

# Legislative Regulations and Judicial Discretion in Bail: A Comparative Study

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## Abstract

Bail plays a crucial role in criminal justice systems as it aims to reconcile two conflicting interests – the priority of safeguarding an accused person's right to personal liberty, and the necessity of the state to facilitate the effective administration of justice. The central tenet of bail jurisprudence is that nobody is guilty of a criminal offence until they are convicted, thus making pretrial detention a rare exception, not an ordinary. Yet, from state to state, constitutional values, a policy emphasis on public safety, crime control philosophies and different judicial traditions are reflected in the laws surrounding the question of bail. In these statutory requirements, the role of the judge is very important as he/she can decide between granting and denying bail based on the circumstances of the case – the gravity of the offence, the possibility of the accused absconding, intimidation of witnesses, risk of accused re-committing the offence, and the greater interest of justice. Thus, the role of lawmakers in regulating and the judges' discretion have become one of the most discussed facts of the criminal procedure debate.

This paper tries to make a comparison of the bail laws enacted by selected jurisdictions such as India, United Kingdom, United States of America and Canada along with their bail practices. It reviews the constitution, legislation, judicial applications and international human rights cases that inform, interpret and mould the process of bail. The study employs doctrinal and comparative research with analysis of policies and policy reports, scholarly literature, and landmark judicial decisions as research tools. Specific attention is given to the way in which various legal systems balance between statutory obligation and judicial discretion in order to promote fundamental freedoms of the individual, the rule of law, personal equality and respect for the interests of society. This research also looks at the effects of recent reforms which are intended to eliminate avoidable pre-trial custody, enhance prison conditions and introduce more equitable consistent management of bail.

The study also examines some of the current issues confronting the administration of bail as these are assessed through the lens of a judicial framework, socio-economic concerns grown out of financial bail conditions, delay of disposal of bail applications, influence of the media on high-profile cases and the application of restrictive bail provisions in organized crime, economic offences and terrorism. It also discusses new trends like the use of artificial intelligence by judges in decision making, electronic monitoring, digital courts and the use of risk assessment tools in bail evaluation. The paper compares the practices of various countries on bail, and suggests best practices that maintain transparency, proportionality, accountability, and procedural fairness in bail processes.

It states that the legislature should be clear with its orders and give each judge some judicial discretion so as to not arbitrarily take away a person's liberty. It ends with a suggestion that structured bail guidelines be developed, judicial training made more robust, and that legal aid be expanded, as well as

more evidence-based legislative changes that will enable a rights-oriented, more rational, and more effective bail system to satisfy the changing requirements of modern criminal justice.

**Keywords:** bail, judicial discretion, comparative criminal justice, pre-trial detention, personal liberty.

## 1. Introduction

Bail is a fundamental right in criminal procedures which allows the accused party to be temporarily released from prison until investigations or trial, or appealing of the decision had been completed, upon the necessity of conditions set by the court of competent jurisdiction. Bail has been around since the concept that "all men are presumed innocent until proven guilty" and that personal freedom every person must enjoy must not be restricted needlessly until that guilt is established. The main purpose of the bail is to ensure that the accused person appears before the court and thereby safeguards the liberty of the person and protects against arbitrary arrest. Bail, therefore, it is a compromise between society's interest in having the justice system run smoothly and the interest of a person to be free from excessive interference of the State's function.<sup>1</sup>

In democratic legal systems, bail rather than jail is an important principle that has played an ever more important role in the protection of human dignity and due process. English common law was the precursor of the bail tradition, which developed around the idea of safeguarding against arbitrary capture, as seen as exemplified in Magna Carta of 1215 with its protection of "free men from unlawful imprisonment. Other judicial outcomes such as Petition of Right (1628), the Habeas Corpus Act (1679) and the English Bill of Rights (1689) increased judicial control over detention and shaped the practice of detention in the common-law world, throughout the 16th (and 17th) century. Judicial interpretations which have highlighted 'fairness', 'reasonableness' and 'procedural justice' have placed enormous importance on bail jurisprudence in India, where it has become integrated into constitutional guarantees contained in Article 14, 21 and 22 of the Constitution.<sup>2</sup>

This evolution is further advanced with the recent reforms in legislation in the Bharatiya Nagarik Suraksha Sanhita, 2023 that aims to increase efficiency and consistency in the bail process. The role of bail in criminal justice administration doesn't end on the accused. It helps prevent preventable pre-trial detention, lowers jail overcrowding, maintains dignity and business of those accused of wrong-doing, and keeps the public trust in the rule of law. However, the inconsistent application of this power of discretion in granting and refusing bail is driven by the differences in how the statutory provision is interpreted and the circumstances of each case. This research therefore aims to discuss and investigate the connection between legislation and discretion of judges in selected jurisdictions.

