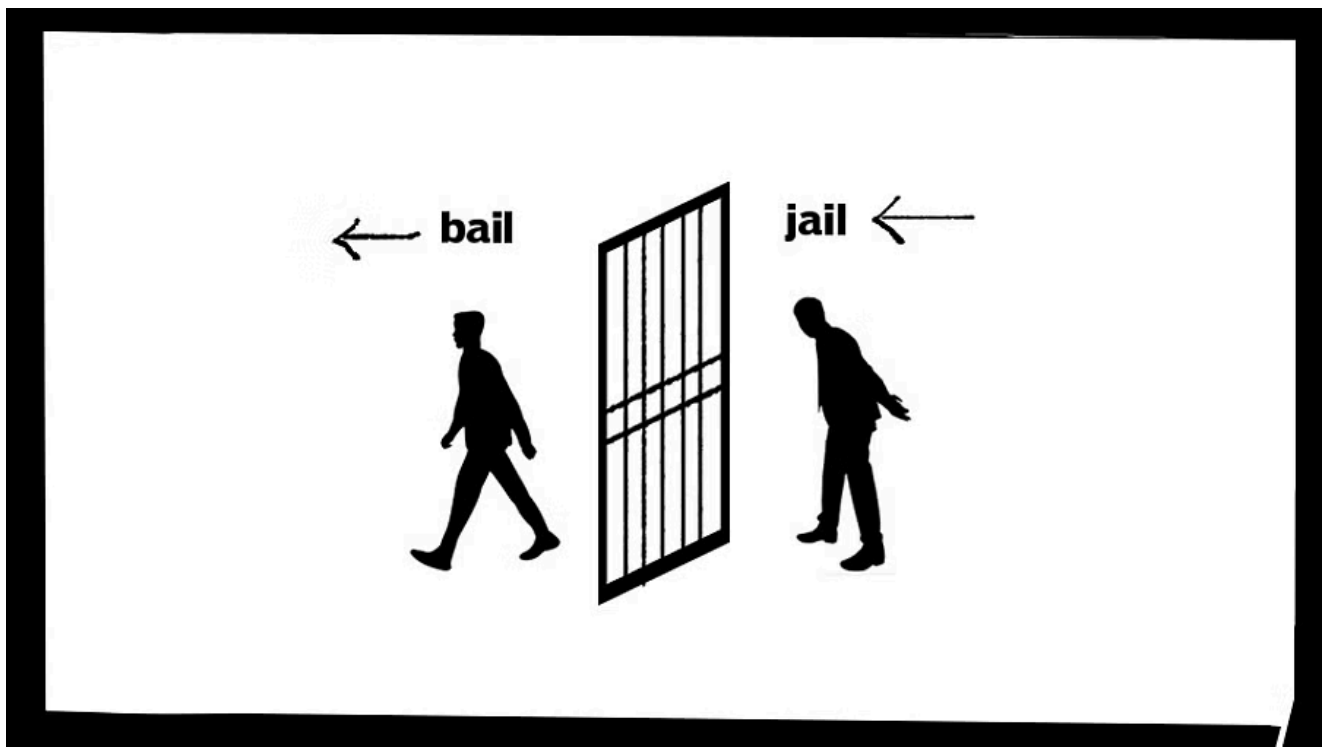


When procedure punishes

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When it comes to the law of bail in India, there are two sides of the coin. On one side, we have the principle that 'bail is a rule, and jail is an exception.' The other side reveals the harsh reality that 'procedure is the punishment.' However, when the metaphorical coin is tossed, it rarely falls with a 50% probability on either side. For instance, while the Supreme Court of India has consistently affirmed that 'bail is a rule and jail is an exception,' this principle has often found pockets of exception in application, meaning that some individuals have been deprived of their liberty without a formal indictment of their guilt. Similarly, despite the Supreme Court holding that the right to default bail is a fundamental right, instances of interpretative chicanery have created pockets of exceptions to this rule.

If a Supreme Court directive can be circumvented through procedural or administrative manipulation, what does that imply about a 'right' being a right at all? Does this not make it a case where procedure becomes punishment? The ruling in Pragyna Thakur and its subsequent application, especially by lower courts, highlight this troubling phenomenon. The Supreme Court, in Pragyna Thakur, laid two propositions: first, on the issue of computation of the 60/90 day period, and second, on the meaning of the phrase 'if not availed off'. While the first proposition has been affirmed, the second has been held to be per incuriam, i.e., discredited by a larger bench of the Supreme Court in M Ravindran. It was held to be per incuriam because it arguably constricted liberty beyond the procedure established by law.

