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## **JURISDICTION AND BAIL FOR FOREIGN NATIONALS IN INDIA (BALANCING OF SOVEREIGNTY, LIBERTY & EQUALITY UNDER PRIVATE INTERNATIONAL LAW)**

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### **Abstract**

In this paper, we deal with one of the most crucial and paramount aspects of criminal jurisprudence, namely bail jurisprudence. Bail is an essential part of criminal jurisprudence, as it directly concerns life and personal liberty. The Indian Constitution guarantees that no person shall be deprived of life or personal liberty except according to the procedure established by law. Therefore, bail plays a vital role in the criminal justice system.

When a person commits a crime or offence, he is held liable for that act, as it is considered an offence against society. For the purpose of conducting investigation and trial, such a person may be kept in the custody of law until guilt or innocence is proven, either in police custody or judicial custody, subject to the discretion of the court. However, the entire criminal justice system is founded upon the universal principle that a person is presumed innocent until proven guilty. In light of this principle, a person arrested by the investigating agency and kept in custody may be granted bail if the court deems it fit.

The Code of Criminal Procedure recognizes that every offence committed by any person is an offence against society; therefore, the grant of bail must balance individual rights with societal interests. The issue becomes more complex when the offender is a foreign national who commits an offence in India during his visit. Thus, bail matters involving foreign nationals are often dealt with differently by courts, and such differentiation appears inevitable in certain cases. Although the individual possesses the right to liberty, the concerns of the court cannot be disregarded when the accused is a foreign national. In matters concerning bail jurisprudence involving foreign nationals, the principles of conflict of laws assume significant importance, thereby bringing Private International Law into central focus. In the Indian criminal justice system, delays in trial and conviction are common, and if the accused absconds from the country where the offence was committed, the trial may face serious hardships.

Therefore, this article analyses bail jurisprudence, particularly in the context of granting bail to foreign nationals, and examines whether such differentiation in bail matters is acceptable in a court of law. These are the main focuses of this paper.

**Keywords:** Bail Jurisprudence; Foreign Nationals; Article 21; Criminal Procedure; Private International Law; Conflict of Laws.

## 1) Introduction

The concept of bail occupies a central position in criminal jurisprudence because it directly concerns the protection of personal liberty. In a democratic society governed by the rule of law, deprivation of liberty before conviction is regarded as an exceptional measure rather than the norm. Bail therefore operates as a legal mechanism that reconciles two competing interests: the liberty of the accused and the interest of the State in ensuring the proper administration of justice. Courts must constantly strike a delicate balance between these considerations while determining whether an accused person should remain in custody during the pendency of trial.

The philosophical foundation of bail is closely connected with the principle of presumption of innocence, which forms a cornerstone of criminal justice systems across the world. Under this principle, every accused person is presumed innocent until proven guilty by a competent court of law. Pre-trial detention, therefore, must be justified by compelling reasons such as the possibility of absconding, interference with evidence, or threat to witnesses. Otherwise, continued detention prior to conviction would amount to punishment without trial<sup>1</sup>.

In India, the constitutional basis for bail jurisprudence derives primarily from Article 21 of the Constitution, which guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law. The Supreme Court has repeatedly interpreted Article 21 in an expansive manner, holding that the right to personal liberty includes protection against arbitrary detention and prolonged incarceration without trial<sup>2</sup>. As a result, the principle that “bail is the rule and jail is the exception” has become firmly embedded within Indian constitutional law<sup>3</sup>.

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<sup>1</sup> Vrinda Bhandari, *Inconsistent and Unclear: The Supreme Court of India on Bail*, 6 NUJS L. Rev. 549 (2013).

<sup>2</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

<sup>3</sup> *State of Rajasthan v. Balchand*, AIR 1977 SC 2447 (India); *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240 (India).

The jurisprudence of bail also reflects the broader philosophical commitment of the legal system to individual freedom. As observed by Lord Denning, whenever an application concerning the liberty of a person is brought before a court, it is treated with the highest priority because the protection of individual freedom lies at the heart of the rule of law<sup>4</sup> This emphasis on liberty ensures that the criminal justice system does not become an instrument of oppression but instead remains a mechanism for safeguarding justice and fairness.

