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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

UNEQUAL ACCESS TO JUSTICE: A CRITICAL STUDY OF SOCIO-ECONOMIC BIAS IN INDIA'S BAIL SYSTEM WITH COMPARATIVE INSIGHTS

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ABSTRACT:

India's criminal system is based on the principle of presumption of innocence. Every person accused of an offence is innocent until he is proven guilty or declared guilty by a competent court of law. This dissertation undertook an empirical and doctrinal legal analysis and found out that this system criminalises poverty and is completely broken for the poor people. As of 2023, undertrial prisoners constitute 73.5% of India's total prison population. Statistics show that the majority of these numbers are constituted by prisoners from Scheduled Caste, Scheduled Tribe, Other Backward Class communities as well as from religious minorities. The dissertation argues that imposing a bail condition that cannot be complied with owing to the accused person's financial capacity is violative of Articles 14, 21 and 39A. The transition from the Code of Criminal Procedure to the Bharatiya Nagarik Suraksha Sanhita has been traced and analysed with special attention to Section 479. Through the NCRB data and socio-legal research, it has been established that the surety system functions as a territory that the poor cannot get into. The result is a sentence that gets imposed without trial or conviction. The system fails miserably in safeguarding the interests of the poor undertrial prisoners. The reform of India's bail system cannot be achieved by amendments alone. The money-oriented surety system has to be replaced with a risk assessment model and at the same time, sufficient financial resources have to be invested in the legal aid infrastructure of the country. The judiciary has to be held accountable for bail orders that put liberty beyond the reach of the indigent accused. Until and unless these changes are made, the

constitutional promise of bail being the rule and jail being the exception would never prevail and will always be just a promise. This would constantly undermine the whole concept of liberty.

Keywords: Undertrial prisoners; Bail Jurisprudence; Surety System; Right to Liberty; Legal Aid.

INTRODUCTION:

The concept of justice in a democratic society is mostly measured by how the system treats those with limited financial resources. In India, this is most visible within the four boundaries of our prisons where the majority of those detained have not been convicted of any crime as of now. They are “undertrials”, the individuals stuck in a frustrating situation that is often decided more by their bank balance than by the gravity of their alleged offenses. The absence of money keeps them in prisons for an indefinite period of time. Bail can be referred to as conditional liberty, but the Constitution certainly does not treat it as a privilege that shall be contingent upon other factors. Article 21 states that: “no person shall be deprived of his life or personal liberty except according to procedure established by law.”¹

Over time, the Supreme Court interpreted this broadly to uphold human dignity. Justice V.R. Krishna Iyer had stated for the very first time in the case of *State of Rajasthan vs. Balchand*² that “bail is the rule and jail is the exception.” This principle cannot be contradicted but the reality tells a completely different story. This paper is an attempt to critically analyse this flaw in our legal system where the constitutional guarantee of liberty meets the harsh and unpredictable reality of social and economic inequalities. The barriers that work as obstacles stopping the poor people from accessing bail will be discussed and criticised accordingly. The transition from the Code of Criminal Procedure to the Bharatiya Nagarik Suraksha Sanhita has been focused on, majorly to understand what reforms have been introduced and whether those are sufficient or not. At the end, a comparative analysis will be provided to understand what features we can adopt from the legal systems of other countries such as the United Kingdom and the United States of America. The main argument throughout will be that the existing legislative framework for the bail system is not poor-people friendly. It is extremely biased and money-oriented. This affects the poor people

¹ INDIA CONST. art.21.

² *State of Rajasthan v. Balchand*, AIR 1977 SC 2447.

disproportionately and infringes their fundamental rights. This leads to criminalisation of poverty, The constitutional guarantees of equality, liberty and equal access to justice are not being upheld or respected.

THE CONCEPT OF BAIL AND ITS CONSTITUTIONAL FRAMEWORK IN RELATION WITH LIBERTY AND EQUALITY:

If we use basic terms for easier understanding, bail is the release of a person from the custody of the law based on a promise to appear before the court whenever required. In the technical language of Section 2(1)(b)³ of BNSS, it is the release dependent upon a bond: a promise backed by money ensuring that the person will return for trial. The significance of bail goes beyond its technicalities. Bail is meant to ensure that a person doesn't lose their job, their family relations or their dignity while they wait for a court to decide their future. In a system like ours where cases get dragged on for years and years, bail is the only thing that prevents the process from becoming the penalty for common people.

