



## INTERNATIONAL JOURNAL OF HUMAN RIGHTS LAW REVIEW

*An International Open Access Double Blind Peer Reviewed, Referred Journal*

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Volume 5 | Issue 3 | 2026

Art. 17

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# When Bail Becomes Punishment: Pre-Trial Detention, Constitutional Liberty, and the Failure of Criminal Justice in India

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### Recommended Citation

Abir Chattaraj, *When Bail Becomes Punishment: Pre-Trial Detention, Constitutional Liberty, and the Failure of Criminal Justice in India*, 5 IJHRLR 258-279 (2026).

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# When Bail Becomes Punishment: Pre-Trial Detention, Constitutional Liberty, and the Failure of Criminal Justice in India

## I. INTRODUCTION

Bail is, in principle, a mechanism for reconciling two imperatives of a constitutional order: the liberty of the individual who is presumed innocent until proven guilty, and the interest of the State in ensuring the accused's presence at trial and the integrity of the process. In India, that reconciliation has broken down. The greater part of the prison population consists not of convicted offenders but of undertrials—persons awaiting or undergoing trial, whose guilt has not been established and who remain, in law, innocent.<sup>1</sup> When such persons are held for months or years before any adjudication of guilt, the institution designed to protect liberty pending trial becomes, in effect, an instrument of detention without conviction.

The constitutional stakes are considerable. Personal liberty is protected by Article 21 of the Constitution, which the Supreme Court has held may be curtailed only by a procedure that is fair, just, and reasonable;<sup>2</sup> the right to a speedy trial has been read into that guarantee;<sup>3</sup> and the foundational principle of Indian bail jurisprudence is that bail is the rule and jail the exception.<sup>4</sup> Yet the lived reality of the undertrial—prolonged incarceration, repeated adjournments, and the practical impossibility, for the poor, of furnishing bail—stands in stark tension with these guarantees. This paper takes that tension as its subject and asks a single question: can a criminal justice system remain constitutionally legitimate when individuals are deprived of liberty for prolonged periods before conviction, and can pre-trial detention itself become an unconstitutional form of punishment?

The thesis advanced here is that prolonged pre-trial detention is no longer merely a procedural inconvenience but one of the most serious constitutional failures in contemporary India. When liberty is curtailed for years before guilt is established, criminal procedure ceases to be a

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<sup>1</sup> National Crime Records Bureau, Gov't of India, *Prison Statistics India 2022*, at tbl. on prison population (2023) (undertrials approx. 75.8% of inmates; occupancy rate approx. 131%).

<sup>2</sup> *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India) (procedure under art. 21 must be fair, just and reasonable).

<sup>3</sup> *Hussainara Khatoon (I) v. Home Sec'y, State of Bihar*, (1980) 1 SCC 81 (India) (speedy trial an integral part of art. 21).

<sup>4</sup> *State of Rajasthan v. Balchand*, (1977) 4 SCC 308 (India) (Krishna Iyer, J.) ("the basic rule may perhaps be tersely put as bail, not jail").

neutral pathway to adjudication and becomes punitive in effect, undermining the presumption of innocence, due process, equality before the law, human dignity, and liberty itself. The paper develops the proposition that *process itself can become punishment*, and argues for the recognition of a constitutional doctrine against punishment through process. Its objectives are to map the bail framework and its constitutional foundations, to document the undertrial crisis and the role of poverty within it, to develop the process-as-punishment theory, to draw comparative lessons, and to propose reforms. The scope is confined to pre-trial detention and bail in the ordinary criminal process; it evaluates doctrine, institutions, and policy, and not the conduct of any government.

The inversion this produces is striking. A prison is, in the constitutional imagination, the place to which the State consigns those whom it has convicted after a fair trial; in India it has become, predominantly, the place where it holds those it has merely accused. The object of bail, the Supreme Court has repeatedly affirmed, is to secure the accused's attendance at trial, not to punish in anticipation of guilt.<sup>5</sup> Where detention is prolonged, untethered to that object, and visited disproportionately upon those unable to purchase their release, the institution inverts its own purpose. The argument of this paper is that such inversion is not merely unfortunate as a matter of policy but defective as a matter of constitutional principle, and that the vocabulary of administrative reform is inadequate to capture what is, at bottom, a failure of constitutional fidelity.

### *Research Methodology*

The study is principally doctrinal, identifying and systematising the constitutional provisions, statutes, and judicial decisions that govern bail and pre-trial liberty, and reasoning from them to a coherent account of the law.<sup>6</sup> Constitutional analysis is used to locate the protection against punitive pre-trial detention within Articles 14, 21, and 22 and the presumption of innocence. Criminal-procedure analysis examines the statutory bail architecture under the Code of Criminal Procedure 1973 and its successor, the Bharatiya Nagarik Suraksha Sanhita 2023. The paper draws on prison studies and official statistics to ground its claims about the scale and incidence of undertrial detention, and on comparative law and human-rights jurisprudence—principally that of

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<sup>5</sup> *Sanjay Chandra v. CBI*, (2012) 1 SCC 40 (India) (object of bail is to secure attendance, not to punish; pre-trial detention must not be used punitively).