At the same time, it must be recognized that the constitutional guarantee of personal liberty under Article 21 applies to all persons, including foreign nationals. The Supreme Court has consistently held that fundamental rights relating to life and liberty are not confined only to citizens but extend to every individual within the territory of India<sup>5</sup>. Consequently, denying bail solely on the ground that the accused is a foreign national would raise serious constitutional concerns, particularly in relation to equality before law and protection of liberty.

This paper therefore seeks to examine the legal principles governing bail for foreign nationals in India and to analyse whether differential treatment in such cases is legally justified. By studying constitutional provisions, statutory frameworks, and judicial precedents, the research aims to develop a balanced approach that reconciles personal liberty, equality before law, and the sovereign interests of the State within the framework of Private International Law.

### **Literature Review**

The jurisprudence of bail has attracted considerable scholarly attention in India due to its close relationship with constitutional liberty and criminal justice administration. Legal scholars have consistently emphasized that bail decisions represent a delicate balancing exercise between the presumption of innocence and the State's interest in ensuring effective prosecution. The existing literature on bail jurisprudence highlights both doctrinal principles and practical concerns relating to pre-trial detention, judicial discretion, and constitutional safeguards.

One significant academic contribution to the study of bail law in India is the analysis of judicial inconsistency in bail decisions. Scholars have argued that the Indian Supreme Court has not always adopted a uniform standard in determining bail applications, which has resulted in

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<sup>4</sup> Alfred Denning, *Freedom Under the Law* 3 (Stevens & Sons 1949).

<sup>5</sup> *National Human Rights Commission v. State of Arunachal Pradesh*, (1996) 1 SCC 742 (India).

unpredictable outcomes across different cases. According to Vrinda Bhandari, the presumption of innocence functions not merely as an evidentiary principle but also as a safeguard against arbitrary pre-trial detention. The author observes that courts must carefully balance personal liberty with public interest while considering bail applications, particularly in serious criminal cases<sup>6</sup>.

Another important strand of scholarship focuses on the constitutional foundation of bail jurisprudence. Commentators have emphasized that the right to personal liberty under Article 21 of the Constitution of India serves as the normative basis for the principle that bail should ordinarily be granted unless compelling reasons justify detention. The jurisprudence developed by the Supreme Court has consistently reaffirmed that the deprivation of liberty must be reasonable, fair, and just<sup>7</sup>. Scholars have also noted that the transformation of Article 21 following the landmark decision in *Maneka Gandhi v. Union of India* expanded the scope of personal liberty and introduced the requirement that any procedure depriving liberty must satisfy standards of fairness and reasonableness<sup>8</sup>.

Academic discussions have also addressed the philosophical underpinnings of bail in relation to the broader concept of liberty. Legal theorists emphasize that personal liberty forms the cornerstone of democratic societies and that the criminal justice system must operate in a manner that protects individuals from unnecessary incarceration. As observed in discussions on constitutional liberty, the deprivation of liberty has profound social, psychological, and economic consequences for individuals as well as their families. Therefore, bail jurisprudence must be guided by principles that protect individual dignity while maintaining public order<sup>9</sup>.

Scholars have further examined the statutory framework governing bail in India, particularly the provisions contained in the Code of Criminal Procedure, 1973. These provisions establish the legal mechanisms through which courts determine whether an accused person should be released pending trial. While Sections 436 and 437 deal with bail in bailable and non-bailable offences respectively, Section 439 confers special powers upon the High Courts and the Courts of Session to grant bail. Academic commentary has highlighted that these provisions provide

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<sup>6</sup> Vrinda Bhandari, *Inconsistent and Unclear: The Supreme Court of India on Bail*, 6 NUJS L. Rev. 549 (2013).

<sup>7</sup> S.S. Upadhyay, *Protection of Personal Liberty and Bail under Article 21 of the Constitution* (2015).

<sup>8</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

<sup>9</sup> S.S. Upadhyay, *Protection of Personal Liberty and Bail under Article 21 of the Constitution* (2015).

significant discretionary powers to judges, which in turn necessitates the development of clear judicial guidelines to ensure consistency and fairness in bail decisions<sup>10</sup>.

Thus, while existing literature has made valuable contributions to understanding bail jurisprudence in India, there remains a significant need for scholarly analysis that integrates constitutional law, criminal procedure, and conflict of laws principles. This study attempts to contribute to that emerging field of inquiry by examining the intersection of bail law and Private International Law within the Indian legal system.

