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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **BAIL, BAIS, AND THE INDIAN JUDICIARY**

AUTHORED BY - PRANAYA RAMESH

## **Abstract**

This paper examines at how bail is handled in contemporary India, focusing on the hidden biases that often shape judicial decisions. It explores the ways in which class, caste, gender, and political visibility can influence who gets bail and who doesn't. Drawing from the 268th Law Commission Report (2017), significant court rulings, and Upendra Baxi's influential critique in *The Crisis of the Indian Legal System*, the paper uncovers deep-rooted flaws in the current framework. By examining real-life case studies and available data, it highlights the disconnect between the law as written and the way it is applied. The paper argues for clearly defined bail guidelines, stronger judicial accountability, and reforms grounded in constitutional values and the pursuit of equal justice.

## **Introduction**

Bail plays a vital role in any criminal justice system that upholds the presumption of innocence. Article 21 of the Indian Constitution guarantees every individual the right to life and personal liberty, including protection from arbitrary arrest or detention. The purpose of bail is to strike a fair balance, ensuring that an accused person remains available for trial while also safeguarding their fundamental freedom.

Despite the ideals enshrined in law, the reality of bail practices in India paints a troubling picture. As the 268th Law Commission Report states, *over 67% of prisoners in Indian jails are undertrials*, many from socio-economically marginalized communities.<sup>1</sup> While judicial discretion plays a crucial role in bail decisions, the lack of consistent, structured guidelines often results in arbitrary and unequal outcomes. This paper takes a closer look at these disparities and asks whether the judiciary has truly managed to strike a balance between protecting personal liberty and promoting social justice.

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<sup>1</sup> Law Commission of India. (2017). *Report No. 268: Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail*.

managed to strike a balance between protecting personal liberty and promoting social justice. It pays particular attention to the legitimacy crisis outlined by Upendra Baxi, and highlights how the poor continue to be disproportionately criminalized. It also acknowledges that bail issues are not merely jurisprudential or structural ones- they are deeply ethical in nature. Judges and lawyers carry professional responsibilities to uphold fairness, promote access to justice, and guard against unconscious bias. When bail is granted or denied based on external factors like status, wealth or visibility, it signals a failure not only of the legal framework but also its ethical foundation. In this context, the paper also addresses the moral obligation of legal actors to uphold constitutional values in their daily practice.

### **The Concept of Bail in Law**

Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) does not define ‘bail’ explicitly, but the concept is addressed in Sections 479 to 482, which correspond to the former Sections 436 to 439 of the CrPc, 1973. Bail is generally understood as the release of an accused person from custody, based on the assurance that they will appear before Court when required. In *Moti Ram. State of M.P.*, the Supreme Court strongly criticized the lower judiciary for treating bail as a privilege rather than a right. Justice V.R Krishna Iyer observed that “What is a poor man’s bail is not poor law, liberty is neither dear to the rich nor cheap to the poor.”<sup>2</sup> Similarly, in *Maneka Gandhi v. Union of India*, the Court held that any procedure affecting personal liberty must be “right, just and fair”, affirming that liberty cannot be curtailed by arbitrary executive actions.<sup>3</sup> The 268<sup>th</sup> Report echoes these principles, stating that it has become a norm rather than an aberration that the powerful, rich and influential obtain bail promptly and ease, whereas the poor languish in jails.<sup>4</sup>

### **Bias in Bail Decisions**

India’s bail system is structurally tilted in the direction of individuals who are able to afford appropriate legal representation and meet financial bail conditions. The 268<sup>th</sup> Report highlights that 70.6% of undertrials are illiterate or semi-literate, implying deep economic vulnerabilities.<sup>5</sup> The arrest of Aryan Khan in October 2021 during a high-profile raid by the Narcotics Control Bureau (NCB) of the Cordelia cruise ship became a national sensation in no time. In the

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<sup>2</sup> *Moti Ram v. State of M.P.*, (1978) 4 SCC 47.

<sup>3</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>4</sup> Law Commission of India, 2017, p. 2

<sup>5</sup> Law Commission of India, 2017, p.7.

absence of possession of narcotics and hard evidence against Khan involved in a larger conspiracy, he was twice denied bail at the lower courts before he received relief by the Bombay High Court after being in custody for 25 days. In its order of bail, the court said that 'On record, there is hardly any evidence which can satisfy this Court that the common intention to commit unlawful act was agreed by all the accused persons.'<sup>6</sup>

Aryan Khan's case is noteworthy not due to being wrongly detained, a scenario many in India are accustomed to, but due to having eventually secured bail through exposure to high-level legal representation, the glare of the press, and rapid mobilization of the law processes. The expediency of the hearing, the items of argument heard promptly, and the detailed judgment pronounced, is a testament to how privilege can magnify the reach of liberty.