The study seeks to pinpoint the differences and similarities between bail regimes; look critically at the effectiveness of statutory protections; and make recommendations for reform to achieve greater consistency, transparency and protect fundamental rights. Research is doctrinal and comparative, and constitutional provisions and statutory provisions, judicial precedents, international legal instruments and literature are utilized. The study will be confined to legal and judicial aspects of bail in the primary focus and only in selected countries across the globe, namely, India, United Kingdom, United States and Canada, without making any attempt of empirical studies and statistical evaluation of the bail.<sup>3</sup>

<sup>1</sup> Wayne R. LaFare et al., *Criminal Procedure* (7th ed., West Academic Publishing, 2020).

<sup>2</sup> *Magna Carta* (1215), class. 39–40.

<sup>3</sup> *Habeas Corpus Act* 1679 (England).

## 2. Conceptual Framework of Bail

Bail is one of the most important protections afforded by the criminal law and it is its purpose to prevent that the accused person would be unnecessarily detained before being found guilty. Bail is the release of a person who has been arrested for an offence on bail, with security or subject to any condition or requirement imposed by a competent court to ensure his appearance at the investigation of an offence or for trial or other proceedings. The pronged aims of bail are to uphold the constitutional right to liberty, prevent unconstitutional interference in the exercise of liberty, to enable the accused to appear before the court and to preserve the integrity of the criminal justice process.

It illustrates a balance between the public interest in effective law enforcement efforts and safeguarding the rights of people to be free from unnecessary pretrial incarceration. Therefore, bail is not only a procedural tool but also a substantive safeguard to uphold a fair and equitable system for criminal proceedings. The doctrine of 'presumption of innocence' lies at the core of bail jurisprudence—a principle that affirms that an accused person is presumed to be innocent until he/she is convicted in a fair trial. This principle is held very dear in the international human rights law as well as in constitutional democracies, and is a limitation on excessive State power. The right to personal freedom, which is closely related to this doctrine, is the right of an individual against being arrested or detained arbitrarily.<sup>4</sup> In India, Articles 14 and 21 of the Constitution make it imperative to provide that every restriction on liberty of the person ought to be reasonable, just and fair: hence judicial review of detention becomes an essential element of criminal justice in India. Nothing is ever been emphasized by courts as the exception of pre-trial detention or that liberty should always be maintained until compelling reasons can be placed. The bail is specifically recognized in the Indian criminal law according to the stage of the procedure and the circumstances of the case. Regular bail is issued to an arrested person who wants to be granted bail release during the investigative or trial phase. The purpose of Anticipatory bail is to protect the person when there are reasonable apprehensions of arrest for an offence that cannot be arrested without bail, under the criminal procedure laws, to prevent misuse of the criminal process. This is a temporary measure provided for a limited period until the outcome of regular bail/anticipatory bail application is finally decided.<sup>5</sup>

Illustrative bail or Default bail is the protection offered to an accused by the law against indefinite provision of custody while investigation by the investigating agency is pending till a time of prescribed by the statute without their filing of the charge sheet. There are specific guidelines that govern the granting and/or refusal of bail issued as per the following considerations in criminal proceedings: nature of the offence and its gravity; possibility of the accused absconding; the possibility that the accused might tamper evidence or influence witnesses; previous criminal records of the accused; interests of justice; And, the need for to protect constitutional guarantees. They lay the foundations for the rule of law, the rational, proportionate and consistent application of judicial discretion, and a balance between individual liberty and public interest.

## 3. Legislative Framework Governing Bail

The constitutional basis for bail is the human right to personal freedom and the presumption of innocence as well as the necessity of pre-trial detention to be only an exceptional measure and not the default option. The Universal Declaration of Human Rights (UDHR), 1948, at the international level

<sup>4</sup> Wayne R. LaFare et al., *Criminal Procedure* (7th ed., West Academic Publishing, 2020).