## **2) Constitutional Foundation of Bail**

The law relating to bail in India is deeply rooted in constitutional principles that protect personal liberty and ensure fairness within the criminal justice system. Bail jurisprudence is not merely a procedural aspect of criminal law but is closely linked with the broader constitutional commitment to individual freedom and the rule of law. The Constitution of India, through judicial interpretation and legislative provisions, establishes the normative framework within which courts determine whether an accused person should be granted bail.

### **2.1) Article 21 – Life and Personal Liberty**

The scope of Article 21 has evolved significantly through judicial interpretation. In the early years of constitutional adjudication, the Supreme Court adopted a relatively narrow interpretation of the provision. However, this position changed dramatically following the landmark decision in *Maneka Gandhi v. Union of India*, where the Court held that the procedure depriving a person of liberty must be fair, just, and reasonable, and not arbitrary or oppressive. This decision transformed Article 21 into a powerful safeguard against excessive state action and laid the foundation for the development of modern bail jurisprudence.

The concept of personal liberty under Article 21 has been interpreted broadly to include various rights that contribute to the dignity and freedom of individuals. Judicial decisions have recognized that the deprivation of liberty through incarceration has profound consequences for individuals and their families. As legal scholars have noted, liberty represents a fundamental value in democratic societies, and any restriction upon it must be carefully justified through lawful procedures.

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<sup>10</sup> Code of Criminal Procedure, No. 2 of 1974, §§ 436–439 (India).

## 2.2) **Presumption of Innocence**

The presumption of innocence also plays a crucial role in shaping bail jurisprudence. If an accused person is presumed innocent, then detention before conviction should be an exception rather than the rule. Pre-trial incarceration may be justified only where there is a substantial risk that the accused may abscond, interfere with the investigation, or commit further offences. Courts must therefore carefully evaluate these factors before denying bail.

Academic scholarship on bail jurisprudence has emphasized that excessive reliance on pre-trial detention undermines the presumption of innocence and imposes significant social and economic burdens on accused persons and their families. Scholars have argued that unnecessary incarceration prior to conviction can effectively function as punishment even before guilt is established. This concern is particularly relevant in jurisdictions such as India, where delays in criminal trials may result in prolonged detention of undertrial prisoners.

## 2.3) **Bail as Rule and Jail as Exception**

The principle that “bail is the rule and jail is the exception” represents one of the most significant judicial doctrines in Indian criminal jurisprudence. This principle was articulated by the Supreme Court in several landmark decisions that emphasized the constitutional importance of protecting personal liberty.

In *State of Rajasthan v. Balchand*, the Supreme Court clearly observed that the basic rule of criminal justice is that bail should ordinarily be granted unless there are circumstances justifying detention<sup>11</sup> The Court recognized that imprisonment prior to conviction must remain an exceptional measure, particularly when the accused has not yet been found guilty of any offence.

Similarly, in *Gudikanti Narasimhulu v. Public Prosecutor*, Justice V.R. Krishna Iyer highlighted the humanitarian and constitutional dimensions of bail jurisprudence. The Court emphasized that bail decisions must consider not only legal factors but also broader considerations of justice and fairness<sup>12</sup> Justice Krishna Iyer observed that the issue of bail involves the interplay of liberty, justice, public safety, and the burden on the public treasury, all of which require a socially sensitive judicial approach.

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<sup>11</sup> *State of Rajasthan v. Balchand*, AIR 1977 SC 2447 (India).

<sup>12</sup> *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240 (India).

The Supreme Court reaffirmed this principle in *Sanjay Chandra v. Central Bureau of Investigation*, where it held that the primary objective of bail is to secure the presence of the accused during trial rather than to punish the accused before conviction<sup>13</sup>. The Court emphasized that detention prior to conviction should not become a substitute for punishment and that courts must carefully weigh the necessity of incarceration against the constitutional value of personal liberty.

#### **2.4) Provisions Related to Bail under the Code of Criminal Procedure**

While constitutional principles provide the philosophical foundation of bail jurisprudence, the statutory framework governing bail is contained in the Code of Criminal Procedure, 1973 (CrPC).

Chapter XXXIII of the CrPC outlines the provisions relating to bail and bonds, thereby establishing the procedural mechanisms through which courts exercise their powers in bail matters.

