

The barriers to bail

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The criminal justice system is facing two competing anxieties. First, the risk of the accused absconding. Second, the continued incarceration of indigent undertrial prisoners despite receiving bail. Recent cases of fraudulent sureties, such as that of Chidiebere Kingsley Nawchara, a Nigerian national, have heightened concern about the accused absconding. In response, the Supreme Court is considering the Professional Bail Bondsmen (Regulations) Rules, 2026. They propose licensing, background checks, and digital verification. Perhaps these Rules are aimed at curbing fraud in surety. Nevertheless, they fail to confront the more urgent constitutional malaise endured by the indigent behind bars.

Bail is contingent upon a steep price. It is easier for the financially able to walk free. The poor, often from marginalised groups, stay in jail for months or years despite being granted bail. The Supreme Court has repeatedly condemned this phenomenon. The pushback began in as early as 1978 with *Moti Ram* when Justice V.R. Krishna Iyer slashed a “shocking” Rs 10,000 surety to Rs 1,000. The next year, in *Hussainara Khatoon*, the Supreme Court famously denounced the broader practice for putting a premium on poverty. However, the stark ground reality remained unchanged by 1982 when the Delhi High Court observed in *Shankara vs State* the dichotomy of bail as the indigent struggled to arrange even Rs 500 for it. Decades later, as Justice Gita Mittal observed in *Ajay Verma vs Govt. of NCT of Delhi*, this enduring barrier to liberty continued to persist.

The question that arises is whether things have improved by 2026. Regrettably, today's statistics paint even a grimmer picture. Indian prisons house over half a million inmates of which nearly three quarters are undertrials. Among them, about two-thirds belong to scheduled caste, scheduled tribe, and other backward classes communities. Approximately

77% of prisoners earn less than rupees one lakh annually, making bail virtually unattainable for most.

Juxtaposed with this reality is a troubling paradox. In January 2023, the Supreme Court was informed that around 5,000 undertrials remained incarcerated despite being granted bail. The court directed that bail orders be swiftly communicated to prisons, integrated into the e-Prisons system, and reviewed if release did not occur within seven days. Courts were also instructed to consider the socio-economic status of the accused and avoid imposing excessive bail amounts or local surety requirements.

According to the Supreme Court's research wing, about 24,879 individuals remained in custody despite being granted bail primarily due to multiple cases or their inability to meet financial conditions. The burden is uneven, with over 13,000 such cases concentrated in Uttar Pradesh, Madhya Pradesh, and Bihar.

Consider Imran, who stayed jailed for four and a half years after bail was granted as he was unable to arrange a surety. Ashok Sandeep Singh waited five months until the Supreme Court reduced his surety from Rs 10 lakh to Rs 25,000, calling the original sum disproportionate. These cases expose how financial conditions, rather

than legal merit, determine liberty, especially for the impoverished. For trial courts, the risk of absconding outweighs the right to reasonable bail, resulting in prolonged pre-trial incarceration.

As per available records, the scheme for indigent prisoners hasn't effectively transposed into reality. Data from the National Legal Services Authority for 2025 show that over 3,000 “Category Three undertrials” (granted bail but unable to furnish surety) were recommended for release, but only about 60% were actually freed.

The Central government's Support to Poor Prisoners scheme, designed to cover bail bonds for those who cannot afford them, is tangled in bureaucracy. Recognition by the District Legal Services Authority is required, with cases routed through district or state-level committees depending on the amount. Serious offences, such as corruption, money laundering, narcotics, and UAPA cases, are excluded though these often attract the highest bails. For example, in 2023, there were about 43,000 undertrial prisoners in narcotic cases alone.

The real problem is the administrative lethargy and the unrealistic financial requirements, which per-

sistently keep poor prisoners locked up. As a result, the scheme has barely used its allocated funds: just Rs 71 lakh out of Rs 20 crore, helping only 273 individuals nationwide. In about 20 states and Union territories, including Bihar, Haryana, Karnataka, and Delhi, no disbursement has occurred. Although the scheme promises full State coverage for indigent prisoners' bail, its convoluted approvals and exclusions cripple its effectiveness.

The 2026 Rules propose professional bail bondsmen, modelled after the United States of America, where bondsmen charge non-refundable fees (often 10% of the bail amount), directly tying liberty to financial means. The American experience has shown this model fails the poor. If the Rules replicate this system, India may witness the perpetuation of similar inequalities.

A better approach would be to leverage NALSA's licensing powers to serve public interest. Every licensed bondsman should then be required to allocate a fixed quota of their portfolio towards indigent prisoners. Given that 76% of the prison population consists of undertrials, most of them low-income, this quota would operate at scale. Mapping underutilised funds of the Support to Poor Prisoners Scheme could subsidise the premium backed by State guarantee. This would replace discretionary slow aid with a structured and predictable system.

Eligibility should be determined at the bail stage, with trial courts noting financial capacity using summary criteria and data from the e-Prisons system whereafter a NALSA-empanelled bondsman is assigned from the register. This would cut out administrative deadweight. Bondsmen, incentivised by assured volume and risk-sharing, could coordinate with the District Legal Services Authority to complete paperwork and secure timely release.

There is an urgent need to address the issue of non-realisation of bail orders. Unless financial capacity is central to bail, the right to bail will remain a mirage for indigent prisoners. Consideration of these Rules is a golden opportunity to put the system on automation owing to its nature of a public-private partnership.

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