<sup>5</sup> Constitution of India, arts. 14 & 21.

states that every person has the right to life, liberty and security of the person, and that an accused person is presumed to be innocent till proven guilty by the law. Likewise, the International Covenant on Civil and Political Rights (ICCPR) 1966 stipulates that no one should be subjected to arbitrary arrest or detention, and detention of a person before trial should not be the rule. The United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), 1990 promote alternatives to detention and stress proportionality, fairness and respect for human dignity. Regional human rights instruments such as the European Convention on Human Rights and the American Convention on Human Rights further reinforce these principles by mandating judicial control of the exercise of liberty and that the conditions are lawful, necessary and proportionate.<sup>6</sup>

The statutory law of bail in India is mainly based on the constitution and the criminal procedure law. Equality before the law, protection of life and personal liberty, as well as protection from arbitrary arrest and detention are guaranteed by a combination of three provisions: Article 14, Article 21, and Article 22 of the Constitution. These guarantees have been instrumental in judicial constructions of the meaning of bail and have led to the inclusion of requirements of fairness, reasonableness and due process in regards to the deprivation of liberty. The earlier Code of Criminal Procedure, 1973 (CrPC) has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) for bail, refusal of bail and cancellation of bail. This classification of offences into bailable and non-bailable and provisions of safeguards for regular bail, anticipatory bail, interim bail and statutory and default bail were provided by BNSS.

Also, there is a serosity and social impact towards the crime or offences involved in certain special criminal acts, by which the condition of grant of bail has been increased, like Unlawful Activities (Prevention) Act, 1967, Prevention of Money Laundering Act, 2002, etc. In many instances such statutory restrictions re-direct judicial discretion towards national security and towards public interests. A comparative analysis of foreign jurisdictions bears witness to varying customs of the constitutions and criminal justice philosophies. The general rights to bail are included in the Bail Act 1976 in the United Kingdom, which lists specific “bail” grounds, including flight risk, interference with witnesses, and the “commission of further offences”. The U.S. has a constitutional model derived from Article VIII of the U.S. Constitution which mandates “excessive bail” be forbidden; however, there are important variations among jurisdictions including federal and state, and even under different state laws, many states are implementing reforms to lessen the use of cash bail.

The right not to be subject to reasonable detention without just cause is guaranteed by the Canadian Charter of Rights and Freedoms in Canada and the principle of ‘restraint of liberty’ in pre-trial detention has featured prominently in the case law in Canada, especially from Ontario court decisions. Similarly, Australia's approach to bail is subject to state and territorial legislation, and takes a risk-based approach which equates with the security of the community and the protection of individual liberty. Together, these pieces of legislation reflect a shared desire to maintain personal liberty and still to adequately execute criminal justice by judicious exercise of discretion.

#### 4. Judicial Discretion in Granting Bail

A judicious approach, where statutory provisions can be applied in a context which takes into account the particular facts and circumstances of the case, is an essential part of bailing and this requires judicial discretion. Legislations set out the procedures in which the release or denial of bail is to be assessed, but

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<sup>6</sup> Universal Declaration of Human Rights, 1948, arts. 3, 9 & 11.

they cannot foresee every scenario that can come up in the process of criminal proceedings. As a result, judges have discretion as to whether an accused should be released pending investigation or trial. But not without restraint or without reason – discretion is controlled by constitutional values, statutory requirements, past precedent and standards of fairness and reasonableness. Judicial discretion is exercised to ensure a decision is individualized, is proportionate to the aims of criminal justice and is consistent in protecting the rights of the accused and the rights of society. When making this decision, the courts take into account a variety of factors that affect bail decisions.<sup>7</sup>

These include the nature of the alleged offence, its gravity, the evidence presented by the prosecution, the criminal antecedents of the accused, the potential for him or her to abscond, evidence being tampered with or witnesses influenced and whether he or she is likely to commit further offences whilst on bail. The following may also be considered by the courts: age, health status, gender, social background, financial resources – especially in cases of disproportionately harsh consequences if detention pending trial is extended. The main aim does not seek to establish guilt but does toss the question whether the defendant may be released without hurting the cause of justice. Therefore, judicial discretion is not punishment first but as a balancing of competing interests. One of the most important features of the bail jurisprudence is the functioning of balancing the Constitutional rights to personal liberty with the public interest.

The fundamental rule of democratic legal systems is that rearrest should be only a last resort, and should be avoided unless the person is to be prosecuted. Meanwhile, courts must take steps to ensure the integrity of criminal investigations and protect victims and witnesses, ensure public confidence in the justice system, and combat threats to national security or public order. Judicial accountability, in this context means that there has to be transparency, knowledge of the law, and the exercise of discretion in accordance with the law. The courts must abstain from issuing hasty judgments which do not outline the reasons for granting or denying bail, making appellate review more meaningful and facilitating more uniformity of judicial judgment. As fundamental as it is, judicial decisions have clear law and are constrained by it.<sup>8</sup>

It must be constrained by the limits set by constitutional protections, laws, and precedent of courts. Restriction on bail in numerous special legislations, including those on terrorism offences, narcotics, money-lending and organized crime, severely limit the discretion of the judges. Arbitrations, discriminatory or mechanically based decisions could be in conflict with the fundamental rights to equality and personal liberty and breach public trust in the rule of law. Structured judicial discretion with clear and specific statutory guidance, judicial precedents and a judicious judicial decision thus continue to play a fundamental part in protecting humanity, fair practice, accountability and effective administration of criminal justice.