Section 436 of the CrPC provides that a person accused of a bailable offence has the right to be released on bail. In such cases, the grant of bail is generally mandatory, subject to the execution of the necessary bond or surety. Section 437 deals with non-bailable offences and grants discretionary powers to the courts to decide whether bail should be granted depending on the circumstances of each case.

Section 438 introduces the concept of anticipatory bail, which allows individuals to seek bail in anticipation of arrest where they have reasonable grounds to believe that they may be arrested for a non-bailable offence. This provision serves as an important safeguard against arbitrary arrest and misuse of criminal process.

Section 439 of the CrPC confers special powers upon the High Courts and the Courts of Session to grant bail. These courts possess wider discretionary authority and may impose appropriate conditions to ensure the presence of the accused during trial. Additionally, Section 436A provides protection against prolonged detention of undertrial prisoners by limiting the maximum period of incarceration during trial.

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<sup>13</sup> *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40 (India).

### **3) Bail and Foreign Nationals under Indian Law**

The grant of bail to foreign nationals presents unique challenges within the Indian criminal justice system. While the constitutional guarantee of personal liberty under Article 21 applies to all persons within the territory of India, courts must also consider additional factors when the accused is not an Indian citizen. These factors include the possibility of absconding from the jurisdiction, difficulties in securing the presence of the accused during trial, and the broader implications for international relations and law enforcement cooperation. As a result, bail decisions involving foreign nationals often require courts to balance constitutional protections of liberty with concerns relating to sovereignty and the effective administration of justice.

At the same time, it is important to emphasize that the Indian Constitution does not permit discrimination in the protection of personal liberty merely on the basis of nationality. The Supreme Court has repeatedly affirmed that fundamental rights relating to life and liberty extend to all individuals present within the territory of India. Therefore, the nationality of an accused person cannot be the sole ground for denying bail. Instead, courts must examine the circumstances of each case and impose appropriate safeguards where necessary.

#### **3.1) Section 14 of the Foreigners Act and Its Impact**

The Foreigners Act, 1946 provides the statutory framework for regulating the entry, presence, and departure of foreign nationals within India. Section 14 of the Act prescribes penalties for violations of visa conditions, illegal entry, or unlawful stay within the country. The Act also grants extensive powers to the Central Government to regulate the activities of foreign nationals through orders and regulations.

One of the significant aspects of the Foreigners Act is the authority vested in the government to control the movement and departure of foreign nationals from India. Under the Foreigners Order, 1948, civil authorities may restrict the departure of a foreign national if his presence is required for the purposes of a criminal investigation or trial. This regulatory framework becomes particularly relevant in cases where a foreign national accused of a criminal offence seeks bail.

#### **3.2) Judicial Approach When the Foreigners Act Is Not Invoked**

Judicial decisions demonstrate that courts frequently adopt a cautious approach when granting bail to foreign nationals, even in situations where the Foreigners Act is not directly invoked.

The primary concern in such cases is the risk that the accused may abscond and thereby frustrate the administration of justice.

A recent illustration of this judicial approach can be found in *Frank Vitus v. Narcotics Control Bureau*. In this case, the Supreme Court considered the legal issues arising from a bail application filed by a foreign national accused of offences under narcotics laws. The Court examined the regulatory framework governing foreign nationals and emphasized that civil authorities possess the power to prevent the departure of a foreigner whose presence is required for answering criminal charges in India<sup>14</sup>

The decision highlights the role of administrative authorities in ensuring that foreign nationals remain available for criminal proceedings. It also demonstrates that courts may impose additional safeguards when granting bail to foreign accused persons. Such safeguards may include notifying the Foreigners Regional Registration Office (FRRO), restricting travel, or requiring the accused to periodically report to authorities.

Judicial reasoning in such cases reflects the broader tension between constitutional guarantees and practical concerns relating to enforcement of criminal jurisdiction. On one hand, courts must protect the fundamental right to liberty; on the other hand, they must ensure that criminal proceedings are not rendered ineffective due to the absence of the accused.

Therefore, the emerging judicial approach suggests that bail decisions involving foreign nationals must be based on a case-by-case assessment rather than a blanket presumption against granting bail. Courts must consider factors such as the seriousness of the offence, the likelihood of absconding, the availability of sureties, and the feasibility of imposing conditions that ensure the presence of the accused during trial.

