Retaining the "Premium on Poverty": India's Perplexing Persistence with a Monetary Bail Regime

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I. Introduction

Government reports and court decisions in India have explicitly recognized that a bail regime based on monetary sanctions and financial obligations places a "premium on poverty" and forces poor defendants to languish in custody. Yet, since its adoption under colonial rule in the mid-19th century, India continues to retain this method for ensuring appearance of defendants who are released pending trial or investigation. Under this system, defendants are released provided they commit to forfeiting a sum of money in the event of their failure to appear. It is common for this obligation to be coupled with a requirement for defendants to find reliable persons willing to stand as sureties—like bondsmen in an American context—who are required to execute a similar undertaking.

The likelihood of persons being forced to remain incarcerated for their poverty, or failure to have adequate social capital, is made starkly obvious under a monetary bail regime. Where a defendant cannot meet the financial threshold, the only alternative is prolonged custody. The potential for monetary bail to turn the criminal process into a modern debtors' prison is why jurisdictions have shifted how they enforce bail obligations to render monetary bail an exception, not the norm.[1] This potential for discrimination has not been lost upon independent India's legislators. It was a subject of serious conversation for almost a decade between 1973 to 1983. However, in the four decades since, the issue has fallen by the wayside and no longer figures as part of the conversation about criminal law.

This paper returns monetary bail to its position under the spotlight. It is at par with several other practices across the globe where defendants suffer incarceration for no reason other than their poverty. For a country in which successive governments differ on ideology but are usually united in framing policies for alleviating the harsh consequences of poverty,

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[1] Some jurisdictions have done away with monetary bail entirely. Recently, for instance, Illinois placed an absolute restriction on monetary bail which came into effect in 2023. See Pretrial Fairness Act 2021, § 102-6. New Zealand placed an absolute restriction on monetary bail through the Bail Act 2000, § 30(5). Other jurisdictions allow for monetary bail, but as a last resort. For instance, Canada amended its Criminal Code in 2018 to incorporate the "principle of restraint," thereby requiring judges to prefer non-monetary conditions to bail over monetary conditions. See Criminal Code of Canada § 515(2.02). The United Kingdom imposes a general restriction on monetary bail, allowing for its use in only exceptional cases. See Bail Act 1976 ch. 63.

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retaining monetary bail—which actively forces tens of thousands to remain in jail every year for their poverty—appears a truly perplexing choice.[2] Yet, successive revisions to the criminal procedure laws since independence, the most recent of which came in 2023, have brought no change to the primacy of monetary bail. The retention has been accompanied by not even a murmur of comment or disapproval, reflecting a dire need for re-energizing debates around this admittedly onerous practice.

This paper first sketches an outline of the Indian criminal process before looking more closely at the bail system from the lens of enforcement and explaining what it entails to secure a defendant's release from custody. The third section elaborates how the monetary bail system in India has been understood as causing extreme prejudice to poor defendants within the establishment for years and narrates how the government and courts have confronted this problem. This response is built upon avoiding accountability for the system and instead attempting to plug gaps by calling for better use of discretion by judges in imposing less onerous bail terms. The last section of the paper critiques the strength of this response and demonstrates why it is unlikely to reduce the oppressiveness of monetary bail. I offer no prescriptive solutions besides reiterating the call to abandon monetary bail and insistence on sureties to permit release of defendants pending trial.

II. Outlining the Indian Criminal Process

India's criminal process is of remarkable vintage. Its constituent parts—the recently repealed criminal codes introduced during the British era[3]—are still considered landmarks in global conversations about criminal law.[4] At the same time, contemporary criminal law scholarship is not bursting at the seams with accounts of the Indian system to make it readily familiar for an audience. A bit of context-setting is therefore required for readers to better understand the specific lines of criticism that this paper makes about India's bail system.[5]

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[2] The paper does not deal with other legal scenarios where persons are granted conditional liberty in India, such as convicts granted bail pending appeal or release on probation or furlough, or persons preventively detained and released after executing bonds for good behavior. Readers may note that the key condition in these settings, as in the bail setting, is extracting a monetary commitment from the person concerned and therefore the criticisms of monetary bail would extend to these regimes as well.

[3] These codes were the Indian Penal Code 1860 (IPC), the Criminal Procedure Code 1973 (CrPC) (derived principally from the Criminal Procedure Code 1861), and the Indian Evidence Act 1872 (IEA). This trinity of laws was repealed with effect from July 1, 2024 by the Bharatiya Nyaya Sanhita 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS), and the Bharatiya Sakshya Adhiniyam 2023 (BSA), respectively. For resources, see Modern Criminal Law Review, MCLR+ Resources: India (Criminal Code Reform) (https://perma.cc/LA9A-ZDZW).

[4] See, e.g., Barry Wright & Wing-Cheong Chan, Codification, Macaulay and the Indian Penal Code (2011); J.D. Heydon, The Origins of the Indian Evidence Act, 10 Oxford U. Commw. L.J. 1 (2010).

[5] For examinations of the Indian criminal process, see Aparna Chandra & Mrinal Satish, Criminal Law and the Constitution, in The Oxford Handbook of the Indian Constitution 794 (Sujit Choudhry et al. eds., 2016); B.B. Pande, Criminal Law and Criminal Justice: Advanced Legal Writings (2022).

A. Systemic Identity

Like many other former colonies,[6] much of India's current legal architecture can be traced to experiments performed under British colonization which ended in 1947.[7] The transformation of the land and its peoples from subjects to citizens heralded the adoption of a republican form of government and a formal, individual rights-respecting Constitution.[8] Nonetheless, the transformation did not design a state, but was "designed around the state."[9] The structural heart of the colonial governance model, which had run the land for nearly 150 years, was retained.[10] This model was designed to police its subjects efficiently, and nowhere was this more apparent than in the criminal process.

This process was built upon the comprehensive codes crafted by the British: The Indian Penal Code 1860 codified substantive criminal law, the Indian Evidence Act 1872 did the same for the rules of evidence, and the Code of Criminal Procedure 1861 painstakingly detailed how criminal trials and investigations must be conducted. Their principal focus, arguably, was not criminal *justice,* but the efficient *policing* of the natives,[11] and this intent manifested itself vividly in the criminal procedure law.

Its search and seizure powers were designed to maximize state control with scant concern for liberty.[12] Its arrest powers effectively permitted taking into custody any person

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[6] See, e.g., Ronald J. Daniels et al., The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies, 59 Am. J. Comp. L. 111 (2011).

[7] India was formally a colony and under direct Crown control from 1858 until 1947 with the British legislating for the territory. Before this, from the late 18th century onwards, large tracts of land in the subcontinent were under administration of the British East India Company, which itself operated under Royal Charter and led to the Crown exercising oversight over the affairs of the Company.

[8] India Constitution of 1950.

[9] Sandipto Dasgupta, Legalizing the Revolution: India and the Constitution of the Post-Colony 21 (2024).

[10] India Const. arts. 13 and 372 specified that all laws in force would remain in force, and they would be invalid only to the extent they were found incompatible with the terms of the Constitution. In respect of the retention of the administrative structure of the police, see David Arnold, Police and the Demise of British Rule in India, 1930-47, in Policing and Decolonisation: Politics, Nationalism and the Police, 1917-65, 42 (David M. Anderson & David Killingray eds., 1992); Dasgupta, supra note 9, at 17-28.