Compare this to Mohammed Qasim, a wage labourer in Uttar Pradesh, held in jail on a minor theft charge. He had been in detention for more than three years just because he couldn't raise a ₹10,000 bond. There was no reportage, no priority listing, no high-profile lawyer advocating his constitutional protections in a courtroom. His tale, like that of many a thousand, passed in obscurity—deep in the dimly lit corridors of overwhelmed trial courts and forgotten prison blocks.<sup>7</sup>

More than 75% of India's prisoners, many of whom have already spent more time in prison than the maximum stipulated sentence of the alleged offence, are undertrials, as per the NCRB Prison Statistics of the year 2022.<sup>8</sup> Most hit by this are the margins: the Dalits, the Adivasis, the religious minorities, and the urban poor. Empirical studies and the 268th Law Commission Report establish the correlation of economic vulnerability directly being associated with the denial of bail and delay, and the ease of traversing the system by the more resourceful ones.

The case of *Machal Lalung*, a tribal man in Assam who had spent 54 years in detention on charges of a minor offence, is a grim testament to the apathy of the system. He was certified as sane within a couple of years of being in detention, but no one followed up, and he was forgotten at a mental asylum decades ago until activists intervened recently.

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<sup>6</sup> *Aryan Khan v. Union of India*, Bail Appl. No. 3624 of 2021, Bombay High Court (Oct. 28, 2021)

<sup>7</sup> Supriya Sharma, *He Spent 3 Years in Jail for a Minor Theft Because He Couldn't Pay Rs 10,000 in Bail*, Scroll.in (May 23, 2022), <https://scroll.in/article/1024633/>.

<sup>8</sup> National Crime Records Bureau.(2022). *Prison Statistics India*.

Numerous studies and NCRB data indicate that Dalits, Adivasis, and Muslims are disproportionately represented among undertrials.<sup>9</sup> Caste is also central to this disparity. A 2015 report by the National Dalit Movement for Justice found that Dalits and Adivasis are significantly overrepresented in prison populations. Judges, like others in society, are not immune to caste-based biases—especially in regions where caste hierarchies deeply influence local police and community structures. Many legal scholars point out that caste bias isn't confined to policing it often influences judicial decisions as well, sometimes without judges even realizing it. Gender bias, too, quietly shapes how bail is handled. Courts frequently presume that women need to be protected or that they naturally play nurturing roles in family conflicts. Ironically, these assumptions can work against them, leading to bail being denied on paternalistic grounds, especially in cases related to dowry or so-called 'moral' offences. Although the number of incarcerated women is lower than that of men, women who are imprisoned often face judgments steeped in patriarchal and moralistic norms. In cases involving dowry, adultery, or 'honor crimes,' women are frequently denied bail due to societal notions of proper femininity. Furthermore, courts often impose 'protective conditions'—such as requiring the accused to live with their in-laws or spouse—conditions that serve more to reinforce gender stereotypes than to safeguard individual liberty.

### **Evolving Bail Jurisprudence**

India's Supreme Court has developed a rich jurisprudence on bail, particularly in recent decades. But while principles have evolved, implementation remains inconsistent. In *Siddharam Satlingappa Mehre v. State of Maharashtra*, it marks a high point in progressive bail in jurisprudence. The Supreme Court held that Personal liberty is a very precious fundamental right and it should be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case.<sup>10</sup> The Court declined to place anticipatory bail under arbitrary constraints or time limits and reasserted that custodial interrogation cannot be employed as a tool of oppression. This ruling is noteworthy in that it prioritizes freedom over suspicion, but its intent is diluted too often in trial courts, where police evidence still tips the scale too heavily. Another watershed case, *Arnesh Kumar* dealt with Section 498A IPC (cruelty to wife). The Court expressed concern over routine arrests and stated that no arrest should be made only because the offence is non-bailable and cognizable.<sup>11</sup> The Court laid down a

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<sup>9</sup> National Crime Records Bureau. (2015). *Prison Statistics India*.

<sup>10</sup> *Siddharam Satlingappa Mehre v. State of Maharashtra* (2011) 1 SCC 694.

