Law of Bail: Rethinking presumption of innocence doctrine in India through a *Minimum Interference Standard*

Divyanshu Dembi[1]

In this paper I argue that courts should use their judicial discretion in granting bail and conditions imposed therein on a *minimum interference standard* (MIS). Under MIS the courts should only refuse bail when it is *absolutely* necessary in light of particular facts of the case. I argue that under MIS, we need to develop 'trial *as if* innocent' standard which would demand a higher threshold for depriving liberty unless absolutely necessary for fair trial *or* until guilt has been established. I introduce the concept of *probable guilt bias* to rationalise how presumption of innocence is understood in Indian bail jurisprudence. I've focused mainly on section 437 & 438 CRPC for doctrinal analysis.

Bail & Presumption of innocence

Many legal theorists and historians trace the usage of money bail to secure the presence of accused for trial to medieval England.[2] When the concept first took form, it was not focused on detention.[3]

Presumption of innocence (POI) forms the bedrock of most criminal justice systems. However there exists a fierce debate on the scope and meaning of the rule.[4] POI is more than a mere rule of evidence and represents an estoppel against arbitrary state action affecting the liberty of the accused.[5] To interpret POI only as an evidentiary and procedural rule which states that the prosecution must prove their case beyond reasonable doubt - does not capture the depth of the principle, for it does not say anything about the state of the accused while such a case is being proved by the prosecution. The substantive aspect of the principle forms the backbone of this essay i.e. the argument that you cannot or at least *must not* deprive an accused of his liberty

[1] L.L.B Candidate at Jindal Global Law School (2020-2023).
[2] Wendy R. Calaway & Jennifer M. Kinsley, *Rethinking Bail Reform*, 52 U. RICH. L. REV. 795-830 (2018).
[3] Nick Pinto, *The Bail Trap*, The New York Times, (Mar., 01, 2021, 9:30), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html.
[4] Andrew Ashworth, *Four Threats to Presumption of Innocence*, 10 International Journal of Evidence & Proof 241-279 (2006).
[5] Vrinda Bhandari, *Inconsistent and Unclear: The Supreme Court of India on Bail*, 6 NUJS L. REV. 549 (2013).

unless he is proven guilty or unless it is absolutely necessary for fairness of trial, as I will discuss later.

How the criminal process is conducted is important to understand POI. European Human rights law states that not only is there an evidentiary burden on the prosecution to fulfil the beyond reasonable doubt threshold but also that the trial must commence *as if* the accused was innocent,[6] and any such coercive methods must only be applied if and when they're necessary. I argue that it is this very framing that is missing in Indian bail jurisprudence which leads to a large number of pre & under-trial detention. It's evident how the Indian courts see the issue of bail and liberty as a destination rather than the starting point itself.

Presumption of Innocence & Crime Control: Indian experience

I now am going to evaluate Justice Krishnaiyer's statement on Presumption of innocence in *Gudikanti*[7] as exemplary of the normative understanding of the principle and how it is inconsistent with the presumption itself.

"*I do not think that an accused party is detained in custody because of his guilt, but because there are sufficient probable grounds for the charge against him as to make it proper that he should be tried, and because the detention is necessary to ensure his appearance at trial*".

A critical evaluation of this understanding of presumption of innocence reveals two cracks in reasoning. First is the unqualified assumption that detention is the *only* way by which an individual may be secured for trial. Various scholars have argued[8] that such an assumption does not have any empirical basis to it and thus to hold it as an axiom is incorrect. I argue that among other considerations evaluated while granting bail – the idea that detention is necessary to secure the accused for trial must pass through a *minimum interference* test. The courts must only order detention if it is absolutely necessary and there are clear and present signs that granting bail to the individual would result in compromising the fair trial. On conditions imposed for bail, J. Chandrachud recently opined[9] - 'The human right to dignity and the protection of constitutional safeguards should not become illusory by the imposition of

[6] Supra Note 4.
[7] Gudikanti Narasimhulu & Ors. V. Public Prosecutor 1978 AIR 429.
[8] Krishnaswamy, Kothari, Dutta, Ganesan et. all, *Re-imagining Bail Decision Making: An analysis for Bail practice in Kerala and recommendation for reform* (Mar. 2, 2021, 23:00), https://clpr.org.in/wp-content/uploads/2020/03/BailReport_AW_Web_Final.pdf.
[9] Parvez Noordin Lokhandwala v. State of Maharashtra and Ors. (2020) 10 SCC 77.

conditions which are disproportionate to the need to secure the presence of accused, the proper course of investigation and eventually to ensure a fair trial'. In *Ankita Kailash Khandelwal*[10] the court stated that 'interest of justice' in section 437(3)(c) CRPC should only mean "advancing the trial process" and inclusion of broader meaning to impose harsh conditions should be shunned because of purposive interpretation.