#### **4) Bail under Special and Serious Offences Involving Foreign Nationals**

The determination of bail becomes particularly complex when foreign nationals are accused of serious criminal offences. In such cases, courts must carefully balance the constitutional protection of personal liberty with the need to safeguard public interest and ensure the effective administration of justice. The seriousness of the offence, the likelihood of the accused

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<sup>14</sup> *Frank Vitus v. Narcotics Control Bureau*, Criminal Appeal Nos. 2814–2815 of 2024 (Supreme Court of India).

absconding, and the possibility of tampering with evidence are often decisive factors influencing bail decisions.

In India, several special statutes impose stricter conditions for granting bail in order to address offences that pose significant threats to society. These statutes often restrict judicial discretion and require courts to consider additional safeguards before releasing an accused person on bail. When the accused is a foreign national, these statutory restrictions become even more significant because of the potential difficulty in ensuring the accused's presence during trial.

#### **4.1) NDPS Act**

The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act) contains some of the strictest provisions relating to bail in the Indian legal system. Section 37 of the Act imposes stringent conditions that must be satisfied before bail can be granted in cases involving serious narcotics offences. Under this provision, bail may be granted only if the court is satisfied that there are reasonable grounds to believe that the accused is not guilty of the offence and that he is unlikely to commit any offence while on bail.

In cases involving foreign nationals accused of drug trafficking, courts often adopt a particularly cautious approach because such offences frequently involve transnational criminal networks. The possibility that an accused foreign national may leave the country and evade prosecution further complicates the judicial decision-making process. Consequently, courts may impose strict bail conditions such as surrender of passport, restrictions on travel, and periodic reporting to law enforcement authorities.

#### **4.2) POCSO Act**

The Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was enacted to protect children from sexual abuse and exploitation. Offences under this statute are considered extremely serious because they involve the protection of vulnerable victims. Courts therefore exercise great caution while considering bail applications in cases involving allegations under the POCSO Act.

When the accused is a foreign national, additional concerns arise regarding the possibility of the accused leaving the jurisdiction and avoiding trial. Courts must ensure that the interests of justice and the protection of victims are not compromised by the grant of bail. At the same time,

the presumption of innocence remains applicable, and the accused cannot be treated as guilty before the conclusion of the trial.

The judicial approach in such cases typically involves a careful assessment of the nature of allegations, the evidence available, and the likelihood of the accused interfering with the investigation or trial process.

#### **4.3) Arms Act**

Offences under the Arms Act, 1959 involve the illegal possession, manufacture, or trafficking of firearms and ammunition. These offences are often associated with threats to public safety and national security. Courts therefore adopt a cautious approach while granting bail in such cases, particularly when the alleged offence involves serious violations of law.

When foreign nationals are accused of offences under the Arms Act, courts must also consider the potential implications for national security and public safety. The seriousness of the allegations, the nature of the weapons involved, and the possibility of links with organized criminal networks are relevant factors in determining whether bail should be granted.

However, even in such cases, the constitutional principle of personal liberty remains relevant. Courts must ensure that detention is justified by legitimate concerns rather than merely by the nationality of the accused.

#### **4.4) Customs Act (Smuggling Cases)**

Smuggling offences under the Customs Act, 1962 frequently involve foreign nationals because such crimes often form part of international trade and cross-border criminal activity. These offences may involve the illegal import or export of goods, including contraband items, gold, narcotics, or restricted commodities.

In cases involving smuggling, courts must evaluate the extent of the accused's involvement in the alleged offence and the possibility of the accused absconding from the jurisdiction. Foreign nationals involved in smuggling operations may have international connections that could enable them to evade prosecution if released on bail. Therefore, courts often impose stringent conditions before granting bail in such cases.

Despite these concerns, courts must avoid treating foreign nationals differently solely on the basis of nationality. The seriousness of the offence and the strength of the evidence must remain the primary considerations in bail decisions.

#### **4.5) Serious IPC Offences**

Bail decisions also become particularly complex in cases involving serious offences under the Indian Penal Code (IPC), such as murder, rape, kidnapping, assault, stalking, and cruelty under Section 498A. These offences often involve grave allegations that may significantly influence judicial discretion in bail matters.

