds. Nevertheless, recent budget reductions and austerity measures have led to worries about adequate access to justice, particularly for at-risk defendants. The Right to bail under sec. 4 of the Bail Act 1976, is indefeasible, Sec states that on each occasion that a person is brought before a court accused of an offence, or remanded after conviction for enquiries or a report, he must be granted bail without condition, if none of the exceptions to bail apply and the Prosecutors must keep the issue of bail under review throughout the life of the case. The conditions of bail may only be imposed where necessary to ensure that the exceptions to bail are addressed. Only where conditions are not sufficient to address the exceptions to bail should a remand in custody be sought. Under sec. 5 of the Bail Act 1976, the court or officer refusing bail or imposing conditions must give reasons for their decision. The grounds for refusing bail are set out in Schedule 1 to the Bail Act 1976.

Bail in the United States

The Eighth Amendment of the United States Constitution[26] forbids "excessive bail." Nonetheless, the methods of bail differ significantly among states, frequently depending on cash-based systems. In federal criminal cases, which concern all offenses against the country, the Bail Reform Act of 1984 provides the framework governing release and detention, outlining specific rules that must be adhered to. While the Constitution does not guarantee a right to bail, it does prevent the setting of disproportionately high bail amounts.[27]
The bail system in the U.S. often grants considerable discretionary authority to prosecutors, magistrates, or even algorithms in regions that utilize risk-assessment tools. These mechanisms, intended to remove political influence from the decision-making process, have faced criticism for perpetuating existing biases and providing minimal transparency or protections for due process.[28]

In USA the bail includes the following categories:
In Cash Bail, the accused has to pay the amount of bail in cash. The Court even takes cheques or credit cards.
A Surety Bond is even called a bail bond. The surety bond is paid when the accused is not in a position to pay his bail amount. This is done through a bail agent called a bail bondsman.
A Release on Citation, involves a police officer issuing a citation to the suspect that the accused shall appear in court rather than booking him for the offence. This is an effective way where a police officer can focus on other heinous crimes.
In a Property Bond, the defendant provides his property to act as a bail bond. When the defendant does not appear in the court on the due date, then the court can foreclose the property if it thinks so, to recoup forfeited bail.
In Release on Own Personal Recognizance, is allowed only for minors, non-violent offence, the defendant is not a harm to society or any individual, and that the defendant would flee and would be absent on his court dates. So, in this case, he only has to come to the court on due dates and does not have to pay for bail.[29]
The USA mandates legal counsel under the Sixth Amendment, but public defenders are often overburdened, under-resourced, and unable to provide effective advocacy. In many cases, defendants waive bail hearings or accept unfavorable plea deals due to inadequate counsel. Under Sec 3142, Bail Reform Act of 1984 , lays down that in general the judicial officer shall order the defendant to be released on personal recognizance or upon unsecured appearance bond. There are Bail schedules with uniform bench mark of bail setting bail amounts for various categories of criminal charges have been in use for decades in the US.

Challenges in Indian Bail System

[24] Bail Act 1976, s 3.
[25] Bail Act 1976, s 4(1).
[26] Shima B Baughman, *The Bail Book: A Comprehensive Look at Bail in America's Criminal Justice System* (CUP 2017) Introduction.
[27] 'Understanding the U.S. Bail System' *The American Reporter* https://www.theamericanreporter.com/understanding-the-u-s-bail-system/ accessed 10 August 2022.
[28] 'Evolution of US Federal Bail Laws: From 1966 to Present' *Leppard Law* https://leppardlaw.com/federal/bail/evolution-of-us-federal-bail-laws-from-1966-to-present/ accessed 17 September 2022.
[29] Congressional Research Service, *Bail: An Abridged Overview of Federal Criminal Law* (CRS Report R40222, 2009) https://www.congress.gov/crs-product/R40222 accessed 12 September 2022.

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Even with constitutional protections and legal provisions, the actual execution of bail regulations in India exposes a range of systemic issues. These issues obstruct the achievement of pre-trial freedom and disproportionately impact disadvantaged groups.
The bail framework in India presents a contradiction, while the legal system seemingly aims to safeguard individual freedom, its application is fundamentally flawed. In cases categorized as non-bailable, the decision to grant bail primarily rests with the judges. This authority, though influenced by established legal precedents, often leads to irregularities, arbitrariness, and selective jurisdiction. Lower courts, swayed by societal attitudes, media scrutiny, or imagined political consequences, may systematically refuse bail, especially in prominent cases. Bail hearings in India are often postponed due to overloaded court schedules and procedural delays. In both rural and semi-urban regions, magistrates may defer bail requests several times, leading to extended periods of detention prior to trial. Individuals awaiting trial frequently remain incarcerated longer than the maximum penalty for their alleged crimes. Even with explicit instructions from the Supreme Court in Arnesh Kumar v. State of Bihar[30] and Satender Kumar Antil v. CBI[31], law enforcement continues to detain individuals for offenses carrying sentences of less than seven years without sufficient justification. The lack of accountability for wrongful or excessive detentions aggravates the situation.

Proposals for Reform

India's bail process is plagued by procrastination, discretionary abuse, and socio-economic marginalization. The Supreme Court's directives in the cases of Arnesh Kumar v. State of Bihar and Satender Kumar Antil v. CBI need to be codified for uniform application across the nation to decrease unnecessary arrests and detentions. A standard checklist of considerations—such as the nature of the crime, flight risk, and economic background—should be enforced to limit arbitrary and inconsistent bail decisions. Although the Legal Services Authorities Act of 1987 offers a foundation, its actual execution falls short. Access to legal aid should be broadened, especially at the initial presentation before a magistrate. It is essential to implement legal stipulations for mandatory bail reviews every 30 to 60 days to alleviate overcrowding of undertrial inmates, akin to the remand review practices in the UK. Establishing a standardized bail amount, similar to that in the US, could provide defendants with a clearer understanding of the potential bail they might face. This approach would also expedite bail hearings, as all involved parties would have some familiarity with the figures. Furthermore, with advance knowledge of potential bail amounts, defendants would have the opportunity to arrange necessary sureties prior to the hearing.

Conclusion

The right to pre-trial freedom encapsulates more than a procedural entitlement; it represents a fundamental assurance of justice and dignity. In India, the existing bail frameworks require immediate reassessment in line with the UK, and the USA, to remove disparities based on wealth, race, and systemic biases. There is a pressing need for a bail system that is transparent, equitable, and guided by human rights, effectively balancing individual liberty with the just interests of the state. Only under these circumstances can the legal assertion of “innocent until proven guilty” be genuinely honored.

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[30] *Arnesh Kumar v State of Bihar* (2014) 8 SCC 273.
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