Secondly, since a full dress rehearsal of evidence[11] and a judgement of guilt cannot be made at this stage – all that the phrase "*sufficient probable grounds for the charge against him as to make proper that he should be tried*" qualifies when subject to the *minimum interference standard* is the initiation of a fair trial against the accused and not the deprivation of his liberty.

I argue that the prima facie test[12] that involves application of the judicial mind on the matter of bail has implicit in itself the *theoretical* evaluation of the accused's guilt. This enquiry is not a reflection on what the ultimate result may be, since that will be decided by a fair trial, but is the judge's approximation of the accused's likelihood of guilt at that point in the process. Such an enquiry is laced with what I call the *probable guilt bias.* Under this bias, judges more often than not evaluate considerations regarding bail *as if* the accused were guilty which is shown by the judicial anxiety to grant bail. One can also argue that the *probable guilt bias* is in-built in the matters perused while considering bail which are inter alia - gravity of offence, nature of evidence, punishment likely to be handed down, likelihood of fleeing etc., for why does a criminal justice system built on the presumption of innocence look to considerations that demand a pre-mature enquiry into the accused's guilt if not for the anxieties induced by the *probable guilt bias*. In matters refusing bail, such a finding is based on an incorrect partial acceptance of accused's *likelihood* of guilt based on prima facie evidence available. Detention should be a function of guilt, not likelihood of guilt. It is imperative to note that both, the process of prime facie evaluation of guilt (laced with *probable guilt bias*) for granting bail, and consequently the result of denying bail based on this enquiry – run afoul of presumption of innocence. A strict philosophical argument against such an evaluation is based on the idea that presumption of innocence must stop such an exercise into likelihood of guilt before the court finally decides on the matter. Although the evidentiary burden on prosecutions remains the same, probable guilt acts as a judicial bias that *conflates* a fair trial with depravation of the

[10] Ankita Kailash Khandelwal and Ors. V. State of Maharashtra and Ors. (2020) 10 SCC 670.

[11] Abhinav Sekhri, *Reversing the presumption of innocence: Part III* (Mar. 3, 2021, 10:30), https://theproofofguilt.blogspot.com/2015/05/reversing-presumption-of-innocence-part_9.html.

[12] Rohan Joachim Alva, *Between Poverty and a Hard Place in Prison: Bail and the Suffering Indigent*, 1 NAT'l L.U. DELHI Stud. L.J. 124 (2012).

accused's liberty. To think of deprivation of the accused's liberty as *sine qua non* for a fair trial is against the presumption of innocence.[13]

In order to respect the constitutional value of Article 21 and POI, we need to adopt a 'trial as if innocent' standard in consonance with a *minimum interference standard* in order to restrict the probable guilt bias to the most extreme cases. Such a standard will also act as the framework to enforce the bail not jail principle.

It is argued that India follows a crime control model as opposed to a due process model.[14] Under crime control – suppressing crime is more important than individual liberty and thus I argue that the crime control model in fact facilitates the *probable guilt bias*. Since individual liberty is not the priority (as opposed to in the due process model), the state prioritises detaining individuals against whom there appears a prima facie case lest they damage 'interest of society' if released on bail. I argue that a recognition of the same in Indian criminal law jurisprudence must lead to the logical conclusion that individual liberty and 'larger interest of society' in fact have never been competing *equal* interests for the judiciary; as under the crime control model the interest of society weighs over the individual liberty - an inference which is reflected and confirmed by empirical evidence[15] and doctrinal understanding of bail decisions. Thus the sweep of Article 21 in bail decisions has in fact *not* been vast.[16]