[11] Markus D. Dubber, The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective (2018).

[12] Ahmed Mahomed Jackariah v. Ahmed Mahomed, 15 I.L.R. Cal. 109 (1888). The speech of the Lieutenant Governor of Bengal on the aspect of search and seizure provisions in the criminal procedure code which is extracted in the decision bears repetition:

> The prevailing ideas on the subject of criminal law had been somewhat affected by the English law; and the departures from the rules of the English law which the Committee recommended were founded on this ground, that many of the prominent parts of the English law were based on political considerations, the object of those familiar rules of criminal law being not to bring the criminal to justice, but to protect the people from a tyrannical Government, and the functions of juries of the people having been for many centuries principally directed to the protection of the interests of the people. Not only were those provisions now unnecessary in England, but they were especially out of place in a country where it was not pretended that the subject enjoyed that liberty which was the birthright of an Englishman, and it was not intended to introduce rules into the criminal

against whom credible information of committing a crime has been received.[13] And the colonial government conferred no general right to bail.[14] In summary, it placed minimal fetters upon state power, it did not brook questions, and it treated individual rights as an afterthought.

The first legislators of the nascent Indian state had suffered the brunt of this system while fighting for freedom and were routinely prosecuted and imprisoned.[15] Once independence neared, though, they sought to use this same power for governance, as Dasgupta vividly elaborates. A legal system once masterfully used for extraction and exploitation of subjects could, the legislators hoped, be infused by a new, republican blood and harnessed for meeting welfare objectives to improve the lot of citizens.[16] In this vein, the inherent contradiction in retaining a criminal process designed to police native subjects to now deliver criminal justice unto them, could be rationalized by the new notionally republican state.[17]

B. Structural Identity

Structurally, administration of criminal law in India under the procedural code reflects a blend of traditional common law and continental systems.[18] The state has no monopoly on instituting criminal proceedings, and a right of private prosecutions continues to thrive.[19] Theoretically, the state *must* begin a formal investigation into any information it receives about commission of crimes permitting arrest without warrant.[20] An investigation by law enforcement agencies may involve arrests, searches, seizures, summoning witnesses, and it ends with the police filing a dossier with its findings.[21] This dossier goes before a

> law which were designed with the object of securing the liberties of the people. That being so, His Honour thought they might fairly get rid of some of the rules, the object of which was to secure for the people that jealous protection which the English law gave to the accused. It seemed to him that they were not bound to protect the criminal according to any code of fair play, but that their object should be to get at the truth, and anything which would tend to elicit the truth was regarded by the Committee to be desirable for the interests of the accused if he was innocent, for those of the public if he was guilty.

[13] Criminal Procedure Code 1973, § 41; Bharatiya Nagarik Suraksha Sanhita 2023, § 35.

[14] The classification of offenses into bailable and non-bailable was provided in the First Schedule to the Criminal Procedure Code 1861, and retained in all successive formulations of that code as well as the 2023 BNSS.

[15] Arnold, supra note 10.

[16] This theme is critically explored by Dasgupta, supra note 9.

[17] Id. at 203; Kuldeep Mathur, The State and the Use of Coercive Power in India, 32 Asian Surv. 337 (1992).

[18] P.N. Ramaswami, Criminal Procedure: Accusatorial and Inquisitorial, (1955) Crim. L.J. 37.

[19] Criminal Procedure Code 1973, § 200; Bharatiya Nagarik Suraksha Sanhita 2023, § 223.

[20] Lalita Kumari v. State of Uttar Pradesh, (2014) 5 SCC 1 (Supreme Court of India, Five Justices' Bench).

[21] Code of Criminal Procedure 1973, ch. XIV. The dossier is called "Police Report" or "Complaint" depending on the agency.

judge, who must decide whether the case should proceed to a trial or not.[22] Most cases do end up going to trial which is conducted solely by judges[23] and tends to be a lengthy affair due to delays plaguing courts across the judicial hierarchy.[24]

At this point, a little more elaboration is necessary about how a police investigation unfolds in India because it has a bearing on custody and bail. The key source of evidence in investigations is the defendant himself. Statistically, it is usually an uneducated or a less-educated man, from a poor household and more often than not also from a minority religious or social group.[25] Police have wide powers of arrest during an investigation and can detain persons in custody for up to twenty-four hours without any additional judicial permission.[26] On the strength of judicial permission, police can be granted custody of up to fifteen days. Some police custody is usually granted when it is sought; courts acknowledge the benefits of keeping a defendant in police custody for thorough investigations,[27] and poor defendants with low-quality legal representation do not offer much by way of resistance.[28] There is no right to legal assistance during police interrogations, nor are interrogations recorded.[29] However, statements made to police by a defendant in custody are not directly admissible in evidence.[30] Why, then, is a defendant still seen as the best source of evidence? The legal prohibition comes with a back door: statements by defendants can be partially admitted so long as their contents seem to be confirmed by subsequent

[22] There are statutory avenues for plea-bargaining in India, but these have not taken off. For a discussion, see Abhinav Sekhri, Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design, 15 Socio-Legal Rev. 1 (2019).

[23] The system did consist of jury trials and trials with aid of assessors, but these were abolished in the Criminal Procedure Code 1973.

[24] National Crime Records Bureau, Crime in India 2022, at 1165 (2023) (https://perma.cc/MFX8-5X39).

[25] Supreme Court of India, Report on Prisons in India 136-37 (2024) (indicating that annual income of 38% of prisoners was less than INR 30,000 or USD 345); National Crime Records Bureau, Prison Statistics India 2022, at xiii (2023) (indicating that almost 40% of prisoners have not finished Grade Ten schooling); Amnesty International, Justice under Trial (2017) (https://www.amnestyusa.org/reports/justice-under-trial-a-study-of-pre-trial-detention-in-india/) (providing a general profile of undertrial prisoners); Irfan Ahmed & Md Zakaria Siddiqui, Democracy in Jail, 52 Econ. & Pol. Wkly (2017); Shailesh Poddar, Discrimination in Criminal Justice, The India Forum, Nov. 5, 2021 (https://perma.cc/72RM-LXCQ).

[26] Criminal Procedure Code 1973, § 57.

[27] CBI v. Anil Sharma, (1997) 7 SCC 187 (Supreme Court of India, Two Justices' Bench); P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24 (Supreme Court of India, Three Justices' Bench).

[28] Centre for Law and Policy Research, Re-Imagining Bail Decision Making: An Analysis of Bail Practice in Karnataka and Recommendations for Reform 44-52 (2020); Jinee Lokaneeta & Zeba Sikoria, Magistrates and Constitutional Practices 103-20 (2024).

[29] State of Bombay v. Kathi Kalu Oghad, A.I.R. 1961 S.C. 1808 (Supreme Court of India, Eleven Justices' Bench). A limited right for lawyers to be present during police questioning has existed since 2008 and is purely at the discretion of police. See Criminal Procedure Code 1973, § 41A; BNSS § 35.