<sup>11</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

standard requiring police officers to issue written reasons for arrest. Even though the judgment did not explicitly discuss bail, its fundamental message was clear: pre-trial detention should be seen as an exception, not as a rule. Once more, implementation lags behind. The police-court system continues to favour jail as a preventive default.

Upendra Baxi's critique offered in *The Crisis of the Indian Legal System* (1982) is an important point of foundation for understanding how legal systems, even using their allegedly emancipatory language, tend to enforce already existing inequalities. Baxi formulates the concept of "symbolic law"—legislation that promises rights and protection but lacks the institutional or political will to make actual enforcement possible. This critique is especially relevant in the context of bail provisions, where formal guarantees of liberty are frequently undermined by structural barriers. As Baxi warns, “laws are passed more to display concern than to change the underlying structures of injustice... symbolic legality without functional justice.”<sup>12</sup> He points out a number of inconsistencies in the system: while the law guarantees equality, the accessibility of justice is dictated by wealth and status; although the Constitution favors decentralization, judicial administration is highly centralized; and legal expertise is the preserve of the elites, making the system inaccessible and unfathomable to the poor. Such inconsistencies, Baxi contends, account for why progressive interpretations of the law tend not to percolate to the lower judiciary, which in turn remains beholden to a conservative and formalist legal tradition.

### **Judicial Discretion and its Discontents**

Judicial discretion in bail is meant to offer flexibility, but it often results in subjective, inconsistent, and opaque rulings. In *Gudikanti Narasimhulu v. Public Prosecutor*, Justice Krishna Iyer warned: Personal liberty, deprived when bail is refused, is too precious a value...to glamorize impressionistic orders as discretionary.<sup>13</sup> However, in practice, there is no binding framework guiding bail decisions. This creates room for unconscious bias, class assumption and arbitrariness. Baxi (1982) highlights how judicial behaviour is shaped by a colonial legacy and an elitist worldview. In his book *The Crisis of the Legal System*, he observed: The Indian legal system is more symbolic than functional: it sustains the illusions of

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<sup>12</sup> Upendra Baxi, *The Crisis of the Indian Legal System: Alternatives in Development, Law and Justice* (Vikas Pub. House 1982).

<sup>13</sup> *Gudikanti Narasimhulu v. Public Prosecutor*, AIR 1978 SC 429.

justice while systematically excluding the poor.<sup>14</sup>

India's prison population is dominated by undertrials. According to the Law Commission's Report: A total of 2,31,340 undertrial prisoners were lodged in jails under IPC offences, and 50,457 under special laws.<sup>15</sup> In *Hussainara Khatoon v. State of Bihar*, the Court reiterated that the poor find the criminal process a veritable maze. Because legal services, however organized, do not reach them.<sup>16</sup> This quote reflects the structural failure to ensure speedy trial and equal access to justice, particularly for the marginalized.

Baxi (1982) calls the Indian judiciary as being in a "crisis of legitimacy." While it is legally obliged to deliver justice, the judiciary operates in such a way that it undermines the integrity of the people. He acknowledges that the colonial hangover in judicial thinking. There is lack of public participation in lawmaking and implementation. Inaccessibility of courts and legal knowledge and failure to judicial accountability. He emphasizes that law is no longer legitimate for the masses. It remains a privilege of the elite, made operational through complex legal fictions and procedural labyrinths.<sup>17</sup> His analysis explains why progressive judgments often fail to trickle down to the trial court level, where real injustice occurs.

### **Comparative Jurisprudence and International Standards**

The United Kingdom: The Bail Act, 1976 embodies a presumption of bail and a structured approach to denials, something India lacks. The law also stipulates precise factors including risk of offending, witness tampering, or absconding and requires these to be assessed in all situations. This statutory clarity contrasts sharply with India's vague, judge-dependent regime. Indian law lacks similar codification which leads to unpredictability and forum shopping.

India's global obligations also require reform. Article 9(3) of the ICCPR, to which India is a party, provides that 'It shall not be the general rule that persons awaiting trial shall be detained in custody.'<sup>18</sup> *The Mandela Rules* (UN Standard Minimum Rules for Treatment of Prisoners) underscore the utilization of non-custodial measures and conditions of detention that are even

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<sup>14</sup> *id* at 12.

<sup>15</sup> Law Commission of India, 2017, p.12.

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

<sup>17</sup> *id* at 12, p. 30.