Thus it is incorrect to posit as if judicial philosophy considers both of them equal - when the deprivation of individual liberty is real and harsh, while the benefits (if any) to the society by restraining these individuals are ill proven. Absence of an empirically informed approach juxtaposed with the reality of people languishing in Jail points to the fact that the two concepts are not considered to be similarly placed. As long as we function on the assumption that detention of the accused is prima facie beneficial to society, we're affirming two subconscious biases that have no basis in criminal law. First is to assume that such individuals when out on bail are likely to harm the society and second, which forms the basis of first – of *probable guilt.*

[13] Una Ni Raifeartaigh, *Reconciling Bail law with the presumption of innocence*, 17 Oxford Journal Of legal Studies 1-21 (1997).
[14] S.N. Sharma, *Towards Crime Control Model*, 49 Journal of Indian Law Institute 543-550 (2007).
[15] Vignesh Radhakrishnan & Sumant Sen, *70% of prisoners in India are under-trials*, The Hindu (Mar., 01, 2021, 4:45), https://www.thehindu.com/data/data-70-prisoners-in-india-are-undertrials/article32569643.ece. At the end of 2019, 3.28 lakh prison inmates were undergoing trial while 1.42 Lakh were convicted.
[16] Supra Note 7.

On deprivation of liberty

There is a philosophical disagreement between the crime control and due process model on when is it justified to deprive an individual of his liberty. The Indian understanding says it is only justified when it is according to 'procedure established by law'. The denial of bail by application of judicial discretion happens through a procedure established by law – since the CRPC does not comment on it. But is it fair, just and reasonable? This is the dark matter where criminal and constitutional values collide. For one – there are legitimate arguments of how the money bail and stringent conditions imposed therein render the very idea of bail illusory.[17] Even though section 440 of the CRPC states that such amount may be reduced according to the circumstances of the case, the Indian experience of fixing bail amount has often overlooked the indigent and followed a money proportional to gravity of offence approach.[18] A *strict scrutiny*[19] on how bail law adversely impacts a specific class of individuals led the Law commission to argue for it to be in contravention to Articles 14 and 15.[20] The question of whether the depravation of liberty is according to a fair and reasonable law stands unclear.

Judicial Discretion in Bail

Bail has always been looked at as a balancing act between the liberty of the individual and the larger interests of society.[21]

The Indian courts have developed many tests and criteria when deciding upon the question of bail. Such criteria are often conflicting and broadly worded which obscures the real calculus that a judge has to undertake.[22] In *Gudikanti* it was stated that for purpose of deciding bail these following aspects must be looked into i.e. "the charge, the nature of the evidence by which it is supported, and the punishment to which the party would be liable if convicted". In *Sanjay Chandra*[23] the court listed these considerations – "the position and the status of the accused

[17] Law Commission of India, Report No. 268, *Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (Mar., 01, 2021, 11:00), https://lawcommissionofindia.nic.in/reports/Report268.pdf.
[18] Supra Note 12.
[19] Cassidy Heiserman, *Punishing Indigency: Why Cash bail is unconstitutional under the equal protection clause*, Drexel Law Review Blog (Mar., 02, 2021, 23:45), https://drexel.edu/law/lawreview/blog/overview/2020/September/cash-bail/.
[20] Supra Note17.
[21] Supra Note 4.
[22] Supra Note 5.
[23] Sanjay Chandra v. CBI 2012 AIR SC 830.

with reference to the victim and the witnesses; the likelihood, of the accused fleeing from justice; of repeating the offence; of tampering with witnesses; the history of the case as well as of its investigation and other relevant grounds etc." In *Prahlad Singh Bhati v. NCT, Delhi*[24] the considerations were stated as " the nature of the evidence in support thereof, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations"

As can be inferred from above – there is no uniform understanding of what exactly is to be considered while granting bail. It has led to a phenomenon in which judges under no scrutiny develop own rules and customs for setting and granting bail.[25] One example is how a three judge bench of the supreme court in *Pokar Ram*[26], in violation of *stare decisis*, stated that anticipatory bail cannot be applied in a case wherein accused is charged with murder under section 302 of the IPC, whereas it has been already established by *Sibbia*[27] that no such single principle can be laid out for granting anticipatory bail. The Law commission also acknowledged that many High Courts still decide cases on principle of anticipatory bail laid down in *Balchand Jain*[28] as against *Sibbia*. This is symptomatic of the larger malaise of inconsistency plaguing bail jurisprudence in India. I argue that such inconsistency is a linear product of the vague considerations evaluated in judgements. The doctrinal vagueness acts as a way for individual judge's discretion to seep into bail decisions which further distorts an already complicated landscape.[29] I argue that it is precisely why two courts when deciding on similar matters might use very different reasoning to decide divergently. A recent example was the Disha Ravi and Safoora Zargar bail order under UAPA.[30]