## 5. Comparative Analysis of Bail Jurisprudence

Bail practice differs from state to state, presenting a variety of constitutional interpretations, statutes, and legal styles, yet all working towards the ultimate goal of satisfying important rights to free an accused person and conduct a robust prosecution. The constitutional doctrine on bail is based on Articles 14, 21 and 22 of the Constitution of India, which uphold the rights of equality before the law, protection of life and personal liberty, and protection against arbitrary arrest and detention of individuals. The Supreme

<sup>7</sup> Constitution of India, arts. 14 and 21.

<sup>8</sup> *State of Rajasthan v. Balchand*, (1977) 4 SCC 308.

Court has always sanctified the fundamental right to personal liberty and always said "bail is the rule and jail is the exception.

Judicial interpretation has, at every turn, broadened the rights of the accused individual by invoking concepts of fairness, proportionality and presumption of innocence. The recent overhaul of the bail provisions under the Bharatiya Nagarik Suraksha Sanhita, 2023 aims to alleviate the complexities of the bail process, minimize avoidable pre-trial incarceration, and promote uniformity in adjudications without compromising safeguards for public safety. In the United Kingdom, the main legislation covering bail is the Bail Act 1976 which provides for a presumption in favour of bail unless there are certain reasons for the lack of bail. Some factors courts consider when denying release include the risk of absconding, interfering with witnesses or committing additional crimes.<sup>9</sup>

The necessity and proportionality principles also have a strong impact on judicial practice and the European Convention on Human Rights with Article 5, restates the right to freedom of movement and clearly identifies the compelled necessity of detention as lawful and reasonable procedures. Bail process in the United States has traditionally been based on the cash bail approach, where the money bail is typically demanded as a prerequisite to release. But the periodic social-economic difficulties and discriminatory results have raised issues of numerous bail reform movements in different states. There is loose legislation in the Eighth Amendment and a growing trend in the courts to implement a risk-based rather than a monetary-based analysis to decide who is released. There is loose legislation on excessive bail within the Eighth Amendment of the Constitution and there has been an increased tendency in the courts to focus on risk rather than financial capacity when deciding who is released.

Within the Canadian legal framework, the right to the "reasonable" bail comes into being within Section 11(e) of the Canadian Charter of Rights and Freedoms, which mandates that the detention of persons prior to a trial be exceptional. The Canadian courts are guided by the principle of restraint and will usually order an accused to be released from custody unless there are particular reasons to need to retain custody of the individual, namely, in order to attend trial, to maintain a balance of safety, or to preserve confidence in the administration of justice. While onus is on the accused to justify their release in select stringent offences, the Supreme Court of Canada has made it a recurring principle to narrowly limit the scope of exceptions so as to respect constitutional rights.

Comparisons show that there are a number of features and values that are common to the jurisdictions, such as, adherence to the presumption of innocence, judicial oversight of detention and protection of personal liberty from detention as guaranteed by the constitution. However, there are significant variations in the specified conditions, the financial requirements for bail, judge's discretion, and procedures for the treatment of serious crimes. To contribute to the promotion of fairness, transparency and respect for human rights in processes taking place prior to final adjudication, increasing trends globally are supportive of reducing unnecessary pretrial detention, moving away from cash-based have-based bail systems and towards evidence-based risk assessments, the use of a broader range of non-custodial responses and the adoption of digital monitoring technologies and greater judicial accountability.