[30] Indian Evidence Act 1872, § 25; Criminal Procedure Code 1973, § 162.

discoveries of fact.[31] As a result, in spite of a rule banning evidence of confessions being introduced even before the first procedural codes of 1861, there remains an overwhelming tendency to structure investigations entirely around the "disclosures" made in confessions by defendants in custody.[32]

The generally accepted need for arrest and detention during an investigation means that courts are hesitant about considering requests for release on bail wherever police suggest that there is an investigative need for further detention, and instead courts routinely extend remands to custody.[33] There is a statutory time limit operating for custody at the pre-trial stage, such that failing to conclude an investigation within that time triggers a right to release for a defendant.[34] It is perhaps not sheer coincidence that, per government data, the overwhelming majority of arrested persons are released from custody around the statutory time limit.[35] Another time limit operates to restrict detention at the trial stage, though it comes with more strings attached than the statutory bail at the pre-trial investigative stage.[36] To be clear, the issues of *why* courts adopt a posture of reluctance in granting bail, what legal rules (if any) concern the exercise of judicial discretion in matters of bail, and whether statutory time limits are effective, are all fascinating questions, but they are beyond the scope of this paper. Suffice it to say that Indian criminal law has no statutory principles governing exercise of bail discretion, and bail jurisprudence has emerged as a highly individualized and arbitrary area of law attracting immense criticism and scrutiny.[37]

III. Bail and Its Enforcement in the Indian Criminal Process

The Indian legal system takes great pride in the Constitution and its scheme recognizing the importance of personal liberty. In practice, though, an overwhelming dominance of state interests has lent further basis to the claim that the republicanism of India's legal system is more notional than is otherwise accepted. This is keenly felt in its criminal process,[38]

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[31] Indian Evidence Act 1872, § 27. This concept of confirmation by subsequent facts is extensively written about in evidence law. For a summary, see A. Gotlieb, Confirmation by Subsequent Facts, 72 Law Q. Rev. 209 (1956).

[32] For a discussion, see Abhinav Sekhri, The Right Against Self-Incrimination in India: The Compelling Case of Kathi Kalu Oghad, 3 Indian L. Rev. 180 (2019).

[33] Centre for Law and Policy Research, supra note 28, at 44-84; Jinee Lokaneeta & Zeba Sikoria, Magistrates and Constitutional Practices 103-20 (2024).

[34] Criminal Procedure Code 1973, § 167; BNSS § 187.

[35] National Crime Records Bureau, Prison Statistics Report 2022, at xvii (2023) (indicating that 69% undertrial prisoners are confined up to one year before being released, and within that figure, 46% are confined for up to three months).

[36] Criminal Procedure Code 1973, §§ 436A, 437(6).

[37] Abhinav Sekhri, The Bailable v. Non-Bailable Classification in Indian Criminal Procedure, 3 GNLU L. & Soc'y Rev. 56 (2021).

[38] Mathur, supra note 17.

where police retain vast powers to arrest and detain persons, and the law privileges the state interest in pretrial custody rather than emphasizing a right to bail and early release.

Having established the outlines of the Indian criminal process, this section takes a deep dive into the concept of bail and its enforcement. Most discussions on bail in the Indian context tend to focus on how courts exercise their significant discretion in such matters.[39] The focus is rarely on the more mundane yet practical aspects of the bail regime: *what* is meant by bail, and *how* it is enforced in courts.

A. The Ubiquity of Bail

There is no general right to bail in India—whether this right is afforded depends on the nature of the alleged crime, and a defendant has a right to be released only for a small minority of crimes.[40] Until 2023, there was no statutory definition of the term "bail." The present criminal procedure law, brought into effect in 2024, defines bail as release of a person from "custody of law" upon "conditions" imposed by an officer or court on execution of a "bond" or "bail bond."[41] These bonds in their implementation are closely related to recognizance bonds, a legal tool popular across 16th- to 19th-century England.[42] A "bond" is defined as a "personal bond" or an "undertaking for release without surety,"[43] and "bail bond" is defined as an undertaking for release *with* surety.[44] The key condition in both kinds of bonds is a financial or monetary one—the law stipulates that the bond is in the nature of a promise to forfeit a sum of money in the event of failing to appear before police or court.[45] A bail bond carries an additional requirement, of finding a "surety" to make a similar monetary commitment.[46] Unlike the American practice of professional bondsmen and the surety-defendant relationship being an enforceable contract, the surety-defendant relationship in Indian law continues to preach adherence to the traditional idea

[39] See, e.g., Taking Bail Seriously: The State of Bail Jurisprudence in India (Salman Khurshid et al. eds., 2019); Radhika Chitkara, Revisiting *Kartar Singh v. State of Punjab*: Procedural Exceptions and Fair Trial in Anti-Terrorism Laws, 13 Jindal Glob. L. Rev. 103 (2022); Anup Surendranath & Gale Andrew, Confused Purposes and Inconsistent Adjudication: An Assessment of Bail Decisions in Delhi's Courts, 19 Asian J. Comp. L. 294 (2024).

[40] See BNSS §§ 78 & 485. The distinction is between bailable and non-bailable offenses. This harks back to the distinction in common law where bail was a matter of right for certain minor offenses, and a matter of discretion for most felonies, and almost impossible for some capital crimes. It was introduced in the 1861 Criminal Procedure Code under the British regime, and the classifications drawn then between offenses have largely endured. See Sekhri, supra note 37.

[41] BNSS § 2(b).

[42] F.E. Devine, Forms of Bail in Common Law Systems, 13 Int'l J. Comp. & Applied Crim. Just. 83 (1989); Joel B. Samaha, The Recognizance in Elizabethan Law Enforcement, 25 Am. J. Legal Hist. 189 (1981).

[43] BNSS § 2(e). "Personal bond" is not defined.

[44] Id. § 2(d).

[45] Id. § 485. There can be non-financial conditions as well in addition to this essential condition.

[46] Id. A sample of a bond and bail bond can be found in the procedural code with this essential condition. See Form No. 47, BNSS.

that it is a personal and non-contractual relationship.[47] A surety must be someone who can demonstrably exert control over a defendant owing to their personal relationship, not someone who chooses to do so for consideration.[48]

The statutory definition makes clear that bail is not linked purely to arrest but release from any "custody of law." So, it does not matter at which stage of the legal process the defendant is arrested. Nor does it matter if the offense they are accused of is one where bail exists as a matter of *right* or as a matter of discretion. If you are accused of a crime and are brought before a court, you must seek bail and remain notionally within the "custody of law" or agree to physically submit to such custody by going to prison.[49]

B. Bonds and Sureties

The ubiquity of bail means it is quite important to understand *how* bail is enforced. Two core concepts have been statutorily identified in the definition of bail: there must be a bond, and this bond imposes conditions which must be met by a defendant. Failure to abide by the conditions means that the bond can be forfeited, permitting the state to take the defendant into the custody that he had secured conditional release from.[50] So, the key elements in operationalizing bail are the different bonds that the law can seek from a defendant and the conditions which may be imposed upon release.

As mentioned above, both bonds and bail bonds mandatorily require that a defendant promise to forfeit a sum of money if he fails to comply with conditions stipulated for release.[51] There is very little by way of mandatory rules, in the procedural code or elsewhere, governing the execution of bonds in different situations. Even for minor crimes where bail is a right, the court can insist upon a bail bond and sureties.[52] However, for defendants unable to execute bail bonds (those with sureties) even after a week of being granted bail in such minor crimes, the law presumes them to be indigent and requires a court to relax the surety requirement and order release on a simple bond.[53] For serious crimes where bail is not a matter of right, one can reasonably argue that the law mandatorily requires execution of bail bonds and does not permit release without sureties on simple personal bonds.[54]

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[47] F.E. Devine, How American Commercial Bail Developed Differently from other Common Law Countries, 18 Int'l J. Comp. & Applied Crim. Just. 265 (1994); Devine, supra note 42; Frederick I. Taft, Detention of the Unconvicted in Patna, India, 5 Case W. Rsrv. J. Int'l L. 155 (1973). In this vein, the law was amended in 2005, requiring the surety to disclose how many defendants he has stood surety for. See Criminal Procedure Code 1973, § 441A; BNSS § 486.