<sup>6</sup> On the doctrinal method, see Terry Hutchinson & Nigel Duncan, *Defining and Describing What We Do: Doctrinal Legal Research*, 17 Deakin L. Rev. 83 (2012).

the United Kingdom, the United States, Canada, Germany, and the European Court of Human Rights – to identify transferable safeguards. Finally, policy analysis evaluates the adequacy of existing mechanisms and the feasibility of reform. The method is critical and interdisciplinary, combining constitutional doctrine with criminology, prison studies, and governance, and the novel claims advanced – the process-as-punishment doctrine, the right to time-bound criminal justice, and compensation for excessive detention – are tested against established authority and foreseeable objection.

## II. THE HISTORICAL DEVELOPMENT OF BAIL JURISPRUDENCE

Bail has its origins in the common law, where it developed as a means of securing the accused's attendance at trial while avoiding unnecessary pre-trial imprisonment. The English tradition, crystallised in instruments from the Statute of Westminster to the Habeas Corpus Act 1679 and the Bill of Rights 1689 – which condemned excessive bail – established that detention before trial was an exception to be justified, not a default to be assumed. This inheritance shaped the Indian statutory scheme.

Under the Code of Criminal Procedure 1973, bail is governed by a structured framework: Sections 436 and 437 distinguish bailable from non-bailable offences, Section 439 confers special powers on the Court of Session and the High Court, and Section 167(2) provides for so-called default or compulsive bail where the investigation is not completed within the statutory period.<sup>7</sup> The default-bail provision is of particular constitutional importance, for it ties the deprivation of liberty to the diligence of the investigating agency and treats the failure to investigate within time as a ground for release as of right.<sup>8</sup> Section 436A, inserted in 2005, went further, requiring the release of an undertrial who has been detained for one-half of the maximum sentence prescribed for the offence.<sup>9</sup> These provisions have now been carried forward, with modifications, into the Bharatiya Nagarik Suraksha Sanhita 2023, whose Section 187 reproduces the default-bail scheme and whose Section 479 re-enacts and extends the undertrial-release provision, additionally requiring the release of a first-time offender after detention of one-third of the maximum sentence.<sup>10</sup>

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<sup>7</sup> Code of Criminal Procedure, No. 2 of 1974, §§ 436-437, 439 (India) [hereinafter CrPC].

<sup>8</sup> CrPC § 167(2) (India) (default or compulsive bail on failure to complete investigation within the prescribed period); see *Rakesh Kumar Paul v. State of Assam*, (2017) 15 SCC 67 (India).

<sup>9</sup> CrPC § 436A (India) (inserted by Act 25 of 2005) (release of undertrial detained for one-half of the maximum sentence).

<sup>10</sup> Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 187, 479 (India) (in force)

The Indian constitutional framework superimposes upon this statutory scheme a set of guarantees that transform bail from a matter of procedural discretion into a question of fundamental right. Article 21 protects life and personal liberty; Article 22 regulates arrest and detention; and Article 14 guarantees equality before the law. The historical purpose of bail—to secure attendance without inflicting punishment in advance of guilt—thus acquires, in the Indian setting, a constitutional dimension: the denial of bail is not merely an administrative decision but a deprivation of liberty that must answer to the Constitution.

The statutory architecture has also been tested against, and occasionally subordinated to, the constitutional guarantee of liberty. Even where special enactments impose stringent restrictions on bail, the courts have held that those restrictions cannot survive a sustained violation of the right to a speedy trial: prolonged incarceration coupled with the improbability of an early conclusion of proceedings entitles a constitutional court to grant bail notwithstanding the statutory bar.<sup>11</sup> Earlier, confronting the accumulation of undertrials under a special law, the Court had directed their release on bail upon completion of specified periods of detention, treating prolonged pre-trial custody as itself a ground for relief.<sup>12</sup> These decisions confirm that the statutory framework operates within, and is ultimately controlled by, the constitutional guarantee of personal liberty rather than the reverse.

### III. CONSTITUTIONAL FOUNDATIONS OF PERSONAL LIBERTY

#### *A. Article 21 and the Fair-Procedure Guarantee*

The cornerstone is Article 21, which provides that no person shall be deprived of life or personal liberty except according to procedure established by law.<sup>13</sup> In *Maneka Gandhi v. Union of India*, the Court held that such procedure must be fair, just, and reasonable, and not arbitrary, fanciful, or oppressive, thereby fusing the guarantees of Articles 14, 19, and 21 into a single standard of substantive fairness. It follows that a deprivation of liberty through pre-trial detention is constitutional only if

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from July 1, 2024; § 479 additionally provides for release of a first-time offender after one-third of the maximum period).

<sup>11</sup> *Union of India v. K.A. Najeeb*, (2021) 3 SCC 713 (India) (constitutional courts may grant bail despite statutory restriction where prolonged incarceration and trial delay violate art. 21).

<sup>12</sup> *Supreme Court Legal Aid Comm. v. Union of India*, (1994) 6 SCC 731 (India) (directing release of undertrials detained for prolonged periods under a special enactment).

<sup>13</sup> India Const. art. 21.

the procedure that authorises and sustains it is itself fair and reasonable; detention that is prolonged, unexplained, or untethered to the legitimate purposes of bail cannot satisfy that standard.