In *Vinod Bhandari*[31] the court acknowledged that the accused had gone without a trial for over a year and there did not appear to be any chance of a trial in the near future. The court then used the accusation (of large scale corruption in medical college) as a metric for not handing

[24] (2001) 4 SCC 280.
[25] Supra Note 2.
[26] Pokar Ram v State of Rajasthan, 1985 SCC (2) 597.
[27] Gurbaksh Singh Sibbia v State of Punjab, 1980 AIR 1632.
[28] Balchand Jain v. State of Madhya Pradesh 1977 AIR 366.
[29] Supra Note 5.
[30] Gautam Bhatia, *Safoora Zargar & Disha Ravi: A Tale of two Bail Orders*, Indian Constitutional Law & Philosophy (Mar. 01, 2021, 11:00), https://indconlawphil.wordpress.com/2021/02/24/safoora-zargar-and-disha-ravi-a-tale-of-two-bail-orders/.
[31] VINOD BHANDARI v STATE OF MADHYA PRADESH 2015 SCC OnLine SC 96.

out bail lest the society's faith in the profession break down. In *Bishewshwar Ganjhu*[32] an individual who was accused of accepting bribe of 470 rupees had spent more than half of maximum imprisonment and was denied bail just because his application had been rejected five times earlier. Both these judgements are exemplary of the bail jurisprudence in India – inconsistent, without any coherent basis, in contravention of Article 21 and against presumption of innocence.

I argue that the *only* criteria for adjudicating bail according to a *minimum interference standard*, should be whether the individual may attempt to flee from justice and/or influence the working of justice. My argument is that both of these acts are firstly, extremely difficult to do for the vast majority of people who *are* in fact detained[33], and secondly, that the threshold of adjudicating whether an individual is capable of, by virtue of his power, of influencing the judiciary and/or state to rule in his favour – should be fairly high. The second question demands a twin lensed look. First, based on ground realities, is to look at accused's socio-economic status and second, and more important, is to look at ways and mechanism in which such persons can actually affect the trial. Abstract ideas of "hindering justice" cannot be used as a carte blanche by the state to deny bail. Such decisions must be based on a robust calculus of competing interesting and the specific context of that particular case.

The poor, bail & loss of liberty

The existence of money as a prerequisite for furnishing bail is argued to be a grave injustice to the indigent. The Supreme Court through the *Hussainara Khatoon*[34] series of judgements made various interventions into the state of pre -trial and under trial detention. It did result in many under trials being freed but it was argued to be treating only the symptom of a larger problem rather than treating the problem itself i.e. money bail.[35] This has a disproportionate impact on indigent who cannot pay the bail bond and thus even the guarantee of bail under section 167 becomes inoperative. It has been argued[36] that the reasons for the increasing under-trial

[32] Bishweshwar Ganjhu v. State of Jharkhand (2007) 15 SCC 736.