[48] BNSS §§ 485 & 486.

[49] Some local practices exist permitting release on a bond which is not a bail bond. See Tarsem Lal v. Directorate of Enforcement, INSC 434 (2024) (Supreme Court of India, Two Justices' Bench).

[50] BNSS §§ 485 & 492.

[51] Id. § 485.

[52] Id. § 478.

[53] Id.

[54] Id. § 480.

Beyond this however, questions such as how many sureties, the amount of bail, and conditions for release, are all aspects which are left entirely to the wisdom of a judge and carry no statutory guidance or prescription.[55]

C. The System in Action

Enforcing a monetary commitment is clearly the fulcrum of India's bail regime. It is important, therefore, to understand just how this monetary commitment operates in practice. Three issues are of note: *first,* how do courts decide the bail amount, *second,* who pays the money, and *third,* when must they pay up. Unlike some jurisdictions,[56] there is no schedule fixing bail amounts in Indian law.[57] Statutory guidance to courts asks them to fix the bail amount as not "excessive" and "with due regard to the case."[58] There is surprisingly negligible judicial exposition on this clause,[59] and no prescription of principles for judges to consider while setting bail, which makes determining bail amounts a highly context-dependent exercise requiring local expertise.[60]

The bail amount fixed by court is traditionally *not* paid up by a defendant, which means that the bond executed by the defendant is just a written commitment to comply with conditions that is not backed by any actual money.[61] However, in some parts of India, local practice requires defendants to furnish the bail amount or establish their solvency.[62]

While bonds executed by defendants operate in a manner reminiscent of traditional common law doctrine and the recognizance system in vogue until the 1970s in England,[63] more changes have occurred when it comes to enforcing obligations of sureties. In line with the recognizance approach at common law,[64] the text of the criminal codes does not stipulate that a surety must furnish security equivalent to the bail amount but only demonstrate

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[55] Id. § 485.

[56] Bail schedules are common across the United States. For a discussion and critique, see James A. Allen, "Making Bail": Limiting the Use of Bail Schedules and Defining the Elusive Meaning of "Excessive Bail," 25 J. L. & Pol'y 639 (2017).

[57] BNSS §§ 484-485.

[58] BNSS § 484.

[59] See, e.g., 5 Sohoni's Code of Criminal Procedure, 1973, at 845-47 (21st ed. 2015).

[60] Taft, supra note 47. In my experience, this variation can exist even within the same city, with different local courts catering to different social milieus and therefore having different conceptions of adequate bail amounts.

[61] Except where defendant seeks permission, and is granted such permission, to not execute a bond but to deposit cash bail for securing release. See BNSS § 490.

[62] In many southern states of India, defendants are also required to furnish actual financial security or a solvency certificate, to demonstrate their solvency to discharge the monetary obligation that is cast by the bail.

[63] Devine, supra note 42.

[64] Id.; Joel B. Samaha, The Recognizance in Elizabethan Law Enforcement, 25 Am. J. Legal Hist. 189 (1981); A.K. Bottomley, The Granting of Bail: Principles and Practice, 31 Mod. L. Rev. 40 (1968); Elsa de Haas, Concepts of the Nature of Bail in English and American Criminal Law, 6 U. Toronto L.J. 385 (1946).

proof of solvency.[65] Over time, discrepancies have emerged in local practices across India. There is serious divergence in the *degree* to which sureties must prove their solvency, with courts in some areas requiring a government-issued certificate of this fact.[66] While proof of solvency suffices in some parts of the country, in others the practice has changed to require *actual* security and not mere proof from a surety.[67] Thus, for instance, in the Indian capital New Delhi, it has become a widespread practice for courts to require that sureties demonstrate not an abstract state of solvency but furnish a specific security for the bail amount.[68]

IV. A Very Predictable Problem of Monetary Bail

Courts ordinarily require execution of bail bonds to secure a defendant's release from custody in India, which means finding a friend or relative to stand surety, who in turn must have the financial wherewithal to furnish an adequate security to meet the bail amount fixed by the court. The chance that a defendant is unable to find a proper surety is non-zero—not everyone has a friend or relative with adequate financial security to promptly post bail. A monetary bail system thus has an inherent risk of incarcerating defendants for no reason other than their inability to meet a financial demand. This theoretical formulation of the problem comes to life daily across Indian courts and prisons. The end-of-year figures for persons not released despite being granted bail have been steadily increasing; data from 2023 suggests nearly 25,000 prisoners at the end of the year were those who had been granted bail but were unable to post bonds for release.[69]

This is a crisis which acutely shows the direct links between poverty and imprisonment within India's criminal process. Personal liberty is, in no uncertain terms, being subjugated to one's financial capacity under the present bail regime.[70] As this part explains, courts and legislators have been keenly aware of this problem since the 1970s and have made interventions to stem the tide.

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[65] Criminal Procedure Code 1861, §§ 212-220; Criminal Procedure Code 1872, §§ 391-392; Criminal Procedure Code 1882, §§ 498-499; Criminal Procedure Code 1898, §§ 498-499.

[66] This is common practice in the states of Maharashtra, Kerala, Karnataka, and Tamil Nadu, amongst others. As per this practice, a certificate is required from the local revenue office in the name of the surety, to demonstrate that the surety is solvent to discharge the financial obligation created by the bail bond. The process of obtaining such a certificate is, naturally, time-consuming and can lead to additional incarceration. Quite often, applications are moved seeking permission to accept the surety and secure release of a defendant while giving four weeks' time to obtain the necessary certificate *post facto*.

[67] Taft, supra note 47.

[68] At present, bail bonds in Delhi routinely operate in this fashion, requiring either the furnishing of bank deposits or title deeds. This appears similar to developments elsewhere over the course of the 20th century with securities being deposited with bail clerks.

[69] Supreme Court of India, Report on Prisons in India 289 (2024).

[70] Rohan J. Alva, Between Poverty and a Hard Place in Prison: Bail and the Suffering Indigent, 1 Nat'l. L.U. Delhi Stud. L.J. 124, 126-31 (2012); Talha Abdul Rahman, Bail Laws and Poverty, in Taking Bail Seriously: The State of Bail Jurisprudence in India 261 (Salman Khurshid et al. eds., 2019).

A. Acknowledging the Problem

The decision to retain colonial laws at the turn of Indian independence meant that the extractive laws of a colony were to be retrofitted with a transformative constitutional vision that the new republic championed. At the same time, there were constant efforts in the first two decades of India's independence to revisit the colonial setup and determine how fit for purpose it was. In terms of the criminal process, this effort was seen in piecemeal amendments to the procedural law in 1955[71] and several observations for a more consolidated reform made by independent India's Law Commission.[72]

Neither the 1955 amendment nor the Law Commission's reports made any observations about the hardships caused by monetary bail for poor defendants.[73] By most accounts,[74] the issue was acknowledged for the first time by the federal government in 1973 through an Expert Committee report.[75] In hindsight, this report states an obvious truth—poverty begets a slew of disadvantages for persons enmeshed with the law, especially criminal law—but it was the first time that a government document acknowledged that the Indian legal system was visiting such consequences upon the poor. The *system* of bail, specifically monetary bail, came under the scanner and it was condemned outright as putting a "premium on poverty."[76] It called for widescale reform not limited to abolition of monetary bail.[77] As part of the suggested reforms, the report cited work done by the Vera Institute in the United States in the early 1960s advocating release on simple recognizance without money deposits.[78]

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[71] Act 26 of 1955.