### ***B. Article 14 and Equality Before the Law***

Article 14 guarantees equality before the law and the equal protection of the laws, and forbids arbitrariness in State action.<sup>14</sup> In the bail context, Article 14 is engaged in two ways. First, arbitrary or inconsistent denial of bail—detention untethered to articulable risk—offends the non-arbitrariness principle. Second, and more insidiously, a bail system that conditions release on the capacity to furnish monetary surety produces a systematic inequality between the rich, who secure liberty, and the poor, who do not, for conduct that is otherwise identical. That a person's liberty should turn on wealth rather than on the risk he poses is difficult to reconcile with equality before the law.

### ***C. The Presumption of Innocence***

The presumption of innocence, though not expressly enumerated, is a fundamental principle of the criminal law and an incident of the fair-trial guarantee under Article 21. Pre-trial detention sits in unavoidable tension with it: the longer a presumptively innocent person is detained, the more the detention resembles the punishment that may lawfully follow only upon conviction. The presumption demands that detention before trial be the exception, justified by necessity, and not a routine consequence of accusation.

### ***D. Fair-Trial Rights and the Right to a Speedy Trial***

The right to a speedy trial is a component of the fair-trial guarantee and has been read into Article 21. In *Hussainara Khatoon v. State of Bihar*, confronting the plight of undertrials detained for periods exceeding the maximum sentence their alleged offences carried, the Court held that a reasonably expeditious trial is an integral part of the fundamental right to life and liberty. In *Abdul Rehman Antulay v. R.S. Nayak*, a Constitution Bench laid down guidelines for assessing speedy-trial claims while declining to fix rigid outer limits,<sup>15</sup> and in *Hussain v. Union of India* the Court issued systemic directions on bail and the disposal of long-pending cases.<sup>16</sup>

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<sup>14</sup> India Const. art. 14.

<sup>15</sup> *Abdul Rehman Antulay v. R.S. Nayak*, (1992) 1 SCC 225 (India) (Constitution Bench; guidelines on the right to speedy trial).

<sup>16</sup> *Hussain v. Union of India*, (2017) 5 SCC 702 (India) (systemic directions on bail and disposal of pending cases).

### *E. Human Dignity*

Article 21 has been held to encompass the right to live with human dignity. Pre-trial detention, with its attendant loss of autonomy, exposure to overcrowded and often degrading prison conditions, and severance from family and livelihood, implicates dignity directly. The dignitary dimension is essential to the argument of this paper, for it locates the constitutional injury of detention not only in the loss of physical liberty but in the degradation of the person that prolonged, unjustified incarceration entails.

### *F. The Rule of Law*

Finally, the rule of law – a basic feature of the Constitution – requires that the coercive power of the State be exercised according to settled, non-arbitrary norms and be answerable for its abuse. A system in which liberty is lost for years through institutional default, without timely adjudication or remedy, is in tension with that principle. Taken together, these foundations establish that pre-trial liberty is not a matter of administrative grace but a constitutional entitlement, and that its prolonged and unjustified deprivation is a constitutional wrong.

## **IV. THE UNDERTRIAL CRISIS IN INDIA**

The scale of undertrial detention in India is the empirical foundation of the constitutional problem. According to the National Crime Records Bureau, undertrials constituted approximately 75.8% of the prison population—about 4.34 lakh of roughly 5.73 lakh inmates—while prisons operated at an occupancy rate of around 131% against sanctioned capacity. A significant proportion of undertrials had been detained for extended periods, with a meaningful fraction held for more than three years awaiting the conclusion of their trials. These figures describe not isolated aberrations but a structural condition: detention without conviction has become the modal experience of imprisonment in India.

The structural causes are several and mutually reinforcing. Investigations are frequently prolonged, delaying the filing of charge-sheets and the commencement of trial. Trials themselves are protracted by chronic docket congestion, judicial vacancies, and routine adjournments. Bail applications, though nominally entitled to expeditious disposal, are often delayed, and conditions of bail—particularly monetary surety—are set at levels the poor cannot meet, so that even those granted bail may remain incarcerated. The Supreme Court has repeatedly intervened: it has cautioned against unnecessary arrest and insisted on compliance with the procedural safeguards

governing arrest,<sup>17</sup> and, in *Satender Kumar Antil v. CBI*, it issued comprehensive directions to streamline bail, reiterated that bail is the rule, urged the enactment of a dedicated bail statute, and directed the expeditious disposal of bail applications.<sup>18</sup> That such directions have been necessary, and repeated, is itself evidence that the problem is systemic rather than episodic.

The undertrial crisis is therefore properly understood as a governance failure rather than a series of individual misfortunes. It reflects the interaction of under-resourced investigation, congested courts, and a bail culture that defaults to detention, and it produces a population of presumptively innocent persons whose liberty is lost not because guilt has been established but because the system cannot, or does not, adjudicate their cases in reasonable time. It is against this empirical backdrop that the constitutional analysis must proceed.

The temporal dimension of the crisis is as significant as its scale. Detention that would be unobjectionable if brief becomes constitutionally troubling as it lengthens, and in India the periods involved are frequently measured in years rather than weeks. Delay accrues at every stage—between arrest and charge-sheet, between charge-sheet and the framing of charges, and between the framing of charges and the conclusion of evidence—and bail applications, which ought to be disposed of swiftly, are themselves subject to listing delays that prolong custody pending a decision that may ultimately favour release. The Court's repeated direction that bail applications be decided within tight timelines is a tacit acknowledgement that the system does not, at present, deliver timely decisions on liberty.<sup>19</sup> The aggregate effect is that the duration of pre-trial detention often bears no rational relationship either to the gravity of the alleged offence or to the strength of the case against the accused, but tracks instead the contingencies of docket congestion and institutional capacity—an irrationality that itself raises a question under Article 14.