## 6. Landmark Judicial Decisions

The concept of bail has been shaped in various ways through judicial interpretation, as a significant nu-

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<sup>9</sup> *State of Rajasthan v. Balchand*, (1977) 4 SCC 308.

number of judicial orders have interpreted bail guarantees in the Constitution, guided judicial discretion and settled principles of bail, whether granting or refusing it. The Preliminary objections must take into consideration the Supreme Court's earlier remarks that liberty is a fundamental constitutional value and that pre-trial detention should be a rare phenomenon in India. The Court in *State of Rajasthan v. Balchand* (1977), reiterated the golden rule "bail is the rule, jail the exception", which further strengthened the presumption of innocence and minimized unnecessary confinement. This principle was also elaborated upon in the case of *Guidant Narasimha v. Public Prosecutor* (1978), where Justice V.R. Krishna Iyer stressed on the need for balancing the liberty of the individual with the interest of the society, instead of following the college rules and formalities and emphasized that the views of Justice must be based on fairness, judicial prudence and the constitutional values.<sup>10</sup>

The decisions laid down these judgments laid the foundation for the philosophical core of contemporary Indian bail jurisprudence. Supreme Court went further with the constitutional concept of "bail" in *Hussainara Khatoon v. State of Bihar*, 1979, when for the first time it held the right of a speedy trial to be part of the writ of "bail". The Court condemned the prolonged detention of the undertrial prisoners and directed release of undertrial prisoners who had remained for unreasonable period which brought some linkage between access to justice and the protection of human dignity and between access and bail. The Court, in the subsequent case of *Sanjay Chandra v. Central Bureau of Investigation* (2012), again reiterated the fact that prelude to trial is not punishment and that, a serious accusation cannot justify application of bail only if there are no compelling reasons.

More recently, *Satender Kumar Antil v Central Bureau of Investigation* (2022) provided extensive principles applicable to the approval of bail and brought into focus the issue of overcrowding in prisons, which can be minimized through uniformity of application of principles by the courts. Similarly, in Lok Adalat's case of *Arnab Manoranjan Goswami vs. State of Maharashtra*, 2021, the Court has narrated that its role is to safeguard the personal liberty, whenever it is being infringed illegally, as Article 21, which is the principal of the bail law, is still the fundamental of bail cases. Foreign judges have also shaped the development of the bail doctrine through their rulings which have reinforced constitutional and human rights protections. The United States Supreme Court in the case of *United States v. Salerno* (1987) confirmed that preventative detention under the Bail Reform Act, 1984, is constitutional, but confirmed that preventative detentions occur only when there are compelling governmental interests.<sup>11</sup>

In *R v. Antic* (2017), the Supreme Court of Canada restated the rule of restraint, suggesting that any bail conditions, particularly financial conditions, must be the least restrictive conditions possible and that unnecessary financial conditions are to be avoided. Likewise, in *Caballero v. the United Kingdom* (2000), the European Court of Human Rights determined that that the right to liberty under Article 5 of the European Convention on Human Rights was infringed by granting bail without giving due consideration to any meaningful judicial assessment. Taken together these historic cases reflect a judicious move to defend personal liberty, fair and proportional detention practices and clear, informed, rights-based bail rulings on democratic institutions.

## 7. Contemporary Issues in Bail Administration

Nationwide the administration of bail remains fraught with contemporary issues that impact to the justice systems in criminal matters to be just and efficient. There is a predominant concern of serious

<sup>10</sup> *Guidant Narasimha v. Public Prosecutor*, (1978) 1 SCC 240.

<sup>11</sup> *United States v. Salerno*, 481 U.S. 739 (1987).

overcrowding in prisons, which is largely deemed to be due to the large number of undertrial prisoners awaiting completion of investigations or trial. Long pretrial incarcerations have a negative impact on the presumption of innocence embodied in the Constitution, and also impose large financial and administrative burdens on correctional facilities. During judicial proceedings the accused is often kept in custody for a long time, as they do not receive an effective legal protection or law enforcement operates inefficiently. Accused persons are often detained for longer periods during prosecution process than they are likely to be sentenced to; it is because they never get proper legal representation or law enforcement function is not efficient.

The problems are especially pronounced in developing countries where overcrowding is a problem due to the judicial backlogs, creating delay in access to justice. Differences in the administration of bail also exist, with many being socio-economic. For example, with regard to financial bail conditions, disadvantaged individuals may have trouble meeting financial obligations, while many others have a lack of competent legal aid. Thus, poverty could be a defining factor for kids' continued detention, not the merits of the case at hand. Construction delays, lack of legal service jobs, and discrimination within the legal process are common obstacles that marginalised communities, such as socially disadvantaged groups, migrants and persons with disabilities, typically face when applying for bail.<sup>12</sup>

Moreover, media attention on big cases has become more strongly influential on public opinion, and on an indirect level, upon judicial decisions, and this has pressured judges to raise their standards for bail against the constitutional principle that every accused is presumed innocent until proved guilty. Certain offences fall into a special category, involving further issues for bail hearing. The stringent statutory provisions that govern cases involving terrorism, organized crime and offences affecting national security completely limit judicial discretion and first and foremost are designed to safeguard the public, rather than protect individual liberty. A similar situation exists with cybercrime and with economic offences involving complex financial transactions where the Court is faced with a dilemma between the efficient investigation of offences and at safeguarding the constitutional rights of individuals.

