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Undertrial Detention And The Law Of Bail Under The Nagarik Suraksha Sanhita

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Abstract

Three quarters of the persons held in Indian prisons have not been convicted of anything. That proportion has been stable for four decades, across two general recodifications of criminal procedure and a long line of judicial pronouncements holding that liberty is the rule and detention the exception. This article asks why the doctrine and the statistics have failed to converge, and whether the Bharatiya Nagarik Suraksha Sanhita 2023 alters the position. It argues that the persistence of undertrial detention is not primarily a failure of principle but a failure of institutional design at four points: the decision to arrest, the setting of monetary conditions that a poor accused cannot satisfy, the operation of statutory bail restrictions in special legislation, and the absence of any actor with a duty to bring a prolonged detention to the notice of a court. Section 479 of the Sanhita is examined as the most significant textual change, and its exclusion of persons facing multiple cases is identified as the provision most likely to defeat its purpose. The article contends that the constitutional route pioneered in the speedy trial cases has now been developed as far as adjudication alone can take it, and that the remaining work belongs to the design of release conditions, to the surety requirement, and to legal aid at the stage of first production.

Keywords:- Bail, Undertrial Prisoners, Criminal Procedure, Article 21, Speedy Trial, India

I. INTRODUCTION

The Indian law of bail has produced a body of judicial statement that is close to unanimous and a set of outcomes that has barely shifted. Courts at every level repeat that bail is the rule and jail the exception. Prison returns show that more than three quarters of those held are undertrials and that occupancy exceeds capacity by a wide margin. The gap between the two records is the subject of this article.

The argument is that the gap is not caused by disagreement about the governing principle. It is caused by the fact that the principle addresses the decision of a judge at a hearing, while most of the determinants of pretrial custody operate before that hearing, or after it, or in a domain the judge cannot reach. An accused is arrested when arrest was not necessary. A magistrate grants bail on terms the accused cannot meet. A special statute reverses the ordinary burden. A file lies undisturbed for three years because no institution is charged with noticing that it has.

The Bharatiya Nagarik Suraksha Sanhita 2023 replaced the Code of Criminal Procedure 1973. It provides an occasion to test whether recodification changes any of this. The article examines its bail provisions, and Section 479 in particular, against the four points of failure identified above, and concludes that the Sanhita makes one real advance alongside one drafting choice that is likely to neutralise much of it.

II. THE DOCTRINAL POSITION

The constitutional foundation was laid in a series of decisions in the late nineteen seventies and early nineteen eighties. In *Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh*, (1978) 1 SCC 240, the Supreme Court set out the considerations governing a bail application and insisted that the deprivation of liberty before conviction requires justification rather than assumption. In *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81, the Court

found men and women held for periods exceeding the maximum sentence for the offence charged, and located a right to a speedy trial within Article 21.

Later decisions consolidated the position. *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40, held that the seriousness of an economic offence does not by itself justify continued detention where the trial will be long. *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273, addressed the anterior question by requiring police officers to record reasons for arrest in offences punishable with less than seven years of imprisonment, and requiring magistrates to record satisfaction before authorising detention.

The most systematic statement is *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51, which classified offences into categories, issued directions on compliance with the arrest provisions, set timelines for the disposal of bail applications, and asked the Union to consider a separate enactment on bail. Mate (2013) situates this style of adjudication within the broader development of the Supreme Court's supervisory jurisdiction, in which the Court issues directions to administrators in the absence of legislation. The style has obvious advantages of speed. Its weakness is that compliance depends on the same institutions whose conduct produced the problem.

III. ARREST AS THE FIRST DETERMINANT

Custody usually begins with a decision no court has reviewed. The requirement in *Arnesh Kumar* that an officer record the necessity of arrest was intended to convert an unexamined practice into a documented one, on the theory that a reason which must be written is a reason that must exist. The device has been partially effective at best, because the record is prepared by the officer whose conduct it is meant to constrain and is examined, if at all, weeks later.