## V. POVERTY, INEQUALITY, AND BAIL

If the undertrial crisis is the symptom, poverty is among its principal determinants. The Indian bail system has historically conditioned release on the furnishing of monetary surety, a requirement that bears no relation to the risk an accused poses and everything to do with his means.

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<sup>17</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273 (India) (safeguards against unnecessary arrest; CrPC §§ 41, 41A).

<sup>18</sup> *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51 (India) (comprehensive bail directions; reiterating that bail is the rule and recommending a dedicated bail enactment).

Justice Krishna Iyer recognised this early: in *Moti Ram v. State of M.P.*, the Court condemned the practice of demanding heavy sureties that the poor cannot furnish, observing that a bail system keyed to wealth discriminates against the indigent and converts the right to bail into a privilege of the affluent.<sup>20</sup> In *Gudikanti Narasimhulu v. Public Prosecutor*, the Court emphasised that the discretion to grant bail must be exercised with regard to the personal liberty of the accused and not mechanically denied.<sup>21</sup>

The economic barriers to bail operate at several points. Surety requirements demand either cash or a propertied guarantor, both of which are beyond the reach of the poorest accused. Access to competent legal representation, essential to the framing and pursuit of a bail application, is unequally distributed, and the constitutional promise of free legal aid under Article 39A and the fair-trial guarantee is imperfectly realised in practice.<sup>22</sup> Social marginalisation compounds the disadvantage: those without stable addresses, formal employment, or social capital are precisely those least able to satisfy the conditions on which release is offered. The result is a bail system in which liberty is, in significant measure, allocated by wealth.

The question whether the bail system punishes poverty is therefore not rhetorical. Two persons accused of the same offence, posing the same risk of flight or interference, may experience radically different outcomes: the one who can furnish surety returns home, while the one who cannot remains in prison, sometimes for longer than any sentence the offence could attract. This class-based disparity in access to liberty is not a marginal defect but a structural feature of the system, and it engages Article 14 directly, for it makes the enjoyment of a fundamental right contingent on economic status. A constitutional account of bail that ignores this distributive dimension is incomplete; the deprivation of liberty falls hardest on those least able to resist it, and the system thereby visits upon poverty a penalty that the criminal law never authorised.

The disadvantage is compounded by unequal access to legal representation. The framing and vigorous pursuit of a bail application – marshalling sureties, addressing the prosecution’s objections, and, where necessary, approaching higher courts – requires competent counsel, yet the indigent accused frequently depends on an over-burdened legal-aid

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<sup>20</sup> *Moti Ram v. State of M.P.*, (1978) 4 SCC 47 (India) (Krishna Iyer, J.) (condemning the demand for heavy monetary sureties beyond the means of the poor).

<sup>21</sup> *Gudikanti Narasimhulu v. Pub. Prosecutor*, (1978) 1 SCC 240 (India) (principles governing the exercise of bail discretion).

<sup>22</sup> India Const. art. 39A; see *Khatri (II) v. State of Bihar*, (1981) 1 SCC 627 (India) (right to free legal aid as part of art. 21).

system that cannot match the resources of a privately retained advocate. The constitutional promise of free legal aid, recognised as an incident of Article 21, is in practice unevenly fulfilled, with the result that the poor are disadvantaged not only at the point of furnishing surety but at the prior point of advocating for release at all. Inequality of representation thus operates as a second, hidden filter, reinforcing the first.

## VI. PROCESS AS PUNISHMENT: A CONSTITUTIONAL CRITIQUE

The intellectual centre of this paper is the contention that criminal process can itself become punishment. The proposition is not metaphorical. Punishment, in its constitutional sense, is the deliberate infliction of hardship by the State upon a person for an offence; it may lawfully follow only a finding of guilt reached through fair procedure. When the State inflicts equivalent hardship—loss of liberty, dignity, livelihood, and reputation—through the process that precedes guilt, the formal distinction between process and punishment collapses in substance even as it is preserved in form. The comparative law makes the point precisely: in *Bell v. Wolfish*, the United States Supreme Court held that conditions or restrictions imposed on a pre-trial detainee become unconstitutional punishment where they are not reasonably related to a legitimate non-punitive governmental objective.<sup>23</sup> The same logic applies to the fact and duration of detention itself.

The punitive character of process accretes at successive stages. Arrest, even where later unjustified, inflicts immediate deprivation and stigma. Prolonged investigation extends that deprivation while guilt remains unproven. The denial or delay of bail converts a temporary restraint into sustained incarceration. And trial delay prolongs the condition indefinitely, so that the presumptively innocent person serves, in advance and without adjudication, a sentence the State has not yet earned the right to impose. At each stage the hardship is real and, frequently, irreversible; and at each stage it is inflicted upon a person whom the Constitution still regards as innocent.