Bail jurisprudence in the modern era has also evolved a gender-sensitive perspective, taking into account the different stages of pregnancy and the needs and circumstances of the accused woman, elderly persons and primary carers. Over the past few years, in various jurisdictions, an increasingly wide range of technologies have been adopted to help judges predict the risk of flight, reoffending or interfering with the administration of justice, including but not limited to Artificial Intelligence (AI) technologies. While these technologies can make for greater uniformity and productivity, questions of algorithmic bias, transparency, accountability, and due process continue to be a concern. Hence, it is crucial to implement balanced reform of bail systems that takes into account judicial discretion and guarantees equality, fairness and respect for fundamental rights.

## **8. Legislative Control versus Judicial Discretion**

The control-judicial discretion link in the adjudication of bail represents one of the key issues of criminal justice administration. Legislatures enact statutory provisions that outline the conditions under which bail may be granted or denied which further promote public confidence in the justice system, legal certainty and uniformity. Particularly noticeable is the mandatory statutory restrictions in laws involving

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<sup>12</sup> *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40.

narcotic offences, serious or organised crimes and money laundering, where statutes have introduced severe conditions for bail.

The provisions are designed to ensure state security, maintain the integrity of the criminal investigation and to avoid the abuse of freedom of movement in connection with the visit of suspected individuals who may represent a serious danger to society. An excessive legislative rigidity, however, might not allow the court to examine the person's particular facts and circumstances, and might lead to unnecessarily long pretrial detention of the accused and impinge on his constitutional rights. Judicial discretion is a vital corrective mechanism that can help courts to better understand statutory provisions when interpreting them in light of constitutional principles.<sup>13</sup>

Judicial creativity over the last two decades has culminated in the emergence of progressive ideas and principles in constitutional courts, such as the following principles: the presumption of innocence, proportionality, fairness, and "bail is the rule and jail is the exception". Statutory provisions have been interpreted in a way that is consistent with the right to equality, personal liberty and due process, and would not permit "arbitrary or mechanical" denial of bail. However, the discretion of the courts is not limitless and must work within a constitutional framework and policy considerations as expressed in the law as valid and operative. This balance is in line with the principle of "separation of powers", which envisions a legislative body that drafts the laws while a judicial body that judiciously interprets and applies them without trespassing on the legislative realm.

As the number of cases being heard increases in complexity the need to have structured judicial discretion in bail judgements has become more evident. While some flexibility will be required for each situation, this inconsistent interpretation of the law could cause uncertainty, lead to inequality of treatment and reduce public levels of trust in the administration of justice. Consistency can be encouraged while maintaining judicial independence through structured discretion with statutory support, binding judicial precedent, reasoned orders and objective assessment in terms. It upholds constitutional values, increases accountability, and creates an effective system of accountability to both individuals and the greater justice through regulation by the legislature complemented by judicial discretion.

## 9. Comparative Evaluation

A comparison of the system of bail in various parts of the world has shown that, although different legal systems have different legislative and judicial structure, they share the one common objective of balancing the liberty of the individual with the efficient administration of criminal justice. A source of the power of Indian model is equality, personal liberty and judicial review which are provided in the Constitution of India which provides courts in India wide discretion to safeguard Fundamental Rights.<sup>14</sup> Within the United Kingdom, the commonwealth's bail system is well known for its statutory clarity and the presumption of release backed by narrowly-contained exceptions, based on the Bail Act 1976. Canada has evolved a rights-based approach under the Canadian Charter of Rights and Freedoms with its respect for the exceptional nature of detention before trial through the concept of 'restraint. The U.S., meanwhile, has increasingly moved away from the traditional cash bail system in Favor of a system of risk factors in response to charges of discrimination and economic disparity. The different jurisdictions

<sup>13</sup> Unlawful Activities (Prevention) Act, 1967.

<sup>14</sup> Canadian Charter of Rights and Freedoms, 1982, s. 11(e).

convey biparty attempts to balance public safety with constitutional aspects with varying mixes of statute and judicial opinion.