The *Sanhita* retains the substance of the earlier provisions on arrest without notice and on the duty to inform, and adds procedural requirements concerning the maintenance of arrest records. What it does not add is an independent check at the moment of arrest. *Khanna and Mahajan* (2016), examining anticipatory bail, observe that Indian practice has developed an unusual remedy precisely because the ordinary controls on arrest are weak. Anticipatory bail is a symptom. A person who can afford counsel and can anticipate an accusation obtains protection in advance; a person who can do neither is arrested and then applies.

This asymmetry deserves emphasis because it shapes the composition of the undertrial population. The available prison data show a marked overrepresentation of Scheduled Castes, Scheduled Tribes and Other Backward Classes among undertrials, a pattern that is difficult to explain by offending patterns alone and easy to explain by differential access to the anterior remedies.

IV. MONETARY CONDITIONS AND THE SURETY REQUIREMENT

The second determinant operates after bail has been granted. Indian practice attaches to most bail orders a bond in a specified sum together with one or two sureties who must furnish proof of solvency and local residence. A migrant labourer accused in a city where he knows no property owner cannot produce a surety, and an order granting bail then has the same practical effect as an order refusing it.

The Supreme Court has addressed this repeatedly, directing that conditions be proportionate to the means of the accused and that a person unable to furnish sureties within a stated period be released on a personal bond. *Supreme Court Legal Aid Committee v. Union of India*, (1994) 6 SCC 731, framed the problem in the context of statutory restrictions on bail and produced a scheme of release keyed to the period of detention already undergone. The difficulty is that these are directions to be applied case by case, and the surety requirement remains the default in the statutory form.

Comparative work is instructive here. Lippke (2016) argues that the presumption of innocence, taken seriously, constrains not only the decision to detain but the conditions attached to release, since a condition that cannot be satisfied is a detention order by another route. That analysis fits Indian practice closely. The reform it suggests is structural rather than exhortatory: a statutory presumption in favour of release on personal bond, with sureties required only where a recorded finding justifies them.

V. SECTION 479 AND THE ARITHMETIC OF DETENTION

The most significant textual innovation in the *Sanhita* is Section 479, which reproduces the earlier provision on the maximum period of detention of an undertrial and extends it. A person who has undergone detention for up to one half of the maximum period of imprisonment specified for the offence is to be released on bail. For a first time accused the threshold is one third. The section also allocates the duty to move: the superintendent of the jail must apply in writing to the court on completion of the relevant period.

Two features of this design are genuinely valuable. The first is that it converts a discretionary assessment into an arithmetical one, which removes the occasion for the risk averse refusal that dominates practice. The second is the allocation of the duty to initiate. Until now, a prolonged detention came to notice only if the accused or counsel raised it, which in practice meant that it often did not come to notice at all. *Ranjan* (2025), studying the underutilisation of legal aid among undertrial prisoners, documents how rarely the assigned advocate makes the application that the law contemplates. Placing the duty on the jail superintendent shifts it to an officer who necessarily knows the period served.

The provision is then narrowed in a way that is likely to defeat much of its purpose. Where an accused faces more than one offence, or where more than one case is pending against him, the section directs that release under it shall not be granted. Multiple case registration is common, and it is common precisely in the population the provision was designed to reach. The result is that the accused most likely to be held longest is the one least able to invoke the arithmetic. The narrowing may be defended as a guard against release where the aggregate exposure is high, but the objective could be met by computing the threshold against the aggregate maximum sentence rather than by excluding the class altogether.

VI. STATUTORY RESTRICTIONS IN SPECIAL LEGISLATION

A large part of the long stay undertrial population is held under statutes that restrict the power to grant bail. Provisions in the narcotics legislation and in the Unlawful Activities (Prevention) Act 1967 require a court, before granting bail, to record satisfaction of a negative proposition about the accused's guilt. Applied literally at a stage when the material is untested, that requirement approaches a bar.