The injuries are not confined to the loss of physical liberty. Detention carries social stigma that survives acquittal; it commonly causes the loss of employment and the collapse of the household economy that depended on the detainee's earnings; it disrupts families and, for many, forecloses educational and social opportunities; and it inflicts reputational harm that no subsequent acquittal can fully repair. These are constitutional injuries to liberty, dignity, and equality, and—this is

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<sup>23</sup> *Bell v. Wolfish*, 441 U.S. 520, 535-539 (1979) (U.S.) (restrictions on pre-trial detainees amount to unconstitutional punishment where not reasonably related to a legitimate non-punitive objective).

the crux—they occur *before* and *independently of* conviction. The constitutional wrong, in other words, is complete upon the unjustified and prolonged deprivation itself; it does not await, and is not cured by, the eventual verdict. To recognise this is to recognise a doctrine against punishment through process: a principle that the State may not achieve through delay and detention what it could lawfully impose only through conviction after a fair and timely trial.

The objection to this account is that pre-trial detention is regulatory rather than punitive—directed at securing attendance and preventing interference with the trial, not at inflicting suffering for an offence—and that its hardships, however real, are the incidental and constitutionally tolerable costs of a legitimate process. The objection has force and must be taken seriously, for a system that could never detain before trial would be unable to protect witnesses, prevent flight, or safeguard the integrity of proceedings. But the regulatory characterisation is not a talisman; it holds only so long as detention remains reasonably related to those legitimate objectives. This is precisely the line the comparative law draws: detention that exceeds what those objectives require, or that continues after they have ceased to obtain, is no longer regulatory but punitive in substance, whatever its formal label.<sup>24</sup> The constitutional inquiry is therefore not whether the State has labelled the detention as non-punitive, but whether its character, duration, and justification in fact remain tethered to a legitimate non-punitive purpose.

Indian doctrine already contains the materials for this distinction. The Court has insisted that bail is not to be withheld as a punishment and that the object of pre-trial custody is to secure attendance, not to anticipate the sentence, and it has held that where detention becomes prolonged and trial remote, the constitutional guarantee of liberty reasserts itself even against statutory restriction. What remains is to draw these threads into an explicit doctrine: that the deprivation of liberty before conviction, once it ceases to be reasonably related to a legitimate non-punitive purpose—whether through excessive duration, institutional delay, or the practical impossibility of release for the indigent—becomes punishment, and that such punishment, imposed without trial upon a presumptively innocent person, is a constitutional wrong. The doctrine against punishment through process is, in this sense, less an invention than a synthesis of principles the Court has already affirmed in fragments.

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<sup>24</sup> *United States v. Salerno*, 481 U.S. 739 (1987) (U.S.) (upholding regulatory pre-trial detention while distinguishing impermissible punishment).

## VII. THE HUMAN COST OF PRE-TRIAL DETENTION

A constitutional account attentive to dignity must register the concrete human consequences of pre-trial detention, for they are the content of the rights at stake. The economic consequences are immediate and severe: detention typically terminates the detainee's employment, eliminates the income on which dependants rely, and imposes legal costs that exhaust household savings, frequently pushing families into debt and destitution. For wage labourers and the self-employed—who form a large share of the undertrial population—even a few weeks of detention can be financially catastrophic.

The social consequences ramify outward from the individual. Prolonged detention destabilises families, strains and sometimes ends marriages, interrupts the education of children deprived of a parent's support, and severs the social ties on which reintegration depends. The psychological consequences are equally grave: the uncertainty of indefinite detention, the trauma of incarceration, and the loss of autonomy and status produce anxiety, depression, and lasting harm to mental health, conditions aggravated by the overcrowding and inadequate facilities that characterise much of the prison system.

These harms are not incidental by-products of an otherwise legitimate process; they are dignity-based constitutional injuries. The Court has held that Article 21 protects the right to live with human dignity, and the systematic degradation that prolonged, unjustified detention inflicts is a derogation from that guarantee. To treat undertrials as statistical units—numbers in an occupancy table—is to miss the constitutional significance of the harm. A jurisprudence that takes liberty and dignity seriously must reckon with the lived reality of detention, for it is in that reality that the abstraction of *personal liberty* acquires its meaning and its measure.

These harms also carry a temporal asymmetry that intensifies their constitutional gravity: they are inflicted in the present, upon a person not yet found guilty, and they are not undone by a later acquittal. The lost job is not restored, the dissolved marriage is not reconstituted, and the years are not returned. The Court's recognition that prisoners retain their fundamental rights, and that custody must be consistent with human dignity, underscores that the detainee does not forfeit constitutional protection at the prison gate.<sup>25</sup> Read with the dignity jurisprudence of Article 21,<sup>26</sup> the human cost of pre-trial detention is not an extra-legal

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<sup>25</sup> *Sunil Batra v. Delhi Admin.*, (1978) 4 SCC 494 (India) (prisoners retain fundamental rights; dignity within custody).

<sup>26</sup> *Francis Coralie Mullin v. Adm'r, U.T. of Delhi*, (1981) 1 SCC 608 (India) (right to live with human dignity as part of art. 21).

lament but the concrete measure of a constitutional injury that the law must take into account both in deciding whether to detain and in determining what is owed when detention proves unjustified.