Courts have repeatedly emphasized that the seriousness of the offence and the severity of the potential punishment are relevant considerations while deciding bail applications. At the same time, courts must avoid substituting pre-trial detention for punishment.

In one instance, the Delhi High Court considered a bail application involving allegations of serious sexual offences and emphasized that courts must examine the nature of the allegations, the evidence available, and the likelihood of the accused influencing witnesses before granting bail<sup>15</sup> Such judicial reasoning reflects the careful balancing of liberty and justice that characterizes bail jurisprudence in India.

When foreign nationals are accused of serious offences under the IPC, courts must therefore consider both constitutional principles and practical enforcement concerns. Bail decisions must be based on a comprehensive evaluation of the facts of each case rather than on generalized assumptions about nationality.

### **5) Undertrial Foreign Prisoners and Validity of Continued Detention**

One of the most serious challenges confronting the Indian criminal justice system is the large number of undertrial prisoners who remain in detention for prolonged periods while awaiting the completion of their trials. This problem becomes particularly complex when the accused is a foreign national, as issues relating to jurisdiction, diplomatic communication, and verification of identity may further delay the progress of criminal proceedings. The continued detention of undertrial prisoners raises significant constitutional concerns, especially with respect to the

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<sup>15</sup> *Keshav Prakash Gupta v. State (NCT of Delhi)*, Bail Appln. 665/2023 (Delhi High Court).

protection of personal liberty under Article 21 of the Constitution.

The fundamental principle underlying bail jurisprudence is that pre-trial detention should not become punitive in nature. Since an accused person is presumed innocent until proven guilty, prolonged incarceration before conviction may effectively amount to punishment without trial. Courts therefore have a constitutional duty to ensure that detention pending trial does not violate the basic guarantees of liberty and fairness.

### **5.1) Delay in Trial**

The issue of prolonged detention due to delay in criminal trials has been a subject of judicial concern for several decades. The Supreme Court of India has repeatedly recognized that the right to a speedy trial form an essential component of the right to life and personal liberty guaranteed under Article 21 of the Constitution.

The landmark decision addressing this issue is *Hussainara Khatoon v. State of Bihar*. In this case, the Supreme Court highlighted the plight of thousands of undertrial prisoners who had been detained in jails for periods longer than the maximum punishment prescribed for the offences they were accused of committing. The Court held that the right to a speedy trial is a fundamental right implicit within Article 21 and that prolonged detention without trial is unconstitutional<sup>16</sup>

This decision marked a turning point in Indian criminal jurisprudence by drawing national attention to the systemic problem of undertrial incarceration. The Court emphasized that the criminal justice system must operate in a manner that respects human dignity and protects individuals from unnecessary deprivation of liberty.

### **5.2) Risk of Absconding**

While the right to personal liberty is of paramount importance, courts must also consider the practical challenges associated with releasing foreign nationals on bail. One of the primary concerns in such cases is the risk that the accused may leave the jurisdiction of the court and evade trial.

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<sup>16</sup> *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1360 (India).

The possibility of absconding becomes particularly relevant when the accused does not have strong social or economic ties within India. Unlike domestic accused persons who may have family members, property, or employment within the country, foreign nationals may find it easier to leave the jurisdiction and avoid further legal proceedings.

### **5.3) Validity of Bail in Pending Trial**

The question of whether an accused person should remain in custody during the pendency of trial depends on several legal and factual considerations. Courts must determine whether detention is necessary to ensure the presence of the accused during trial or to prevent interference with the administration of justice.

The introduction of Section 436A of the Code of Criminal Procedure represents an important legislative attempt to address the problem of prolonged undertrial detention. This provision stipulates that an undertrial prisoner who has undergone detention for a period extending up to one-half of the maximum punishment prescribed for the offence shall be released on bail<sup>17</sup> The provision reflects the legislative recognition that excessive detention without trial undermines the constitutional commitment to liberty and fairness.

Thus, the law relating to undertrial detention underscores the broader constitutional commitment to safeguarding individual freedom while maintaining the integrity of the criminal justice system. Bail jurisprudence must therefore be guided by principles that protect liberty without compromising the effective enforcement of criminal law.