However, in at least five reported cases that we have found in legal databases after the Ravindran ruling — which may be just the tip of the iceberg — courts have continued to rely on the discredited part of the ruling in *Pragyna Thakur v. State of Maharashtra* (2011). In *M Rashid Choudhury v. State of Nagaland* (2021), the Gauhati High Court refused the default bail applications of the accused, basing their decisions on the discredited part of the *Pragyna Thakur*. Similarly, in *Pankaj Kumar Yadav v. State of UP* (2022), *Anwar Ali v. State of Uttar Pradesh* (2022), *Ugochukwu Solomon v. Union of India* (2021), and *Ranjit Singh v. State of Haryana* (2020), the district courts denied default bail to an accused, basing their decision on the same erroneous and discredited precedent in *Pragyna*. This reliance by the lower courts persists despite the Supreme Court’s explicit reversal of the second proposition of *Pragyna Thakur* in *M Ravindran v. Intelligence Directorate* (2020).

This misuse of the *Pragyna Thakur* ruling exhibits a pattern of what can at best be termed as abusive judicial interpretation. Abusive judicial interpretation, as described in the work of Ros Dixon & David Landau, can occur in contexts where courts have substantial discretion and where there is insufficient oversight of how lower courts interpret and apply higher court rulings. Relying on a *per incuriam* ruling can be a facet of such abusive judicial interpretation. In this form of interpretive abuse, courts strategically manipulate legal precedents to achieve desired outcomes, even if only temporarily. These outcomes are temporary because a court higher in the hierarchy may see through the fault and correct the error, or even release the person on bail. However, the abuse lies in the fact that, by the time the matter makes its way through different rounds of appeal, the accused may have spent time in custody beyond the 60/90 day period, effectively negating their fundamental right to default bail.

The persistent misapplication of *Pragyna Thakur* by the district courts and high courts reflects a system where procedural rules appear to be bendable to accommodate administrative convenience or prosecutorial strategies. Rather than being used to protect personal liberty, Section 167(2) (the default bail clause) is being narrowly construed by some courts, restricting its application and weakening its purpose of delivering substantive justice. This abusive interpretation, combined with the continued reliance on erroneous precedent, creates ambiguity in the application of the right to default bail, effectively eroding the constitutional rights that the Supreme Court aimed to protect.

When courts of first instance err in applying precedents, they undermine fundamental rights and call the foundations of justice into question. A similar pattern had previously emerged in the aftermath of the *Shreya Singhal* case, where the Supreme Court had struck down Section 66-A of the Income Tax Act as being unconstitutional. Despite this unequivocal ruling on its unconstitutionality, lower courts and prosecutorial offices had continued to apply Section 66-A approvingly, leading to numerous prosecutions under a law that no longer existed—and numerous illegal suspensions of liberty.

Both these sets of cases reveal a systemic gap where the rulings of the Supreme Court fail to percolate down the judicial hierarchy, leading to selective application or outright disregard of the binding judgements. The failure of the courts at the bottom of the pyramid to apply the precedents correctly also presents a critical challenge to the rule of law. It raises pressing questions about the accountability of judicial authorities and the mechanisms in place to ensure that Supreme Court judgements are consistently and accurately implemented at all levels of the judiciary.

The issue is no longer merely about procedural errors or isolated judicial mistakes; it is about the larger problem of systemic erosion of trust in judicial integrity. What does it say of the institution of bail if a rule or a right itself is subject to chicanery? More importantly, where do we go when the courts themselves become the agents of injustice, applying abusive interpretations that subvert legal rights?

Five cases may be a small sample to make this argument. But it is still a dangerous precedent for a constitutional democracy based on the rule of law. Without more robust mechanisms for judicial compliance and perhaps an office for judicial audit, the Supreme Court's rulings risk becoming mere symbolic victories, devoid of any practical effect — typical of a system of rules where the 'procedure is the punishment'. Therefore, the Supreme Court must provide authoritative guidance to put an end to this abuse and ensure that the right to default bail is consistently recognised and upheld across all levels of the judiciary. This is not only a matter of legal clarity but of protecting the fundamental rights enshrined in the Constitution, which should not be so easily diluted by abusive interpretative practices.

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