### VIII. THE CONSTITUTIONAL RIGHT TO TIME-BOUND CRIMINAL JUSTICE

If prolonged pre-trial detention is the disease, delay is its proximate cause, and the question arises whether delay itself can become unconstitutional. The speedy-trial jurisprudence supplies the foundation: from *Hussainara Khatoon* onward, the Court has held a reasonably expeditious trial to be an integral component of Article 21. Yet the Court has also declined to convert that guarantee into rigid time-bars: in *P. Ramachandra Rao v. State of Karnataka*, a seven-judge bench overruled earlier decisions that had prescribed fixed periods after which prosecutions would lapse, holding that courts cannot legislate such limits and that speedy-trial claims must be assessed contextually.<sup>27</sup> The result is a right that is constitutionally recognised but remedially weak: real in principle, elusive in enforcement.

Comparative and human-rights law suggests that the difficulty lies not in recognising the right but in giving it teeth. The European Convention guarantees trial within a reasonable time and requires the release of a detained person pending trial where detention becomes unreasonable,<sup>28</sup> and the European Court has developed detailed criteria for assessing reasonableness and has insisted on effective domestic remedies for delay.<sup>29</sup> German law caps ordinary pre-trial detention at six months, subject to mandatory review by a higher court and extension only for compelling reasons,<sup>30</sup> and Canadian law has adopted presumptive ceilings beyond which delay is *prima facie* unreasonable.<sup>31</sup> These models demonstrate that structured temporal limits, coupled with a remedy, are workable without the rigidity that *Ramachandra Rao* rightly feared.

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<sup>27</sup> *P. Ramachandra Rao v. State of Karnataka*, (2002) 4 SCC 578 (India) (seven-judge bench; courts cannot prescribe rigid time-bars for the conclusion of criminal trials).

<sup>28</sup> Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(3), Nov. 4, 1950, 213 U.N.T.S. 221 (trial within a reasonable time or release pending trial).

<sup>29</sup> *Kudła v. Poland*, App. No. 30210/96, Eur. Ct. H.R. (2000) (Grand Chamber) (effective domestic remedy required for excessive length of proceedings).

<sup>30</sup> Strafprozessordnung [StPO] § 121 (Ger.) (ordinary pre-trial detention limited to six months, subject to review by the Higher Regional Court and extension only for compelling reasons).

<sup>31</sup> *R v. Jordan*, 2016 SCC 27 (Can.) (presumptive ceilings beyond which trial delay is unreasonable under s. 11(b) of the Charter).

The argument of this paper is that India should recognise a constitutional right to time-bound criminal justice: not a mechanical limit voiding prosecutions, but an enforceable expectation that the State will investigate and try within a reasonable time, breach of which – where the delay is attributable to the State rather than the accused – triggers concrete consequences, principally release on bail and, in egregious cases, compensation. Such a right is a natural development of the speedy-trial guarantee already embedded in Article 21; it respects *Ramachandra Rao* by attaching remedies to attributable delay rather than imposing bright-line bars; and it directly addresses the engine of the undertrial crisis, which is delay itself.

The European jurisprudence illustrates how such a right can be operationalised without rigidity. From *Wemhoff v. Germany* onward, the Strasbourg Court has assessed the reasonableness of continued pre-trial detention by reference to the persistence of grounds justifying it and the diligence with which the authorities have conducted the proceedings, releasing the detainee once detention can no longer be justified rather than waiting for the trial's conclusion.<sup>32</sup> This is a standard, not a stopwatch: it asks not merely how long detention has lasted but whether its continuation remains justified and whether the State has prosecuted the case with reasonable expedition. An Indian right to time-bound criminal justice could adopt the same structure – pairing presumptive timelines with an inquiry into attribution and justification – thereby honouring both the constitutional interest in liberty and the legitimate needs of prosecution, and avoiding the rigidity that *Ramachandra Rao* condemned while supplying the enforceable consequence its absence has left wanting.

## IX. WRONGFUL DETENTION AND PUBLIC-LAW COMPENSATION

Where pre-trial detention proves to have been excessive or wrongful – most starkly where it ends in acquittal after years of incarceration – the question of remedy becomes acute. Indian constitutional law has developed a robust jurisprudence of public-law compensation for State violations of fundamental rights. In *Rudul Sah v. State of Bihar*, the Court awarded compensation under Article 32 to a man detained for fourteen years after his acquittal, holding that the power to enforce fundamental rights includes the power to award monetary relief.<sup>33</sup> In *Bhim Singh v. State of J&K*, it awarded compensation for unlawful detention,<sup>34</sup> and in

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<sup>32</sup> *Wemhoff v. Germany*, App. No. 2122/64, Eur. Ct. H.R. (1968) (reasonableness of continued pre-trial detention under art. 5(3)).

<sup>33</sup> *Rudul Sah v. State of Bihar*, (1983) 4 SCC 141 (India) (compensation under art. 32 for prolonged detention after acquittal).

<sup>34</sup> *Bhim Singh v. State of J&K*, (1985) 4 SCC 677 (India) (compensation for unlawful

*Nilabati Behera v. State of Orissa* it held public-law compensation to be a remedy distinct from private tort and unaffected by sovereign immunity.<sup>35</sup> This lineage supplies the doctrinal materials for compensating excessive pre-trial detention.