From a functional perspective, bail can be categorised into three types under the Indian legal system. The first is regular bail which is sought after arrest and detention. It is the usual remedy through which the accused requests the court to release him during pendency of the investigation and trial. Whether bail is granted or not depends upon a lot of factors such as the nature of the offence. Bail is either granted as a matter of right or it comes under the discretionary powers of the court. There is no in between. The provisions relating to regular bail in bailable and non-bailable offences are mentioned under Sections 480⁴ and 483⁵ of the BNSS respectively. The second category is anticipatory bail. It is a pre-arrest remedy available to a person who has reasons to believe that they may be arrested on accusation of a non-bailable offence.⁶ The third category is default bail which arises from the failure of the investigating agencies to complete the process of investigation and filing chargesheet within the prescribed time-limit.⁷

Section 479 of the Act has now created a lenient provision for the offenders with no criminal history wherein such individuals may be released on a personal bond after finishing one-third of

³ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 2(1)(b).

⁴ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 480.

⁵ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 483.

⁶ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 482.

⁷ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 187(3).

the maximum sentence prescribed for their alleged offence. For other undertrials, they can apply for release after serving one-half of the maximum sentence. However, there are certain restrictions. Mandatory release is not available to those who have been accused in multiple offences or where the allegations involve serious offences that are punishable with death or life-imprisonment.⁸ This reform clearly attempts to create a fair balance between personal liberty and public interest.

The Maneka Gandhi case was nothing less than an eye opener. The Court took a very broad and humane approach and stated that procedures established by law must be just, fair and reasonable as per the standards of Article 21.⁹ This transformation meant that any procedure that is technically lawful and in accordance with a particular statute could be constitutionally considered arbitrary. Just because it is mentioned in a statute, that does not mean it will be upheld irrespective of any circumstance. A bail condition that a person cannot satisfy due to no availability of financial assets is an unreasonable procedure.

When articles 14¹⁰ and 21 are read together, they become a powerful tool for questioning the bail system's inherent class bias and discrimination. The logic of Article 14's application to bail is very simple. When a magistrate fixes bail at a surety of Rs. 20,000/- for two people, the order looks fair. But the wealthy person has the privilege of walking out within hours. The poor accused returns to prison at the end of the day. The same bail order here is resulting in two completely different outcomes based solely on economic status. As the Supreme Court observed in *E.P. Royappa v. State of Tamil Nadu*, “Equality and arbitrariness are sworn enemies.”¹¹ In the case of *Moti Ram v. State of M.P.*, Justice V.R. Krishna Iyer explained this contradiction nicely while stating that: “The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges.”¹² Article 39A was inserted with the intent of social justice and this section directs the State to ensure equal justice and provide free legal aid to citizens who need it.¹³ In the case of *Hussainara Khatoon v. State of Bihar*,¹⁴ it was declared that *the right to free legal aid is an essential ingredient of Article 21.*

⁸ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479.

⁹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹⁰ INDIA CONST. art. 14.

¹¹ *E.P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348.

¹² *Moti Ram v. State of M.P.*, AIR 1978 SC 1594.

¹³ INDIA CONST. art. 39A.

¹⁴ *Hussainara Khatoon v. State of Bihar*, 1979 SCR (3) 532.

THE SURETY TRAP AND THE CRIMINALISATION OF POVERTY:

When a court grants bail on sureties, the person has to produce the required documents along with the property's valuation reports and official records. These are presented before the judges to assess the property's existence, adequacy and capability to pay off the amount fixed. Considering the fact that India is a country where the poor people constitute such a huge majority of the demography, their situation also has to be taken in consideration before setting such absurd requirements. Let us talk about a hypothetical situation. For instance, a labourer whose family has worked on the same plot of unregistered land for generations based on an understanding between their ancestors. The person cannot produce such documents. It is the same for a migrant who stays in a slum. He has migrated to another city to feed his family. The person cannot be expected to have registered assets to his name. India's economy is mostly informal. The poor people have no formal document to present before the court. They barely even have the knowledge of such technicalities.

According to the National Crime Records Bureau (NCRB) *Prison Statistics India 2023 Report*, "undertrial prisoners constitute 76.2% (4,22,238 inmates) of India's total prison population, compared to 23.3% convicts."¹⁵ They do not have a single conviction against their names but still they are stuck behind the bars. One thing that is evident after reviewing these statistics is that the prisons are housing more inmates than the sanctioned capacity. Each and every prisoner in there is suffering. Out of every four people in an Indian prison, three are innocent in the eyes of the law.