<sup>18</sup> International Covenant on Civil and Political Rights (ICCPR), 1966.

more humane.<sup>19</sup> However, India's prison reports indicate systematic flouting of the standards. More than 75% of India's prison population are undertrials and many of them stay in jail longer than the maximum term of the offence they are alleged to have committed.

### **Ethical Responsibilities of Legal Professionals**

Discretion in bail orders is not merely a question of legal construction but is closely linked to professional ethics. The Bar Council of India Rules mandate that advocates maintain the dignity of their profession, act equitably with the opposite side, and assist in the administration of justice. Lawyers must refrain from adopting delay tactics or exploiting procedural loopholes that result in prolonged incarceration of undertrials.

Judges are also guided by the Supreme Court's *Restatement of Values of Judicial Life*, which underscores the importance of impartiality, sensitivity to the vulnerable, and independent decision-making. Yet, in practice, these ideals are often compromised. Bail decisions can be influenced consciously or otherwise by public sentiment, political pressure, or institutional inertia.

At its core, ethical judging requires more than legal reasoning. A judge should not be swayed by whether the accused is a well-known figure or a daily-wage worker. The real question is whether liberty can be preserved without jeopardizing justice. Similarly, lawyers must rise above viewing bail applications as routine paperwork. Each hearing is a moment to defend fairness and uphold dignity.

Incorporating ethics into bail practices means recognizing that the law is not just about procedures, it's about responsibility. When the moral weight of bail decisions is ignored, the very foundation of justice begins to erode.

### **Recommendations: Toward a just bail regime**

India needs to establish legally binding judicial guidelines for granting bail to prevent arbitrary and inconsistent decisions. The 268th Law Commission Report recommends adopting a rebuttable presumption of bail for offenses that carry a sentence of up to seven years. Courts should be mandated to provide written justifications when bail is granted or denied, and these

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<sup>19</sup> United Nations. (2015). *Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules)*.

records should be made accessible for both public and academic scrutiny.

To support fairer outcomes, the use of risk assessment tools should be introduced to objectively evaluate the likelihood of an accused fleeing or tampering with evidence. This would help move away from reliance on intuition or social and economic profiling. At the same time, community bail funds, managed by Legal Services Authorities, could ensure that individuals from marginalized backgrounds are not kept in jail simply because they can't afford to post bail.

Bail hearings should also be held promptly, ideally within 72 hours of arrest to address procedural delays that lead to unnecessarily long periods of pretrial detention. Judges must receive ongoing training in caste, gender, and class sensitivity to ensure more equitable decision-making. Their rulings should also be periodically reviewed to uncover any discriminatory patterns and ensure they remain in line with constitutional principles. These reforms wouldn't just improve how bail is administered—they would also help reaffirm the judiciary's commitment to equality, fairness, and justice for all.

### **Opinion**

We are forced to ask ourselves: Is bail in India truly a right, or has it become a privilege reserved for those with status, visibility, and wealth? It's an uncomfortable question, but the answer is clear. While the principles of bail are rooted in the Constitution's promise of innocence and personal liberty, its actual application tells us a different story where the wealthy access it with ease, and the poor face denial, delay or diluted justice.

The case of Aryan Khan is not a celebrity anomaly but a glimpse of how quickly the system can operate when it wills it to. It illustrates the possibility of judicial speed when privilege is at hand. That same system, however, when it deals with a nameless daily wage worker or a forgotten Adivasi man, is slow, punitive, and apathetic.

If India actually believes in the constitutional principle of justice and equality, the jurisprudence of bail must be envisioned anew. It must begin with the foundational principle that justice can't hinge on who you are, how much you are paid, or how famous you are. Freedom shouldn't hinge on the ability to get a good lawyer or a viral hashtag. Until then, a promise of equal

justice under the law is a promise not kept.

Nonetheless, reform cannot depend solely on legislative or structural changes. The bail system is largely upheld by legal professionals—judges, lawyers, and prosecutors, who have a duty to serve justice, fairness, and impartiality. Ethical decision-making must lie at the core of every bail plea, every hearing, and every ruling. Judges must be guided by constitutional principles, not unconscious bias or public opinion. Lawyers, too, must recognise that their role is not merely adversarial, it is deeply civic and moral.

If liberty is to have real meaning in India, it must be available to everyone, regardless of who is accused. The legal community must take the lead, ensuring that bail becomes a right for all, not a privilege for the few. Only then can the judiciary rebuild public trust and truly fulfil its role as the custodian of justice and equality.