The case for a structured compensation framework is reinforced by comparative practice. The European Convention confers an enforceable right to compensation on those detained in contravention of its liberty guarantee,<sup>36</sup> the United Kingdom maintains a statutory scheme for compensating miscarriages of justice,<sup>37</sup> Canada recognises constitutional damages for breach of Charter rights,<sup>38</sup> and Germany provides statutory compensation for wrongful prosecution and detention, including a fixed daily sum for non-pecuniary loss in addition to material losses.<sup>39</sup> The Law Commission of India has likewise recommended a statutory framework for compensating wrongful prosecution and incarceration.<sup>40</sup>

Drawing on these models, a principled Indian framework would provide compensation where pre-trial detention is excessive or wrongful—judged by its duration, its attribution to State default, and the eventual outcome—calibrated to both the material losses suffered (lost earnings, legal costs) and the dignitary harm of incarceration, and payable by the State rather than by individual officers. Such compensation is not a windfall but a mechanism of accountability: a State that must pay for excessive detention acquires a continuing incentive to investigate and try with diligence, aligning institutional behaviour with the constitutional interest in liberty.

The acquittal that follows years of detention exposes the present remedial vacuum with particular clarity. A person held for a long period and ultimately found not guilty has suffered the full hardship of incarceration without the predicate of conviction, yet under prevailing practice obtains no compensation as of right; relief, if any, depends on

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detention).

<sup>35</sup> *Nilabati Behera v. State of Orissa*, (1993) 2 SCC 746 (India) (public-law compensation distinct from private tort; sovereign immunity no defence).

<sup>36</sup> Convention, *supra* (art. 5(5)) (enforceable right to compensation for detention in contravention of art. 5).

<sup>37</sup> Criminal Justice Act 1988, c. 33, § 133 (UK) (compensation for miscarriages of justice).

<sup>38</sup> *Vancouver (City) v. Ward*, 2010 SCC 27 (Can.) (damages under s. 24(1) of the Charter for breach of guaranteed rights).

<sup>39</sup> Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen [StrEG] § 2 (Ger.) (compensation for wrongful prosecution and detention; fixed daily sum for non-material loss in addition to material losses).

<sup>40</sup> Law Comm'n of India, Rep. No. 277, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (2018) (recommending a statutory compensation framework).

the discretionary exercise of the writ jurisdiction in egregious cases. This is difficult to reconcile with a constitutional order that treats liberty as a fundamental right and recognises public-law compensation for its violation. The Law Commission has recommended both the reform of bail to reduce unnecessary detention and the creation of a statutory remedy for wrongful prosecution and incarceration,<sup>41</sup> and the comparative systems surveyed below treat compensation not as an act of grace but as an entitlement. A principled framework would render compensation routine rather than exceptional where detention has been excessive or wrongful, while confining it through the threshold requirements of duration, attribution, and outcome, so that it compensates genuine constitutional injury without deterring legitimate prosecution or imposing indeterminate liability on the State.

## X. COMPARATIVE PERSPECTIVES

### A. *United Kingdom*

The Bail Act 1976 establishes a general presumption in favour of bail, displaceable only on specified statutory grounds, thereby placing the burden of justifying detention on the State.<sup>42</sup> The Human Rights Act 1998 incorporates the European Convention, including the right to liberty and to trial within a reasonable time,<sup>43</sup> and the Criminal Justice Act 1988 provides a statutory route to compensation for certain miscarriages of justice. The British model illustrates the value of a statutory presumption of bail coupled with Convention-based liberty guarantees.

### B. *United States*

The United States Constitution forbids excessive bail under the Eighth Amendment, and the Supreme Court held in *Stack v. Boyle* that bail set higher than reasonably necessary to ensure the accused's presence is excessive.<sup>44</sup> Preventive detention was upheld, within limits, in *United States v. Salerno*, which treated regulatory detention as permissible but punishment before trial as not, while *Bell v. Wolfish* supplied the test distinguishing legitimate restriction from unconstitutional punishment of detainees. The Sixth Amendment's speedy-trial guarantee, elaborated in *Barker v. Wingo* and implemented by the Speedy Trial Act, completes

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<sup>41</sup> Law Comm'n of India, Rep. No. 268, *Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (2017).

<sup>42</sup> Bail Act 1976, c. 63, § 4 & sch. 1 (UK) (general right to bail subject to specified exceptions).

<sup>43</sup> Human Rights Act 1998, c. 42 (UK) (incorporating, inter alia, art. 5 of the Convention).

<sup>44</sup> *Stack v. Boyle*, 342 U.S. 1 (1951) (U.S.) (bail higher than reasonably necessary to secure presence is "excessive" under the Eighth Amendment).

the framework.<sup>45</sup>

### ***C. Canada***

The Canadian Charter guarantees the right not to be denied reasonable bail without just cause and the right to be tried within a reasonable time. In *R v. Antic*, the Supreme Court of Canada reaffirmed the ladder principle, under which the least onerous form of release is to be preferred and cash bail treated as a measure of last resort,<sup>46</sup> and in *R v. Jordan* it established presumptive ceilings beyond which trial delay is unreasonable, shifting the burden to the State to justify it. Charter damages are available for breach of guaranteed rights.

### ***D. Germany***

German law treats pre-trial detention as an exceptional measure governed by proportionality. The Code of Criminal Procedure limits ordinary pre-trial detention to six months, subject to mandatory review by a Higher Regional Court and extension only where particular difficulty or other important reason justifies it. Wrongful prosecution and detention attract statutory compensation, including a fixed daily sum for non-material loss alongside compensation for material losses. The German model is notable for coupling a hard temporal limit with structured judicial review and a codified compensation entitlement.