"As per the data of the National Crime Records Bureau, 14.6% of undertrials had spent 1-2 years, 7.8% 2-3 years, 6% 3-5 years, and 2.6% longer than five years."¹⁶ Imagine a person rotting behind bars awaiting trial for an offence that carries only a maximum imprisonment of two years? The demographic profile of the prisoners also says a lot. The members of the Scheduled Castes and Scheduled Tribes constitute 24 percent of India's population but their representation in prison population is much higher, somewhere around 34%.¹⁷ On top of that, almost half of the total prison

¹⁵ NATIONAL CRIME RECORDS BUREAU, MINISTRY OF HOME AFFAIRS, *PRISON STATISTICS INDIA 2023*, <https://www.ncrb.gov.in/uploads/files/PSI-2023.pdf>.

¹⁶ Parth Anand & Manvi Bansal, *Frozen Laws, Forgotten Lives*, SACJ NUJS BLOG (May 21, 2025), <https://www.nujssacj.com/post/frozen-laws-forgotten-lives-the-undertrial-crisis-in-india-s-legal-delay>.

¹⁷ *One in Every Three Under-Trial Prisoners in India is Either SC or ST: Study*, THE WIRE (Dec. 8, 2019), <https://thewire.in/rights/one-in-every-three-under-trial-prisoners-in-india-is-either-sc-or-st-study>.

population is of people of the age group from 18 to 30 years. This shows that the youth of the country that is supposed to build its future is stuck behind prisons. *In 2022, a striking 66% of the undertrial prisoners belonged to marginalised caste groups, comprising Scheduled Castes, Scheduled Tribes, and Other Backward Classes (OBC).*¹⁸ This means that 1.3 out of every two undertrials were from these marginalised castes/communities. The Muslim community forms approximately 14.2% of India's population but they constituted 19% of undertrial prisoners in 2022 and 20.1% in 2023.¹⁹ *Likewise, Sikhs represent 1.7% of India's population, but they form 3.9% of the prison population.*²⁰

The insistence on providing a local surety is absurd and ridiculous. A man who is originally from Kolkata gets entangled in a legal case in Gurgaon. Is it fair to ask him to bring a local surety at any cost or otherwise bail shall be refused? This is exactly what happened even in the case of *Sumit Sharma and another v. State of Haryana*.²¹ The Court quashed all these unnecessary charges and said that this requirement of local surety is violative of fundamental rights.

SECTION 479 AND ITS SHORTCOMINGS:

Section 479 decides the fate of most undertrial prisoners. Sub-section (1) states that if any undertrial prisoner underwent detention for one-half of the maximum period of imprisonment associated with the offence, they shall be released on bail.²² This is not applicable to an accused that allegedly committed an offence punishable with death or life imprisonment. A first-time offender shall be released on a personal bond if they have remained incarcerated for one third of the maximum period of imprisonment associated with their offence. In *In Re: Inhuman Conditions in 1382 Prisons*, the Supreme Court confirmed that Section 479 shall have retrospective application which extended the benefits to every prisoner.²³

¹⁸ Shibra Siddiqui, *Majority of Prison Undertrials Youth, from Oppressed Communities*, NEWSCLICK (Jan. 9, 2024), <https://www.newsclick.in/majority-prison-undertrials-youth-oppressed-communities>.

¹⁹ *Over 30% of Detainees in Indian Prisons are Muslims, Double their Share in Population*, THE HINDU (Sept. 14, 2022), <https://www.thehindu.com/data/over-30-of-detainees-in-indian-prisons-are-muslims-double-their-share-in-population/article65882525.ece>.

²⁰ Moumita Barman, *Undertrial Disparities of Caste and Religion in PSI 2023 India*, SIASAT (Oct. 20, 2025), <https://www.siasat.com/undertrial-disparities-of-caste-and-religion-in-psi-2023-india-3285430/>.

²¹ *Sumit Sharma & Another v. State of Haryana*, 2025:PHHC:128529.

²² The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479(1).

²³ *In Re: Inhuman Conditions in 1382 Prisons*, W.P. (C) No. 406/2013.

The second sub-section has introduced another exception stating that an accused cannot be released if any investigation, inquiry or trial is pending against him in multiple cases/multiple offences.²⁴ That means an accused facing two serious charges is being put on the same level as someone accused of two petty offences. The impact of this blanket exclusion falls like a weight mainly upon marginalised communities as they have to be in frequent contact with the police due to discriminatory practices.