[72] Law Commission of India, 14th Report on Reforms in Judicial Administration (1958); Law Commission of India, 36th Report on Sections 497, 498 and 499 of the Criminal Procedure Code 1898: Grant of Bail with Condition (1967); Law Commission of India, 37th Report on the Code of Criminal Procedure 1898 (1967); Law Commission of India, 39th Report on the Code of Criminal Procedure 1898 (1969) [hereinafter Law Commission of India, 39th Report].

[73] The 39th Report observed that in respect of the provisions on amount of bail and reduction thereof, "no changes are necessary in the substance of the powers as provided in section 498(1)." Law Commission of India, 39th Report, supra note 72, at 319.

[74] See S. Muralidhar, Law, Poverty, and Legal Aid: Access to Criminal Justice 31-70 (2004).

[75] Government of India, Ministry of Law, Justice & Company Affairs, Report of the Expert Committee on Legal Aid: Processual Justice to the People (1973) [hereinafter Report of the Expert Committee on Legal Aid]. The issue appears to have been discussed by state governments while considering a need for legal aid programs.

[76] Id. at 76-77 ("Continuance in custody of a poor accused simply because he is unable to afford the money necessary for his release is not only putting a premium on his poverty and perpetuating inequality in judicial administration but also tending to prejudice the defence case as well as ruining whatever means of livelihood the arrested person had prior to arrest.").

[77] Id.

[78] Id. at 80.

The reference to the Vera Institute is important. Begun in 1961, Vera's Manhattan Bail Project[79] was part of a broader movement in the United States to reform the bail regime and was accompanied by several pieces of critical scholarship in law reviews flagging the anti-poor nature of money bail.[80] The pressure paid off. The Bail Reform Act, passed in 1966, encouraged the use of release on recognizance.[81] In stark contrast, the 1973 report of the Expert Committee was accompanied by insignificant parallel scholarship, advocacy, or government endeavor to change the monetary bail regime. It was an activity seemingly conducted in a silo. The report's isolation becomes clearer if we consider that between 1970 and 1973, the federal government was considering drafts of a new criminal procedure law to replace a colonial criminal procedure code of 1898.[82] The government bill was sent to multiple committees and extensively debated through 1973, but at no point was a reference made to the work of this Expert Committee constituted in 1972 whose report was published in May 1973.[83] This was in spite of specific observations in the Report calling upon the government to incorporate its views in the pending considerations on the criminal procedure bill.[84] The bill for a new criminal procedure code was passed and brought into force in April 1974, unsurprisingly with no change to the monetary bail system.[85]

B. Supreme Court Interventions

In 1976, at a time when the Constitution and its democratic process was itself suspended, the government appointed another Expert Committee ("Second Expert Committee") to consider issues of legal aid.[86] Despite its members having criticized the discriminatory impact of the monetary bail regime (and the criminal justice system, more generally) on the poor—one member was responsible for a 1971 state government report

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[79] The project led to a report published in 1968. See Vera Institute, A Report on the Manhattan Bail Reevaluation Project (June 1966-August 1967) (1968); Lee S. Friedman, The Evolution of a Bail Reform, 7 Pol'y Scis. 281 (1976).

[80] See, e.g., James A. George, The Institution of Bail as Related to Indigent Defendants, 21 La. L. Rev. 627 (1960); Caleb Foote, The Coming Constitutional Crisis in Bail: I, 113 U. Pa. L. Rev. 959 (1965); Caleb Foote, The Coming Constitutional Crisis in Bail: II, 113 U. Pa. L. Rev. 1125 (1965).

[81] Bail Reform Act 1966.

[82] Criminal Procedure Bill of 1970, passed in 1973.

[83] Government of India, Lok Sabha Debates, Questions to Answers (Dec. 4, 1973), at 164. The Report of the Expert Committee was stated as being "under consideration" by the government.

[84] Report of the Expert Committee on Legal Aid, supra note 75, at 237-38.

[85] Criminal Procedure Code 1973, §§ 463-445.

[86] Muralidhar explains that there was significant political double-speak at play. The government had declared an emergency and suspended democratic processes and the right of habeas corpus. At the same time, it sought to use its absolute power to usher in reforms, of which the expert committee may have been one manifestation. Muralidhar, supra note 74, at 61-65.

and another for the 1973 federal government report referenced above—the Second Expert Committee's report published in 1977 completely omitted any discussion of this aspect.[87]

Governmental silence did not mean that the findings of the 1973 report were dead and buried.[88] Between appointing the Second Expert Committee in May 1976 and its report being published in August 1977, the government had changed.[89] The members of the Second Committee, both Supreme Court Justices, made inroads from the bench on the problem. The principal author of the 1973 report brought the harshness of monetary bail into the spotlight through a judicial opinion of the Supreme Court in 1978.[90] A change in the air can be assessed by the fact that the issue, which had completely been omitted in the 1977 report, was now discussed again at length by the Law Commission in a 1979 report.[91] Notably, though, the Law Commission did not endorse proposals to abolish monetary bail and called instead for refining the statutory provisions permitting greater judicial discretion to relax conditions and alleviate the pressures on poorer defendants.[92]

A single judicial opinion could neither change laws nor executive practices. What did have the potential for more lasting change, though, was a procedural innovation by the Indian Supreme Court at around this time that dramatically expanded its jurisdiction. This was the onset of "Public Interest Litigation" where the Court registered writ proceedings based on newspaper reports or letters to the court complaining about legal practices that systematically deprived people of their rights.[93] The overarching theme of the initial wave of Public Interest Litigation was advocacy for the marginalized, and one of the first causes célèbres was an effort to reduce the high rates of undertrial incarceration (what may be called "pretrial" incarceration elsewhere).[94] The prisons were in a shocking situation by any metric. By way of letters and newspapers reports, the Court was informed about numerous cases of persons who had served their entire sentences as undertrials, many of whom had

[87] Ministry of Law, Justice and Company Affairs, Report on National Juridicare: Equal Justice-Social Justice (1977).

[88] Muralidhar, supra note 74, at 65-71.

[89] The state of emergency was revoked and general elections held in March 1977, which the government lost to a coalition of political parties.

[90] Moti Ram v. State of M. P., (1978) 4 SCC 47 (Supreme Court of India, Two Justices' Bench).

[91] Law Commission of India, 78th Report on Congestion of Under Trial Prisoners in Jails (1979).

[92] Id. at 20-24. Interestingly, one of its suggestions was to allow defendants accused of non-bailable crimes to be released without sureties, confirming that the discretion to do so did not previously exist.

[93] Shyam Divan, Public Interest Litigation, in The Oxford Handbook of the Indian Constitution 662 (Sujit Choudhry et al. eds., 2017); Clark D. Cunningham, Public Interest Litigation in Indian Supreme Court: A Study in Light of American Experience, 29 J. Indian L. Inst. 494 (1987); Upendra Baxi, Taking Suffering Seriously: Social Action Litigation of the Supreme Court of India, 4 Third World Legal Stud. 107 (1985).