### **6) Prison Conditions, Human Rights, and Hygiene**

The treatment of prisoners, including undertrial detainees, is an important aspect of constitutional governance and human rights protection. Even though an individual may be accused of committing a criminal offence, such a person does not lose the protection of fundamental rights guaranteed under the Constitution. The Supreme Court of India has repeatedly affirmed that prisoners retain their fundamental rights except to the extent that such rights are necessarily curtailed by the fact of lawful detention.

In the context of bail jurisprudence, the conditions prevailing in prisons assume considerable

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<sup>17</sup> Code of Criminal Procedure, No. 2 of 1974, § 436A (India).

importance. Prolonged detention in overcrowded and under-resourced prison facilities can have severe consequences for the physical and psychological well-being of detainees. These concerns are particularly significant when the detainee is a foreign national, as such individuals may face additional challenges including language barriers, lack of social support, and limited access to legal assistance.

### **6.1) Article 21 Protection**

The constitutional guarantee of life and personal liberty under Article 21 of the Constitution of India extends to all persons, including prisoners and undertrial detainees. The Supreme Court has interpreted Article 21 in an expansive manner to include not only the right to life but also the right to live with dignity and humane treatment.

Judicial decisions have consistently held that incarceration does not strip a person of fundamental rights. Even within prison walls, individuals are entitled to protection against cruel, inhuman, or degrading treatment. The constitutional commitment to human dignity therefore imposes an obligation upon the State to ensure that prison conditions meet basic standards of health, sanitation, and safety.

Scholarly discussions on personal liberty emphasize that the deprivation of liberty through incarceration must not be accompanied by conditions that undermine human dignity. The criminal justice system must therefore operate in a manner that respects both legal and humanitarian considerations<sup>18</sup>

### **6.2) Life and Dignity of Foreign Prisoners**

Foreign nationals detained in Indian prisons may encounter additional difficulties beyond those experienced by domestic prisoners. In many cases, foreign detainees lack family members or acquaintances within the country who can provide emotional or financial support during the period of incarceration. Language barriers may also hinder communication with prison authorities, legal counsel, or fellow inmates.

Furthermore, foreign prisoners may face challenges in accessing consular assistance or obtaining necessary legal documentation. These issues may prolong the duration of detention

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<sup>18</sup> S.S. Upadhyay, *Protection of Personal Liberty and Bail under Article 21 of the Constitution*.

and complicate the process of securing bail. Consequently, courts must remain sensitive to the unique circumstances faced by foreign detainees while adjudicating bail applications.

International human rights principles also emphasize the importance of humane treatment of prisoners regardless of nationality. Instruments such as the International Covenant on Civil and Political Rights (ICCPR) recognize the inherent dignity of all individuals and require states to treat persons deprived of liberty with humanity and respect. India, as a signatory to international human rights conventions, is expected to ensure that the treatment of prisoners including foreign nationals conforms to these standards.

Thus, the issue of prison conditions and human rights forms an important dimension of bail jurisprudence. Courts must ensure that the deprivation of liberty remains proportionate and justified, and that individuals awaiting trial are treated with dignity and respect in accordance with constitutional and international standards.

## **7) Private International Law and Conflict of Laws in Bail Matters**

The issue of granting bail to foreign nationals introduces significant questions relating to Private International Law, particularly in relation to jurisdiction, enforcement of criminal process, and cross-border legal cooperation. While bail jurisprudence is primarily governed by domestic criminal procedure, cases involving foreign nationals often intersect with principles of conflict of laws and international legal obligations.

Private International Law, also referred to as conflict of laws, deals with legal disputes that contain elements involving more than one jurisdiction. In the criminal context, the presence of a foreign national accused introduces complexities concerning the authority of courts to exercise jurisdiction and the mechanisms available to ensure compliance with judicial orders. These complexities become particularly relevant when the accused person is released on bail and subsequently leaves the jurisdiction of the court.

### **7.1) Jurisdictional Concerns**

The primary concern in bail matters involving foreign nationals relates to the jurisdiction of Indian courts over the accused. Criminal jurisdiction is generally territorial in nature, meaning that a State has the authority to prosecute offences committed within its territory. When a foreign national commits an offence within India, the Indian courts possess full jurisdiction to

try the offence under domestic law.

However, the exercise of jurisdiction becomes complicated when the accused leaves the country during the pendency of criminal proceedings. Once the accused is outside the territorial boundaries of India, the ability of Indian courts to compel the presence of the accused becomes limited. In such situations, the State may have to rely on mechanisms such as extradition treaties or mutual legal assistance agreements in order to secure the return of the accused.