Nevertheless, imbedded within current bail arrangements are some serious limitations. The enforcement of the constitutional guarantee of personal liberty often hinges on uniformity of responses and speed of proceedings at the court level, which is hindered by inconsistencies among judges and delays in proceedings in India. The cash bail system historically has been a critique on the United States, as it disproportionately harms the economically poorer and can create unequal access to justice. The United Kingdom and Canada have relatively well-defined bail options, but there has been concerns about the conditions and duration of bail and preventive detention, and that there are inconsistencies in the exercise of discretion by courts on serious offences. The following weaknesses give testimony that none of the legal systems has been able to bridge the gap between protecting the rights of individuals and providing legitimate security to the public.

There are some significant lessons that one might learn from the comparative analysis for India. There are ways to minimize inconsistencies in the justice system and build public faith through better statutory clarity, judicial guidelines and the consistent application of standards to granting bail. Proportionality, individualization and Max van der Stoep's constitutional law principle to always establish detention prior to conviction as an exceptional measure should continue to be the focus of judicial decisions. International good practice also includes best use of non-custodial measures, use of evidence-based risk assessment measures, increased promotion of legal aid services, use of digital case management systems and regular judicial oversight of continued detention. Such changes may increase efficiency and retain fairness, transparency and accountability in the bail administration.<sup>15</sup>

## 10. Challenges

Even with the ongoing reforms in laws and progressive judgments by judges, there are several problems confronting effective management of bail. The most prominent issue is diversity in judicial judgment, where seemingly comparable accused cases being awarded different punishment based on dual interpretations of statutory provisions and judicial methodologies. The most salient issue is the inconsistent judicial administration of the situation where similarly situated accused cases receive different sentence owing to varying interpretations of the statutory provisions and differing methods of approaching the society by judicial officers. The lack of consistent and comprehensive bail principles contributes to the unpredictability, which impacts on public confidence in the system.

The delay in the disposal of bail applications compound the issue as well, because language as contained in the constitution presumes the accused person is innocent and yet, he remains incarcerated for long periods of time while all these judicial processes are ongoing. These delays also add to the problem of overly crowded prisons and run up costs for correctional facilities. Over-inclusive arrest of suspects for extended periods of time, commonly reported as excess “pre-trial detention,” caused by a confluence of factors including slow procedural timelines, burdensome courts, and rigid statutory definitions on the seriousness of offences are another major issue.

The addition of many penal statutes with tough conditions imposed for bailing defendants, which amounts to over-criminalization, has also further limited judicial discretion in many cases. More and more severe laws are being passed for economic crimes and other offences, such as crimes with a

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<sup>15</sup> U.S. Constitution, amend. VIII.

terrorist dimension, organized crime and cybercrime – thus granting greater and greater space for preventive detention to the detriment of individual freedom. At the same time, the size of judicial work and ever-increasing caseloads mean that courts are not always able to timely and individualized review of bail requests. Complications surrounding special criminal statutes could also cause the application of the principles of bail to differ from one court to another.<sup>16</sup>

In addition, public trials and media coverage of the trials in high-profile cases can have a secondary effect on bail decisions by creating social pressure for the judiciary to act tough, which can then affect the integrity and impartiality that the constitutional judiciary should maintain. These challenges must be tackled through a complete overhaul of the legislative framework, judicial framework, bail provisions, accountability of institutions, judicial training and the proper interpretation of the bail provisions in accordance with the principles of fairness, equality and personal liberty guaranteed by the Constitution.

## 11. Recommendations

A proper balance between the legislative requirements for bail and judicial discretion and constitutional protection of personal liberty is a key to the effective administration of bail. A principal reform that is necessary is the introduction of consistent bail practice across the nation which explicitly outlines the principles for granting, refusing and revoking of bail. While guidelines are not necessary, having a standardized set would help reduce variability among judges, and help ensure uniformity and uniformity of law. These guidelines are at least to include objective factors such as the nature of the offence, the risk of escaping, fears of intimidation of the witnesses, criminal history, and the proportion of the continued detention.

The need for better judicial capacity by on-going judicial capacity building programmes to help judges know and understand changes in constitutional jurisprudence, comparative law, international human rights standards and model bail procedures for example, is also important. Training would improve the ability to make decisions in a reasoned manner and ensure consistency of implementation of statutory provision. The third major reform is the use of empirical, data-based rather than subjective decision-making protocols for determining the level of bail risks. Assessment instruments can be carefully devised to help courts determine the likelihood of flight, tampering with evidence, or recidivism, without compromising judicial decision-making.<sup>17</sup>

The use of technology in bail management operations, such as electronic filing of arrest warrants, digital monitoring of bail conditions, automated bail scheduling, and case management systems, can also help to streamline bail processes, minimize delays, and enforce judicial orders. Governments, at the same time, should also work towards decreasing the number of individuals unnecessarily kept in custody: by promoting alternative sentences to prison, by speeding up investigations, by conducting regular evaluations of prisoners' detention, and by promptly deciding cases of bail applications. In addition, improvement of legal aid services is also vital so that economically disadvantaged accused persons are able to obtain a competent lawyer, and that the lack of funds is not a bar to the release of accused persons.