[94] Aman Hingorani, Indian Public Interest Litigation: Locating Justice in State Law, 17 Delhi L. Rev. 159 (1995).

been granted bail but were too poor to afford executing the necessary bonds.[95] Over the next five months, a bench headed by the other member of the Second Expert Committee conducted multiple hearings and passed a slew of directions to prison administrations, regularly following up the impact of its directions on decongesting jails.[96] Within the specific directives to executive authorities was general wisdom to the judiciary at large on humanizing the system and being more aware of the consequences faced by poor and marginalized defendants in criminal proceedings. This *obiter dicta* is fascinating for it shows a conscious return to endorsing the observations of the 1973 report.[97]

Much like the 1973 report and its scathing critique of the monetary bail system, the Supreme Court was severe in its criticism of the anti-poor and antiquated nature of this system[98] and observed that "Parliament would do well to consider" that rather than a monetary system for bail, it may be "more consonant with the ethos of our constitution" to have other relevant considerations as determinative for release.[99] The Court cited the federal bail reform in the United States—though, curiously, did not mention the Bail Act passed in England in 1976[100]—and observed that the time had come to move beyond the monetary bail system.[101] However, till such time that it was abolished, the Court laid emphasis on the wriggle room within the law's text to do justice to the poor.[102] The key prong of the suggestions was to insist upon mindful exercise of discretion by trial judges to facilitate release, even without sureties if necessary.[103] While the proposals from the Court and Law Commission appear similar, they were different in one key aspect. The Court advocated for

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[95] Hussainara Khatoon v. Home Secretary, State of Bihar (I), (1980) 1 SCC 81 (Supreme Court of India, Three Justices' Bench) [hereinafter Khatoon I]. Court proceedings began in January pursuant to news reports published in the *Indian Express* newspaper on Jan. 8 and 9, 1979. The first judgment was issued on February 12, 1979, only on the aspect of interim reliefs as the government did not appear to defend the claims.

[96] See Hussainara Khatoon v. Home Secretary, State of Bihar (II), (1980) 1 SCC 91; Hussainara Khatoon v. Home Secretary, State of Bihar (III), (1980) 1 SCC 93; Hussainara Khatoon v. Home Secretary, State of Bihar (IV), (1980) 1 SCC 98; Hussainara Khatoon v. Home Secretary, State of Bihar (V), (1980) 1 SCC 108; Hussainara Khatoon v. Home Secretary, State of Bihar (VI), (1980) 1 SCC 115. For a brief summary of the directions issued by the Supreme Court, see Alva, supra note 70, at 128-30.

[97] The judgment did not cite the 1973 or the 1977 report expressly but instead referred to an older report to which P.N. Bhagwati J. had contributed while working with the State of Gujarat. Khatoon I, at para. 3.

[98] Id.

[99] Id. at paras. 4 & 11.

[100] Bail Act 1976. The Bail Act also removed the monetary bail system and recognizance bonds and instead chose to require a commitment to appear while penalizing non-appearance.

[101] Khatoon I, at paras. 3 & 4.

[102] Id. at para. 4. The observations sought to introduce an approach modelled on the Bail Reform Act of 1966 and the judgment referred to the legislation expressly as well.

[103] Khatoon I, at paras. 4 & 8 ("In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it.").

relaxing the monetary condition outright,[104] whereas the Law Commission called for relaxing bail conditions and release without sureties for those who could not execute bail bonds only for persons accused of less serious bailable offenses.[105]

C. Progress Towards a Legislative Amendment

As we have seen, the Law Commission agreed with the Supreme Court that there was a need to change the bail law, but there was quite a gap in how both stakeholders viewed the problem. By the late 1970s, the Supreme Court had begun to observe that the edifice of monetary bail was discriminatory *per se*, though the government was happy with tweaks to ensure that the worst cases of injustice could be avoided. The persistent advocacy for remedying the plight of undertrial prisoners by the Supreme Court finally led to the harshness of monetary bail being discussed consistently, bringing about scholarship and more reviews by the government in the early 1980s.[106] But there was, as of then, no proposal for legislation.

In a 1994 bill to amend the criminal procedure code, the government finally suggested new provisions on bail, but these suggestions were even narrower than what the Law Commission had recommended in its 1979 Report.[107] The *only* change that this government sponsored bill made was to insert a clause which required judges to assume that a person accused of simple, bailable crimes, who did not file bail bonds (with sureties) within a week of being granted bail, was indigent, and permit release without sureties.[108] The suggestion to explicitly add a clause permitting release without sureties for non-bailable crimes was disregarded, not to mention any of the more principled suggestions made by the Supreme Court on avoiding monetary bail conditions outright.

This proposal was endorsed by the Law Commission in 1996[109] and 2001[110] without any discussion on why the more limited scope of reforms was now suitable. The 1994 Bill

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[104] Id. at paras. 4 & 11.

[105] Law Commission of India, supra note 91, at 20-24.

[106] S.D. Balsara, Bail not Jail: Empty the Prisons, 22 J. Indian L. Inst. 341 (1980); Sudesh Kumar Sharma, Dimensions of Judicial Discretion in Bail Matters, 22 J. Indian L. Inst. 351 (1980); P.N. Bhagwati, Human Rights in the Criminal Justice System, 27 J. Indian L. Inst. 1 (1985); M.P. Jain, Law and the Poor: Some Recent Developments in India, 13 J. Malaysian & Comp. L. 23, 74-80 (1986); 1 Government of India, Report of the All India Committee on Jail Reforms 1980-1983, at 170-84 (1982).

[107] Law Commission of India, 154th Report on the Code of Criminal Procedure, 1973, at 21-24 (1996).

[108] Id.

[109] Id.

[110] Law Commission of India, 177th Report on the Law Relating to Arrest 116-21 (2001).

was re-introduced and finally passed into law in 2005 with no change.[111] India's new procedural code introduced in 2023 did define the terms "bail," "bond," and "bail bond," but did not change the antiquated rules of the game in any manner. This means that the 2005 amendments to the bail system and the directive for permitting release without sureties for minor offenses constitute the most recent legislative intervention in the field.

V. Critiquing the Discretion-Based Solution

The decision to stick with the bail system in the new procedure code of 2023 could not have been due to any evidence that the 2005 amendment significantly reduced the "premium on poverty" placed by the monetary bail system, because all evidence suggests the contrary.[112] More than 25,000 prisoners were in custody at the end of 2023 because they could not furnish bail with sureties.[113] The situation is such that in 2023, the central government publicized schemes to make money available to facilitate the release of poor defendants granted bail.[114] Perhaps no better indication could be given of the bail system's continued oppression than the fact that the Indian Supreme Court has instituted multiple sets of proceedings for monitoring its own earlier guidelines and innovating solutions on bail, which are ongoing at the time of writing.[115]

The retention of monetary bail, despite acknowledging that it causes obvious oppression to poor persons, today seems to be built on an assumption that the system is not the problem because it confers plentiful discretion on judges to do justice—an assumption so enduring that it persists despite being contradicted by all available evidence. It is necessary, therefore, to place this theory of discretion being a "good thing" for bail in the crosshairs.