The judicial response has been to hold that the statutory restriction yields where its operation would defeat Article 21. In *Union of India v. K. A. Najeed*, (2021) 3 SCC 713, the Supreme Court upheld the grant of bail to an accused under the Unlawful Activities (Prevention) Act who had been in custody for a prolonged period without the prospect of an early trial, holding that the statutory restriction did not oust the constitutional court's power where the delay was itself a violation. The reasoning was applied again in *Javed Gulam Nabi Shaikh v. State of Maharashtra*, Criminal Appeal No. 2787 of 2024, decided on 3 July 2024, where the Court granted bail after more than four years of custody in which charges had not been framed and the prosecution proposed to examine eighty witnesses. The Court there stated that a prosecuting agency unable to secure a speedy trial should not oppose bail on the ground that the offence is serious.

This line of authority is soundly based and, within its domain, effective. Its limitation is that it operates through individual adjudication in a constitutional court. An accused must reach the Supreme Court or a High Court to obtain the benefit of it, which reintroduces the resource dependence that the doctrine was meant to overcome.

VII. TRIAL DELAY AND THE INSTITUTIONS THAT PRODUCE IT

Bail law is, in a sense, a response to a problem it cannot solve. Detention before trial is tolerable in proportion to the shortness of the trial. Indian criminal trials are long for reasons that lie outside the law of bail: vacancies in the subordinate judiciary, the practice of adjourning on the non-appearance of official witnesses, the delay in forensic examination, and the volume of cases in which committal and framing of charge take years.

Satish (2024) examines the plea bargaining provisions introduced in 2005 and their limited use, and identifies causes that bear on the present argument. Where an accused is already in custody, the incentive structure of a negotiated disposal is distorted, since the sentence discount may be smaller than the custody already undergone. Where the accused is on bail, the incentive to conclude is weak. Neither situation is improved by a bail regime alone.

The health consequences of the resulting overcrowding are documented in the comparative literature. Aon, Oberconz and Brasholt (2025), in a scoping review of the relationship between prison overcrowding and health, find consistent associations with communicable disease transmission and with deterioration in mental health. Indian prison returns, showing occupancy well above capacity in the majority of states, place the domestic system within the range of conditions that review describes.

VIII. WHAT SHOULD CHANGE

The article's analysis suggests four changes, each addressed to one of the four points of failure.

The default form of release should be the personal bond. The surety requirement should be imposed only where the court records why the personal bond is insufficient in the particular case, and the sum should be fixed by reference to the means of the accused rather than the gravity of the charge. Mann (2022) shows that legal aid provision in India is concentrated at the trial stage and thin at the point of first production, which is precisely where the condition is set.

The exclusion in Section 479 for accused facing multiple cases should be replaced by a rule computing the threshold against the aggregate maximum sentence. This preserves the guard against premature release in genuinely serious aggregate exposure while restoring the provision to the population it was meant to serve.

The duty to report should be extended beyond the jail superintendent to the prosecuting agency and to the legal services authority, with a periodic return filed in the trial court. A duty placed on a single officer fails silently when that officer does not perform it.

A statutory review of detention should be provided at fixed intervals, independent of any application by the accused. The constitutional courts have effectively created such a review through the speedy trial cases, but they have done so one petition at a time, which confines the protection to those able to reach a superior court. Codification would generalise it.

IX. CONCLUSION

Indian bail doctrine does not need restatement. It has been stated with clarity and repetition for close to fifty years, and Satender Kumar Antil set out in 2022 a scheme of compliance that leaves little room for doubt about what courts are expected to do. What the doctrine has not been able to reach are the decisions and conditions that surround the bail hearing: the arrest that was unnecessary, the surety who does not exist, the statutory restriction that operates as a bar, and the file that nobody is obliged to notice.

Section 479 of the *Bharatiya Nagarik Suraksha Sanhita* is the first serious legislative attempt to reach the last of these. Its design places an affirmative duty on an officer who already holds the relevant information, and that design deserves to be extended rather than narrowed. The exclusion of accused facing multiple cases is the provision that most requires revisiting, because it removes the benefit from the group carrying the greatest share of the burden. The threshold could instead be computed on the aggregate maximum sentence. Until the conditions of release are made to correspond to the means of the person released, the proportion of undertrials in Indian prisons is unlikely to move.

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