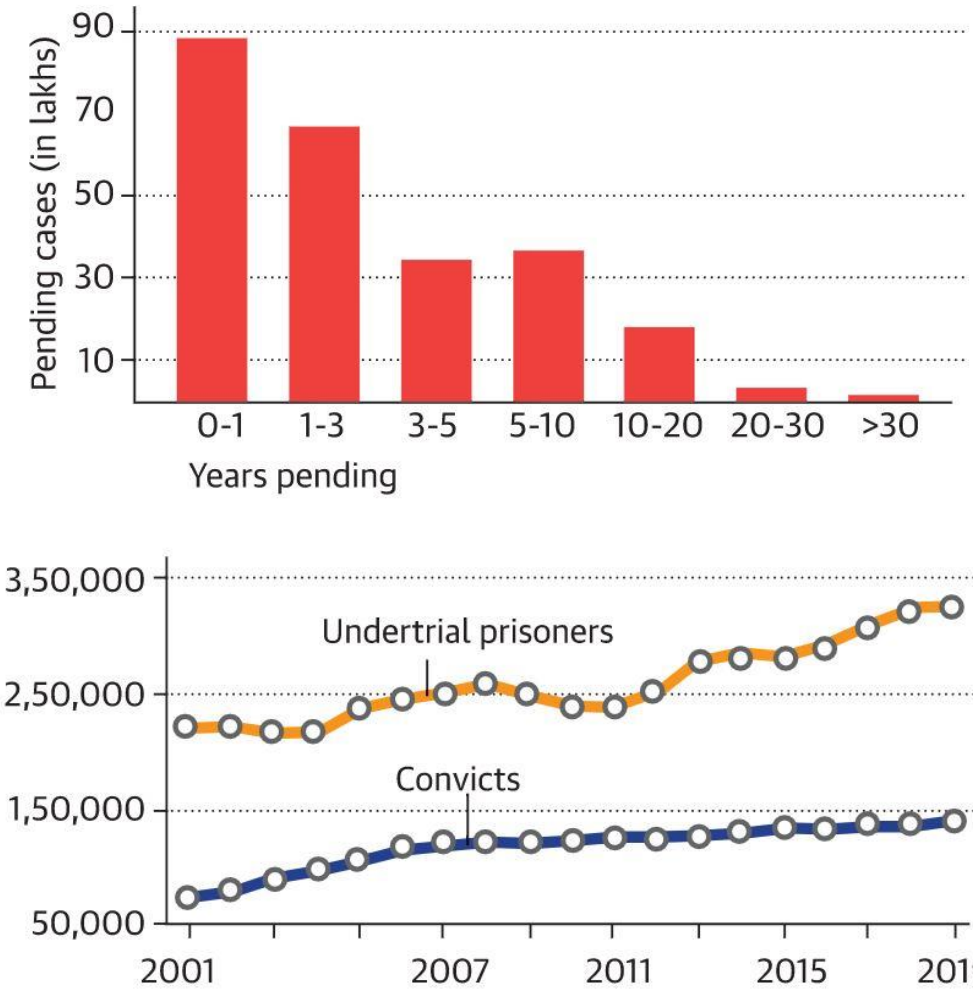
[33] Supra Note 15.

[34] Hussainara Khatoon v Home Secretary, State of Bihar, 1979 AIR 1369.

[35] Supra Note 12.

[36] Aparna Chandra & Keerthana Medarametla, Approaches to Justice in India, *Bail & Incarceration: The state of Under-trial prisoners in India* 67-78 (Eastern Book Company 2017).

problem in India are twofold: first – lax arrest laws[37] and second – stringent bail laws. Even though the court has read the right to a free and speedy trial into Article 21,[38] it is far from being the reality. Below are graphs based on latest figures by NCRB on the state of under-trial prisoners in India.[39]



These figures can be read in light of my earlier argument of how the bias of *probable guilt* in a crime control model coupled with poor person's inability to furnish bail naturally leads to more detentions.

[37] Siddharam Satlingappa Mhetre v. State Of Maharashtra and Ors (1980) 2 SCC 565.
[38] Abdul Rehman Antulay v. R.S. Nayak AIR 1992 SC 1701.
[39] Supra Note 15.

It is thus no surprise that California Supreme Court's recent decision in *In Re Humphrey*[40] ruled cash bail as unconstitutional and against the idea of substantive due process – an American constitutional law idea embedded in fifth and fourteen amendment which protects against arbitrary action and right to liberty.[41] This is due to the underlying philosophical difference between the crime control and due process model as I have discussed earlier.

Even though Chandrachud J. recently stated that *writ of liberty runs through the fabric of constitution*[42] – we have a long way ahead to harmonise article 21 principles of liberty with our bail jurisprudence.

[40] In Re Kenneth Humphrey, Supreme Court of California, (Mar., 03, 2021, 14:20), https://www.courts.ca.gov/opinions/documents/S247278.PDF.

[41] Kieran Correia, *In Re: Humphrey – A Case against Cash Bail*, Indian Constitutional law & Philosophy (Mar., 02, 2021, 10:00), https://indconlawphil.wordpress.com/2021/03/31/notes-from-a-foreign-field-in-re-humphrey-a-case-against-cash-bail-guest-post/.

[42] Arnab Manoranjan Goswami v. The State of Maharashtra and Ors. 2020 SCC OnLine SC 964.