A. A Colonial Hangover? Discretion and the Indian Penal Code

Trusting judicial discretion to deal with economic disparities among defendants has been a hallmark of the legislative approach within the Indian criminal process, dating back to the 1837 report on the draft Penal Code of the Indian Law Commissioners.[116] The issue of economic disparities among defendants arose while designing a scheme of monetary

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[111] Act 25 of 2005 (with effect from Mar. 6, 2006). The amendment to Section 436(1) of the Criminal Procedure Code 1973 required that a person would be presumed indigent if he could not file bail bonds within a week of being granted bail and for indigent persons the court shall discharge the person on a personal bond. It only applied to "bailable" offenses.

[112] See, e.g., Alva, supra note 70; Vijay Raghavan, Undertrial Prisoners: Long Wait for Justice, 51 Econ. & Pol. Wkly. 17 (2016).

[113] Supreme Court of India, Report on Prisons in India 289 (2024).

[114] Id. at 149-50.

[115] In re Inhuman Conditions in 1382 Prisons (Civil Writ Petition No. 406 of 2013); In re Policy Strategy for Grant of Bail (Suo Motu Writ Petition No. 4 of 2021).

[116] T.B. Macaulay et al., The Indian Penal Code as Originally Framed in 1837, with Notes and the First and Second Reports Thereon Dated 23rd July 1846 and 24th June 1847 by C.H. Cameron and D. Eliott (1888).

sanctions as punishment for crime—"The mulct which is ruinous to a labourer is easily borne by a tradesman, and is absolutely unfelt by a rich zemindar."[117] To ensure fines were not ruinous for an offender yet maintained a measure of deterrence was a problem that the Common Law had struggled with and solved by way of a principle—reiterated in the American Bill of Rights—that *excessive* fines must not be imposed.[118] The choice was whether to retain this formula, or abandon it in favor of stipulated penalties as advocated for by other prominent codifiers.[119]

The wide economic disparity they witnessed convinced the Law Commissioners that any fixed model was bound to be unsatisfactory, prompting the recommendation that in most cases the quantum of fine should be left to a judge's discretion and should not be legislatively prescribed.[120] The evil of judicial discretion in imposing of a fine with its occasional errors was a necessary one that had to be endured.[121] The vast economic disparity on display was also important in how the Law Commissioners envisioned the regime for *enforcing* the monetary sanction of fines.[122] A law compelling perpetual imprisonment for an inability to pay debts was unacceptable as it entailed imprisonment for life only because of one's poverty.[123] Instead, they recommended a scheme of prescribing a fixed term of imprisonment for defaulting on a fine, after which the person would be released, though his property may yet remain within the clutches of the law to recover unpaid fines.[124]

I make this historical interlude for three reasons. *First*, to highlight the sheer unoriginality of the discretion-based approach to resolving issues presented by economic disparities between defendants and its colonial roots—a heritage which the current government has sought to rid the country of by introducing new, "decolonial" codes. *Second*, to show that even in 1837 it was recognized that perpetual imprisonment due to poverty was unconscionable, requiring the installation of default rules to avoid such disastrous consequences. *Third*, and most crucially, the recognition that leaving the problem to an exercise of discretion was far from an optimal solution. It was framed as an "evil" precisely because

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[117] Id. at 97. They expanded on this problem posed by the relativity of fines vis-à-vis the offender, especially in India, even further: "There are many millions in India who would be utterly unable to pay a fine of fifty rupees; there are hundreds of thousands for whom such a fine might be levied, but whom it would reduce to extreme distress; there are thousands to whom it would give very little uneasiness; there are hundreds to whom it would be a matter of perfect indifference, and who would not a cross a room to avoid it."

[118] Id. at 98.

[119] Id.

[120] Id.

[121] Id.

[122] Id.

[123] Id. at 99.

[124] Id. at 100. The scheme drew upon the existing practices across presidencies under the East India Company's regulations. However, the limits imposed for the maximum duration of any imprisonment in default of payment of fines under the Draft Penal Code were far less than existing limits in force at the time in the presidencies.

any discretion-based regime permits errors and arbitrariness in outcomes. Negating these pernicious effects of discretion was one of the key theoretical tasks of codification. Yet, in a curious shift, stakeholders are now batting *for* having more discretion through the code rather than amending the code to limit it.

B. The Statutory Limits of Discretion

Whatever the logical limits of the argument favoring discretion, there is a much plainer and more straightforward problem with the idea that discretion will somehow make monetary bail less harsh. This problem is the text of the procedure code which continues to imply that bail with sureties is the default option for courts.

When the Supreme Court made its inroads into monetary bail in the late 1970s, the procedure code did not define bail. Absence of a concrete definition meant the Supreme Court had some wriggle room in its 1978 opinion to creatively interpret the statutory text and conclude that release on bail did not necessarily require sureties.[125] This doctrinal shift paved the way for the Court's general advice in Public Interest Litigations for judges to consider waiving sureties where it seemed necessary. But there was a catch. Even though judicial dicta said one thing, the statutory text continued to sing a different tune as no amendments were made to the legal text to *synergize* and incorporate the judicial dicta more clearly into the statute. The gap between the statute and the judicial dicta meant that trial courts at the ground level often continued to insist upon sureties and appellate courts continued to chide them for failing to be sufficiently mindful of a defendant's poverty while setting bail terms.[126]

When the law was finally amended in 2008, it did not consider this issue within the definition of bail itself. If anything, it indirectly reinforced the idea that release with surety was the norm, as it crafted an exception only for minor crime.[127] Now, the 2023 law has only further entrenched the logic that sureties are absolutely necessary in a certain category of cases, by defining a "bail bond" as one which requires sureties without making any explicit concessions to empower judges to order release on simple bonds.[128]

Understanding what the statutory text prescribes helps us appreciate the limits of the discretion logic for mollifying the oppressive nature of monetary bail. It is not as simple as asking judges to do their job better and choose a less onerous option. Rather, reducing

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[125] Moti Ram, (1978) 4 SCC 47, at paras. 3, 22-28. The bench framed this as a specific issue: "Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond *without sureties*, a person undergoing incarceration for a non-bailable offence . . . ?" Id. at para. 3 (emphasis in original). It then decided the issue by holding that a court could do so.

[126] See, e.g., Jagannathan v. State, (1983) Crim. L.J. 1748 (High Court of Madras); Valson v. State of Kerala, K.L.T. 443 (1982) (High Court of Kerala, Single Judge Bench); Shankara & Others v. State (Delhi Administration), I.L.R. (1996) 1 Del. 274 (1996) (High Court of Delhi, Single Judge Bench); Nanu Gordhan v. State of Gujarat, 2 G.L.R. 1698 (1995) (High Court of Gujarat); Azalea Veronica v. State of Madras, (2007) Crim. L.J. 3038 (High Court of Madras).

[127] See pt. III. C. supra.