The possibility that a foreign accused may leave the jurisdiction and evade trial therefore becomes a central factor influencing bail decisions. Courts often impose strict conditions such as surrender of passports, restrictions on international travel, and mandatory reporting to authorities in order to prevent the accused from leaving the country while criminal proceedings are pending.

### **7.2) Enforcement Difficulties if the Accused Absconds**

One of the most significant challenges in bail cases involving foreign nationals is the difficulty of enforcing judicial orders if the accused absconds from the jurisdiction. When an accused person leaves the country after being released on bail, the process of securing their return may involve complex diplomatic and legal procedures.

Extradition is the primary mechanism through which one State requests another State to surrender an individual accused or convicted of a criminal offence. However, extradition proceedings are often lengthy and subject to the domestic laws of the requested State. Additionally, extradition treaties may impose conditions such as the requirement of dual criminality, meaning that the alleged offence must be recognized as a crime in both jurisdictions.

These procedural complexities can significantly delay criminal trials and may even result in situations where the accused cannot be brought back to face prosecution. Consequently, courts must carefully consider the practical difficulties associated with cross-border enforcement while deciding bail applications involving foreign nationals.

The emerging judicial approach suggests that courts should adopt a balanced and context-specific analysis. Instead of denying bail categorically, courts may impose conditions designed

to minimize the risk of absconding while preserving the liberty of the accused. These conditions may include surrender of travel documents, financial sureties, monitoring by immigration authorities, and coordination with diplomatic missions.

## **8) Conclusion**

The law relating to bail in India is fundamentally rooted in the constitutional commitment to personal liberty and fairness within the criminal justice system. The principle that “bail is the rule and jail is the exception” reflects the broader constitutional philosophy that deprivation of liberty prior to conviction must remain an exceptional measure. This principle derives its legitimacy from Article 21 of the Constitution, which guarantees that no person shall be deprived of life or personal liberty except according to a just, fair, and reasonable procedure established by law.

However, the issue becomes significantly more complex when the accused is a foreign national. Courts are required to consider not only the liberty of the individual but also the practical realities associated with cross-border criminal enforcement. Concerns such as the possibility of absconding, the difficulty of securing the presence of the accused during trial, and the challenges associated with extradition procedures often influence judicial decisions in such cases. These considerations sometimes result in courts adopting a more cautious approach when granting bail to foreign nationals.

At the same time, the constitutional framework of India does not permit discrimination in the protection of personal liberty solely on the basis of nationality. The fundamental rights guaranteed under Article 21 extend to all persons within the territory of India, including foreign nationals. Therefore, denying bail exclusively on the ground that the accused is a foreign national would undermine the constitutional guarantee of equality before law and the presumption of innocence.

The analysis undertaken in this study demonstrates that the legal challenge lies in reconciling two competing concerns: the protection of individual liberty and the sovereign interest of the State in ensuring effective criminal prosecution. Courts must ensure that foreign nationals accused of offences do not evade the jurisdiction of Indian courts, while simultaneously safeguarding the constitutional rights that protect individuals from unnecessary detention.

Courts may impose several safeguards while granting bail to foreign nationals. These safeguards may include surrendering passports, restricting international travel, requiring periodic reporting to immigration authorities, notifying the Foreigners Regional Registration Office (FRRO), or securing financial sureties. Such measures enable courts to protect the administration of justice while respecting the constitutional guarantee of personal liberty.

Ultimately, the legitimacy of the criminal justice system depends upon its ability to balance the interests of society with the protection of individual rights. Bail jurisprudence must therefore remain guided by constitutional values, judicial fairness, and respect for human dignity. The nationality of the accused may be a relevant consideration in assessing the risk of absconding, but it cannot serve as an automatic ground for denying bail.

Thus, differential treatment in bail decisions may be justified only to the extent that it is necessary to address legitimate concerns relating to jurisdiction and enforcement. Such differentiation must remain reasonable, proportionate, and consistent with constitutional guarantees. By adopting a balanced approach that respects both liberty and sovereignty, courts can ensure that justice is administered in a manner that upholds the rule of law while protecting the fundamental rights of all individuals within the jurisdiction of India.

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