Sub-section (3) places an obligation on the Superintendent of the Jail to initiate the bail applications on behalf of the prisoners.²⁵ In the CrPC, the responsibility to file a bail application was on the accused and the literacy rates or awareness level among the people were not at all considered. However, the changes have raised a lot of questions with the multiple exceptions wherein no difference has been created based on the severity of the offences. The provision is also silent on the Court's powers to deny release when the prosecution or the state opposes the bail application. These parts need clarity.

THE RIGHT TO FREE LEGAL AID: A RIGHT THAT EXISTS ONLY ON PAPER:

The collapse of the legal aid system is another obstacle preventing the poor from getting bail. In the case of *Khatri (II) v. State of Bihar*, the Court held that a poor accused must be provided legal aid without him having to request for it. The process of legal aid must begin as soon as he is first produced before the magistrate.²⁶ The doctrine is clear and unambiguous. The reality tells a completely contradictory story. Based on NCRB data of undertrial prisoners in Maharashtra, it was seen that only approximately 7.91% of the undertrial prisoners utilised free legal aid between 2016-19.²⁷ In 2023, the Union government initiated a cash bail scheme for prisoners who were granted bail, but they were unable to get out due to lack of funds. Almost 80% could file bail applications. Most of them lagged behind because they lacked a lawyer. "As per the India Justice Report 2025,

²⁴ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479(2).

²⁵ The Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479(3).

²⁶ *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627.

²⁷ 7.91% of Undertrials Utilised Legal Aid Services in 2016-19, Says TISS Report, INDIAN EXPRESS (Jan. 29, 2023), <https://indianexpress.com/article/cities/mumbai/7-91-of-undertrials-utilised-legal-aid-services-in-2016-19-says-tiss-report-8410155/>.

only 15.5 lakh people availed legal aid in 2023-24, despite nearly 80% of India's population being eligible.”²⁸

COMPARATIVE ANALYSIS: THE UK AND US MODELS

Moving ahead to a comparative analysis, this is to expand the scope of better alternatives for India's system. Direct inclusion of other legal systems into India's system is impractical. The purpose is to demonstrate that the model of monetary sureties is not such an important feature without which a criminal justice system cannot function. England and Wales can be the most purposeful comparison standard for India. The Bail Act 1976 nullified the requirement of money-based bail conditions²⁹ and now a defendant is no longer required to find a “professional” surety to pay the price for their liberty. The Act now operates on a different principle wherein Section 4 has created a qualified right to bail.³⁰ Keeping the person in custody is the last step and is resorted to only when there is no other better alternative. Section 5 states that the court must give reasons for their decision.³¹ *Bail conditions in the UK commonly include residence requirements, reporting to a police station, surrendering a passport, avoiding contact with specific individuals, exclusion zones, and curfew with or without electronic monitoring.*³² A curfew is capable of handling the flight risk without requiring financial assets. A reporting condition addresses the risk of disappearance without requiring a guarantor. An exclusion zone addresses the risk of destruction of evidence without requiring property documents. These are solutions to the problems discussed so far.

The State of New Jersey implemented the Criminal Justice Reform on January 1, 2017, through which certain substantial changes were introduced. An instrument for risk assessment was developed by Arnold Ventures. The Public Safety Assessment produces scores on two aspects- the likelihood of flight risk/failure to appear for court dates and the likelihood of committing another crime. This helps the judges in coming to a fair conclusion without jeopardising the rights of the accused. Since the removal of the money-oriented bail system plus the adoption of the PSA in

²⁸ *Legal Aid and NALSA*, INSIGHTS ON INDIA (Aug. 1, 2025), <https://www.insightsonindia.com/2025/08/01/legal-aid-and-nalsa/>

²⁹ *Code of Criminal Procedure: Bail*, IILS INDIA, https://www.iilsindia.com/study-material/320679_1601207180.pdf

³⁰ The Bail Act 1976, c. 63, § 4 (UK).

³¹ The Bail Act 1976, c. 63, § 5 (UK).

³² *Bail Applications-Right to Bail and Exceptions*, PASTPAPERHERO, <https://www.pastpaperhero.com/resources/uk-legal-bail-act-1976>.