[128] BNSS §§ 2(b), 2(d), 2(e), 478, 480, 485.

the harshness of monetary bail requires a judge to actively undermine the statutory default position by giving reasons, which in turn entails additional scrutiny for judges.[129] Unfortunately, there is no keenness to engage with any critique of the discretion logic, which creates an endless loop. Trial courts continue to follow the text of the law, frustrated appellate courts respond by periodically reiterating the 1970s guidelines,[130] and governments run periodic camps by legal aid agencies to identify persons who are in custody despite getting bail and facilitating their release.[131]

C. The Anti-Poor Nature of Existing Judicial Guidance

The third reason why the discretion approach merits criticism is the specific form in which it has been endorsed and promoted. Drawing from yet another colonial relic, that of the bad actor who feigns poverty to avoid paying fines,[132] both courts and the government continue to place a premium on poverty even as they claim to ameliorate the impact of poverty in bail matters. It is not good enough that the defendant pleads his inability to meet the bail conditions. This inability must be *demonstrated* by the defendant languishing in custody for some time before the possibility of relaxing bail conditions can be entertained. The suggested amendment from the Law Commission compelled judges to consider release without surety if a person remained in jail for a month after being granted bail.[133] Even the Supreme Court limited its intervention to cases where persons had already spent months in custody despite having been granted bail.[134] The demonstrable poverty approach was endorsed by Parliament in the 2008 amendment which suggested that only after a person has remained in custody for a week despite being granted bail should it be presumed that he could not execute a bond with sureties.[135] This attitude continues to remain in vogue after 2008. In an ongoing litigation, the Supreme Court has asked judges to consider relaxing conditions for persons left in custody even after a *month* of being granted bail.[136]

The problem extends to how other courts have functioned as well. Building on the guidance of the Supreme Court in the late 1970s, more judicial directives have been passed by different state-level High Courts imploring a periodic review of prisons in order to identify and assist prisoners incarcerated due to an inability to post bonds after being granted

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[129] On additional scrutiny for judges, see Prashant Reddy T. & Chitrakshi Jain, Tareekh pe Justice: Reforms for India's District Courts (2025).

[130] See, e.g., Shankara & Others v. State (Delhi Administration), I.L.R. (1996) 1 Del. 274 (1996) (High Court of Delhi, Single Judge Bench).

[131] National Legal Services Authority, Under Trial Review Committee Special Campaign Report (2023) (https://perma.cc/53MS-PR6Y).

[132] Macaulay et al., supra note 116, at 100.

[133] Law Commission of India, supra note 91, at 20-24.

[134] Khatoon I, at paras. 2, 3.

[135] Criminal Procedure Code 1973, § 436(1).

[136] In Re Policy Strategy for Grant of Bail (Suo Motu Writ Petition No. 4 of 2021) (order dated Jan. 31, 2023).

bail—but all of them call for reticence and consider only those cases deserving where defendants have spent a demonstrable period of time incarcerated in spite of bail.[137] For instance, a 2017 judgment of the Delhi High Court reiterated directions for judges to relax conditions to prevent persons from languishing in custody despite being granted bail.[138] Judges were asked to be more humane, but at the same time they were asked to not be too *hasty* in relaxing conditions but only to do so where it demonstrably appeared that defendants could not afford to secure release.[139]

D. Summing Up: A Tragic Inevitability?

The argument that discretion to relax conditions for defendants who cannot afford to meet bail conditions can offset the premium on poverty placed by monetary bail is ridden with fault and has, evidently, not worked in practice. It continues to perpetuate prolonged custody for huge numbers of defendants, numbers which I suspect are grossly underestimated. Two categories of persons whose suffering is masked by data showing us figures of those who are in prison at the year-end can easily be identified. *First*, a defendant who besides being detained for longer is also placed under great financial hardship to secure release. I see such examples regularly in courts, where in one case, an impoverished woman and mother of four was in custody for more than a week after being granted bail in a murder case while her family searched for acceptable sureties.[140] *Second*, defendants who are released after having spent only weeks or months in custody even after being granted bail, because a court subsequently relaxes the bail amount, or permits release without sureties, or some government agency identifies the person as needing assistance and facilitates release. An accurate figure of persons incarcerated on account of poverty alone despite having been granted bail may be considerably higher than 25,000 persons.

Repeatedly calling upon judges to try and make room for more humane outcomes within a legal system which is structured to oppress connects with the inherent, unresolved conflict at the heart of the Indian criminal process. There is undoubtedly a constitutional promise to alleviate the plight of the poor and marginalized. But delivering this promise was built on compromise, in that the legal structures of colonialism were retained with a

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[137] Ajay Verma v. Govt. (NCT of Delhi), 2017 SCC OnLine Del 12743 (High Court of Delhi, Single Judge Bench). The 2017 order cited previous directives of the same High Court, as well as other courts.

[138] Id.

[139] Id.; see also In Re Policy Strategy for Grant of Bail, supra note 136.

[140] Tejashvari Devi v. State Govt. of NCT of Delhi (Order dated Aug. 14, 2024 in Bail Appn. 2100/2024) (High Court of Delhi, Single Judge Bench). The defendant had spent 15 months in custody being accused of conspiracy to murder and was granted bail by the High Court. One condition of release was furnishing bail bonds to the sum of INR 25,000 (ca. USD 285) with two sureties for this amount. The defendant was an impoverished woman with four children and no permanent home or income, let alone access to persons who could stand surety for her. Nor did she, or her social circle, have ready access to this money, which is a substantial sum for most in the country. It took more than week for her to arrange all of this, and till such time the defendant remained in prison despite a court ordering her release.

hope that they could be infused with a new spirit. The constant faith in discretion as somehow making the colonial legal behemoth dance a different tune in bail matters slots in nicely with other such assumptions which the post-independence Indian judicial system has contrived because of the unresolved conflict.

The persistence of this conflict renders a Sisyphean feel to any efforts at bail reform from the courts. That is not true for Parliament, and there have been notable changes in the law on bail, albeit not the bail *system*, after India's independence. In 1973, Parliament considered a new criminal procedure code, while relegating an Expert Committee to work in a silo and come up with the most far-reaching bail reforms that the government had thus far considered. Fifty years on, the isolation of the 1973 Expert Committee report certainly seemed to be a mistake. As luck would have it, in 2023 a different government re-introduced the idea of new criminal procedure laws, explicitly designed to "decolonize" the field. In an ideal world, it would have seen proper engagement with the 1973 Expert Committee report and other documents which made a radical critique of the bail system. History repeated itself, though, with the 2023 criminal procedure law shunning any attempt at actual reform and remaining content with retaining the prior setup of monetary bail lock, stock, and barrel. Just how significant a missed opportunity this proves to be will only be revealed with time. Right now, it feels generational, and condemns bail reform to Sisyphean efforts at hoping for better use of discretion to do the trick.

VI. Conclusion

Criminal law in India punishes persons for no other reason than their poverty. It does so by first exerting itself selectively on the poor and marginalized and then demanding proof of their economic and social suffering to return them their liberty. What makes this *status quo* tragic is its predictability. The consequences of retaining monetary bail have been obvious to the government for more than half a century, if not longer. Courts have consistently bemoaned the antiquated and anti-poor nature of the law. Yet, even as a new criminal code replaced the old, colonial code, a monetary bail system has not only been retained but entrenched further.

The Indian criminal process was cutting edge in the 19th century. It is perhaps a testament to the longevity of its core components that it continues to, somehow, function more than 150 years later. The mere fact of that longevity cannot delude any observer into forgetting that any legal text is a product of its time. As one would expect, not every single component of the setup has remained immune to the sands of time. There is no longer a jury trial, defendants can come into the witness box, and there is no mandatory death sentence for any crime. What this paper demonstrates is that the system of monetary bail that the criminal process adopted in the 19th century is yet another component which deserves to go. It perpetuates injustice with disturbing frequency and surgical precision—rendering the most vulnerable sections of society prisoners on account of only their poverty and deprivation.