In addition, clarity of existing ambiguous legislation, especially in special criminal law, would stop the misinterpretation of statutory provisions and add to the certainty in the decision making for bail. Courts should also issue reasonable and reasoned judicial orders, specifying the factual and legal reasoning

<sup>16</sup> *R v. Antic*, 2017 SCC 27.

<sup>17</sup> *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40.

underlying their bail decisions, that ensure accountability, maintains the appellate system and that enhance confidence in the administration of justice.

## **12. Future Trends**

Faster technological developments, changing constitutional values, and even greater international cooperation in the administration of criminal justice will certainly continue to affect the future of bail jurisprudence. Digital courts are supposed to make bail a better experience as they will be able to conduct virtual hearings, electronic filing of documents, online monitoring of bail compliance and make bail applications more easily disposed of in a quicker manner. Both of these can lead to considerable time savings as well as making the process more accessible to litigants and legal practitioners. A new phenomenon is the incorporation of Artificial Intelligence (AI) into judicial decision making, including the use of predictive risk assessment tools that draw on objective data to assess the chances of absconding, witness interference, or re-offending.<sup>18</sup>

While these technologies could provide greater uniformity and efficiency, their use should be supervised by the courts, transparent, algorithmically held accountable and be resistant to misuses and unfair treatment to reflect constitutional principles and due process. Across the globe, bail reform movements are gaining momentum by focusing on lowering overuse of custodial sentences, and creating more alternative, evidence-based, and risk-based approaches to releasing individuals. A number of states and territories are rolling out supervised release schemes and electronic monitoring and the implementation of community-based alternatives that maintain potential freedom of movement of individuals while ensuring public safety. At the same time, restorative justice practices are spreading because they actively promote the process of reconciling, involving victims in decisions, and rehabilitating (where appropriate) in place of pre-trial incarceration as the norm in response to a criminal allegation.

Internationally, there is increasing desire to harmonise the standards of bail in the methods of compliance with universal human rights (as manifested in international conventions and comparable judicial practice). Shared jurisdictions, best practices, judicial dialogue, and internationally accepted procedural safeguards can help to create a more transparent, rights-respecting and fairer bail system. Going forward, reforms should address this need to combine technological innovation with constitutional protections, the clarity of the legislation and judicial responsibility so that whether a person is released on bail or not still fulfils the core constitutional and societal objective of preserving the personal freedom of individual human beings while effectively administering the criminal justice process.

## **13. Conclusion**

The analysis of the two types of bail regulation and judicial interpretation shows that a good system of bail must balance individual liberty and interest of the public. Legislative provisions define the legal criteria used for granting or withholding bail, but judicial consideration ensures that the legal criteria are applied fairly and proportionately and in accordance with the specific circumstances of each case. A comparative analysis of India with the United Kingdom, the United States, Canada, and Australia show that all the countries subscribed to the precepts of presumption of innocence, the constitutional safeguards for personal liberty of the citizens and scrutinizing the pre-trial detention. A comparative

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<sup>18</sup> United Nations Standard Minimum Rules for Non-custodial Measures (Tokyo Rules), 1990.

study of the four countries available in this regard, i.e., the United Kingdom, USA, Canada and Australia indicate that all the four countries prescribe similar principles of presumption of innocence, constitutional protection of personal liberty of citizens and scrutinising pre-trial detention in the different methods. The study also identifies the enduring problems facing the criminal justice sector, such as inadequate decisions in court, length of periods spent “awaiting trial”, restrictive legislation, socio-economic differences and greater pressure from complex cases and public attention. New reforms and technological developments present potential for greater transparency, efficiency, and uniformity in administering bail, which would have to take place within the bounds of constitutional protections and international human rights standards. In sum, the principles of legislative certainty and judicial flexibility should go hand in hand, not hand to hand. Increased statutory clarity; introduction of structured judicial discretion; improved access to legal aid; and legal reform based on the use of evidence will help to establish a fairer, rights-based and more efficient bail system that will help maintain the right to personal liberty and good administration of criminal justice in a changing legal environment.

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