### ***E. European Court of Human Rights***

The European Court's jurisprudence under Article 5 of the Convention is the most developed body of law on pre-trial liberty. The Court has held that detention pending trial must not exceed a reasonable time and that an accused must be released once continued detention ceases to be justified, has developed criteria—such as the persistence of reasonable suspicion and the diligence of the authorities—for assessing reasonableness,<sup>47</sup> and has affirmed an enforceable right to compensation for detention in breach of the Convention. Across these systems three lessons recur for India: a genuine presumption of bail, structured temporal limits on pre-trial detention coupled with judicial review, and an enforceable right to compensation for excessive or wrongful detention.

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<sup>45</sup>*Barker v. Wingo*, 407 U.S. 514 (1972) (U.S.) (four-factor test for the Sixth Amendment speedy-trial right); see Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174.

<sup>46</sup>*R v. Antic*, 2017 SCC 27 (Can.) (ladder principle; cash bail as a measure of last resort).

<sup>47</sup>*Letellier v. France*, App. No. 12369/86, Eur. Ct. H.R. (1991) (criteria for the reasonableness of pre-trial detention under art. 5(3)).

## XI. REFORM PROPOSALS

The reforms proposed below follow from the constitutional analysis and are assessed for legal basis, constitutional justification, practical implementation, and foreseeable criticism.

First, presumption-of-bail legislation. A dedicated bail statute should codify the principle that bail is the rule and detention the exception, placing the burden of justifying detention on the State—a reform the Supreme Court itself has urged. Its constitutional basis lies in Articles 14 and 21; its implementation requires legislative drafting and judicial training; and the principal objection—that it may endanger public safety—is met by retaining narrowly defined grounds for detention based on articulable risk. Second, statutory maximum limits on pre-trial detention, modelled on the German six-month cap with judicial review, would convert the open-ended present regime into a bounded one, subject to extension only for compelling, recorded reasons. Third, automatic bail following investigative delay should be strengthened beyond the existing default-bail provision, so that the State's failure to investigate within time results in release as of right.

Fourth, time-bound trial requirements, giving operational content to the speedy-trial guarantee through case-management norms and presumptive timelines whose breach—where attributable to the State—triggers bail, drawing on the Canadian model while respecting the caution of *Ramachandra Rao* against rigid voidance. Fifth, digital bail hearings to reduce the delay and logistical obstacles that keep undertrials in custody pending the listing of routine applications. Sixth, bail reform for economically weaker persons—replacing monetary surety with personal recognisance, community sureties, and non-financial conditions—to sever the link between wealth and liberty that *Moti Ram* condemned.

Seventh, a national undertrial-review mechanism—standing committees in every district to identify and secure the release of those eligible for bail or statutory release—building on the Court's directions and the existing under-trial-release provisions. Eighth, compensation for wrongful and excessive detention, on the model recommended by the Law Commission and reflected in comparative practice. Ninth, judicial performance monitoring directed at the timely disposal of bail applications and trials, administered internally so as not to compromise judicial independence. Tenth, and most ambitiously, the constitutional recognition of protection against punishment through process—whether by authoritative judicial articulation or constitutional amendment—anchoring the principle that the State may not, through delay and detention, inflict in advance the punishment that only conviction can

authorise. The objection that constitutionalisation reduces flexibility is outweighed by the demonstrated inadequacy of purely statutory and discretionary safeguards.

## XII. CONCLUSION

The central question of this paper is whether a constitutional democracy can tolerate a system in which liberty is lost for years before guilt is determined. The analysis advanced here supports a clear answer: it cannot. When the majority of a country's prisoners are presumptively innocent persons awaiting trial, when liberty is allocated by wealth rather than by risk, and when delay is so pervasive that detention routinely exceeds the punishment the offence could attract, the criminal process has ceased to be a neutral pathway to adjudication and has become punitive in substance. The formal preservation of the presumption of innocence cannot survive its systematic practical negation.

India should accordingly recognise three connected propositions. First, a constitutional right to time-bound criminal justice, derived from the speedy-trial guarantee of Article 21, enforceable through bail and, in egregious cases, compensation, and faithful to the rejection of rigid time-bars in *Ramachandra Rao* by attaching consequences to attributable delay rather than voiding prosecutions. Second, a constitutional doctrine against punishment through process, recognising that the unjustified and prolonged deprivation of liberty before conviction is a constitutional injury complete in itself, irrespective of the eventual verdict. Third, public-law compensation for excessive and wrongful pre-trial detention, on the disciplined model already developed for other constitutional violations and reflected in comparative practice.

None of this promises a criminal justice system free of detention, which no State can guarantee, nor does it dissolve the legitimate interest in securing attendance at trial and protecting the public. The claim is narrower and firmer: that detention before conviction must be the carefully justified exception, bounded in time, indifferent to wealth, and answerable in damages when it miscarries. A system that detains the presumptively innocent for years, and disproportionately the poor among them, does not merely administer justice imperfectly; it inflicts punishment without trial, and in doing so forfeits a measure of its constitutional legitimacy. To restore that legitimacy is the task that the doctrine against punishment through process is meant to serve.

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