2017, New Jersey has significantly reduced the population in prison without compromising with public safety. The main criticism of this system is that the issues of racial discrimination have not been addressed. It is to be noted here that prior to these reforms, Black people were about 54% of the jail population of New Jersey. After the reforms, that figure has not changed.³³ White people and black people might be committing the same crime, but the punishments somehow turn out to be unfairly different for both the communities based on the colour of their skin.

SUGGESTED REFORMS:

The most important reform required is the one that the Supreme Court itself has suggested. There should be one separate legislation for the bail framework. Many democratic countries have separate legislations for bail. For instance, the UK Bail Act of 1976, the US Federal Bail Reform Act of 1966. This shows that a dedicated bail legislation is not something that has never happened in the history of mankind. Some core provisions can be included, such as:

- A statutory presumption that every accused person is entitled to bail subject to some specific exceptions.
- A mandatory rule that there has to be multiple conditions, out of which only the least restrictive one shall apply.
- The conditions for bail have to be specified in detail.
- An explicit provision stating that no bail conditions can be imposed on a person who cannot comply with it simply because of poverty and financial incapacity.
- A “community ties assessment” instead of the “solvent surety” as a bigger measure for reliability.
- A mandatory time limit within which bail hearings must be finished starting from the first time of the accused before a magistrate.
- A statutory right to an immediate bail hearing especially for petty offences where the state has to ensure that the person has access to free legal assistance.

For the risk assessment thing, if a person moves around frequently or does not have a fixed address, that is a negative indicator against residential stability. The same address for a couple of years can

³³ *How New Jersey Used an Algorithm To Drastically Reduce Its Jail Population – And Why It Might Not Be the Right Tool for the Job*, ACLU-NJ (Aug. 30, 2022), <https://www.aclu-nj.org/news/how-new-jersey-used-algorithm-drastically-reduce-its-jail-population-and-why-it-might-not-be/>.

be taken as a positive sign. Having family around in the same jurisdiction can point towards reliability too. Other negative signs would include a total lack of social relationships or history of non-appearance in previous court hearings. In this way, genuine risk assessment can be done instead of criminalising poverty. As discussed earlier, the USA's model pointed towards racial discrimination. This is why factors like criminal history or information on prior arrests/convictions have been intentionally excluded.

The BNSS has placed an obligation on the prison authorities to initiate bail applications, but an Indian prison is nothing less than a mess. They are understaffed too which makes the whole process realistically difficult. The establishment of a mandatory committee in every prison would help with at least one or two legal aid lawyers, a social worker and a data entry operator with knowledge of the e-courts system. This committee can be assigned the task of identifying such eligible prisoners and then filing bail applications on their behalf.

In cases where monetary conditions are genuinely necessary, a new system can be established where the bail amount is linked to the person's income. After establishing the accused's average monthly/annual income, they can be instructed to submit a self-declaration form. For the informal sectors, community attestation shall be considered sufficient. The bail amount can then be set in accordance with the level of income of the accused as well as the gravity of the offence committed and the assessed risk level.

The proposed statute should contain an explicit prohibition on local surety requirements. A surety from Bihar is no less reliable than a surety from Delhi simply based on his geographical location. More investments have to be made for the betterment of the legal aid system as well. Such as, the fees for legal aid lawyers should be increased based on the complexity and duration of criminal cases. That would encourage young meritorious advocates to be a part of the system. A training programme regarding bail jurisprudence should be initiated for advocates interested in this specific area. Cases should be allocated after proper consideration of the clients' regional languages and dialects to ensure good communication between the lawyer and the client, etc.

CONCLUSION:

This paper highlighted how identical rules are applied uniformly to unequal people leading to unfair outcomes. This has been normalised to a point where this seems like a consequence of law and not a constitutional failure. Without preserving ideals like liberty and dignity, the Constitution

would simply lose its meaning. The right to liberty is redundant if the deciding factor is one's financial capacity. In his concluding address to the Constituent Assembly, Dr. B.R. Ambedkar had mentioned that: *"However good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot."*³⁴ Such poor implementation of this document has not been able to give life to the progressive ideals. India's bail system cannot function as a marketplace where liberty is purchasable. To conclude, bail is not a matter of grace or some charity-work. It is a constitutional right that every citizen is entitled to. The duty of the State is to enable its exercise and not obstruct it and that too for every accused in every court and on every single day.



³⁴Dr. B.R. Ambedkar's 1949 Speech, BAR & BENCH (Apr. 14, 2018), <https://www.barandbench.com/columns/dr-ambedkar-1949-constituent-assembly-speech>.