

## Jail vs bail: Power to arrest vs Right to freedom

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### Why in news?

- Recently, Supreme Court bench of justices duly acknowledged that **judicial conservatism** has added to the investigating agencies' misadventures of **weaponising the process as a punishment**.
- Delivering a significant judgment on issues surrounding arrest and grant of bail, it recommended that the Union government frame a new law to facilitate the grant of bail and usher in objectivity in the criminal justice system to ward off unnecessary arrests, especially in cases where the maximum punishment under the alleged offence is up to seven years in jail.
- The bench also issued a slew of directions for investigating agencies and the subordinate courts on arrests and disposal of bail applications, while seeking compliance reports within four months.



### Liberal bail jurisprudence:

- Many Supreme Court judgments have read new rights into Article 21, including **right to dignity, right to travel abroad, right to livelihood, right to food, right to speedy trial, right to clean environment, right to legal aid, and more recently, right to privacy and bodily autonomy**.
- Unfortunately, in this time, courts in India have **transitioned from liberal bail jurisprudence to judicial conservatism**, making the grant of bail the exception and jail the rule.
- The reluctance of courts in granting bail has come in handy for investigating agencies that push to keep people in jail for the maximum period of time possible, while financial, social, and legal hurdles shackle the access of the marginalised to bail.

### Power, and need to make arrests:

- Several Supreme Court judgments have stressed on the **distinction between the power to make arrests** and the need to do so. The court has been emphatic that while an investigating agency may have the authority to arrest someone, it cannot be done routinely and without sufficient cause.
- For an arrest marks the end of an individual's liberty, and therefore such action must be procedurally and substantially compliant with the laws of the land.

*Joginder Kumar Vs State of UP (1994):*

- In *Joginder Kumar Vs State of UP (1994)*, the top court considered the dynamics of misuse of police power of arrest and opined: “No arrest can be made because it is lawful for the police officer to do so.
- The existence of the power of arrest is one thing. The justification for the exercise of it is quite another... **No arrest should be made without a reasonable satisfaction** reached after some investigation about the genuineness and bona fides of a complaint and a reasonable belief both as to the person’s complicity and even so as to the need to effect arrest. Denying a person his liberty is a serious matter.”

#### *DK Basu Vs State of West Bengal (1996):*

- Again, in *DK Basu Vs State of West Bengal (1996)*, the Supreme Court emphasised that the power of arrest, interrogation and detention must be guided by constitutional and statutory provisions aimed at safeguarding the personal liberty and life of a citizen.
- In this judgment, the court laid down elaborate guidelines to be followed by the police officials at the time of making arrests. Some of these included maintaining logs of the officers making arrests, informing the person detained about his right to have legal aid, and informing their family members.

#### *Arnesh Kumar Vs State of Bihar:*

- The 2014 landmark judgment in *Arnesh Kumar Vs State of Bihar* elucidated the **purposive interpretation of Section 41 CrPC** (which empowers the police to arrest people without warrants), holding that an arrest for offences carrying maximum punishment up to seven years in jail can be made only after satisfying the twin condition — that there is a reason to believe or suspect that the accused has committed an offence, and there is a necessity for an arrest.
- The judgment further said that a **magistrate is duty-bound to release an accused if the investigating agency fails to show compliance with the requirements under Section 41 of the CrPC**, besides ensuring all other constitutional rights of the person arrested. The court directed states and Union territories to hand over a checklist to the police officials so as to ascertain they satisfy the legal requirements before arresting a person.
- The Supreme Court judgment, borrowed from the Arnesh Kumar judgment while issuing the guidelines that require police officers to **maintain written records before arresting the accused in cases where the offence is punishable with imprisonment** for a term less than seven years and issue proper notice before a suspect is called for questioning; **ensure automatic grant of bail in cases where the accused was not arrested during investigation**; adopt a liberal view in cases pertaining to women and the infirm; and mandate the disposal of bail applications within two weeks and pre-arrest bail applications within six weeks.

#### **Bail is the rule, jail the exception:**

- Justice Krishna Iyer, writing for the bench in *State of Rajasthan Vs Balchand alias Baliay (1977)* held that “the basic rule is bail, not jail”.
- The two-page judgment said unequivocally that bail should be granted in all cases except where there is a flight risk, or there is the possibility that the accused could thwart the course of justice, repeat the offence or intimidate witnesses.
- Justice Iyer, who emerged a strong proponent of liberty as a judge of the apex court, emphasised this again in *Gudikanti Narasimhulu Vs State (1978)*.
- “The issue (of bail) is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a **developed jurisprudence of bail is integral to a socially sensitised judicial process**. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of ‘procedure established by law’. The last four words of Article 21 are the life of that human right.”

#### **Related Cases:**

- The purpose of granting bail was explained by the Supreme Court in *Gurbaksh Singh Sibbia Vs State of Punjab (1980)* when it underscored that **bail is not to be rejected as a punitive measure**.
- In 1994, in the *Supreme Court Legal Aid Committee Representing Undertrial Prisoners Vs Union of India*, the apex court held that if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 receives a jolt.
- The court, through this judgment, issued guidelines on releasing under-trials on bail after they serve half the maximum punishment prescribed under the alleged offences for category of cases where the maximum quantum is up to ten years’ imprisonment.

- The Supreme Court, in *Sanjay Chandra Vs CBI (2012)*, pointed out that a mere apprehension regarding tampering with witnesses cannot be sufficient to keep an under-trial behind bars.
- In *Nikesh Tarachand Shah Vs Union of India (2018)*, the Supreme Court quashed a provision in the Prevention of Money Laundering Act, 2002, holding that the impugned provision imposed extremely harsh and discriminatory conditions for release on bail and violated Article 21.

#### **Case of Mohammed Zubair:**

- AltNews co-founder and fact-checker Mohammed Zubair was recently **arrested in three separate but similar cases** relating to his old tweets, by invoking charges of promoting enmity and communal hatred.
- He was remanded to judicial custody by a Delhi court on July 2 following rejection of his bail plea even though the charges can fetch a maximum punishment of less than seven years in jail.
- His arrests in the other two cases by the Uttar Pradesh Police are also under similar charges where the maximum punishment cannot exceed seven years but he awaits his release on bail.

#### **Power to grant bail is not circumscribed:**

- Not only in the cases where the punishment is less than seven years in jail but also in cases involving more serious offences, the Supreme Court has maintained that its power to grant bail is not circumscribed.
- In February 2021, the top court ruled that **an accused is entitled to bail even under stringent anti-terror and narcotic laws** when there is little possibility of the trial being completed early.
- The court granted bail to KA Najeeb, facing trial in Kerala under the Unlawful Activities (Prevention) Act for allegedly chopping off a professor's wrist.
- In *P Chidambaram Vs Directorate of Enforcement (2020)*, the top court clarified that economic offences cannot be categorised into one group and denied bail on that basis.

#### **Way Forward:**

- It is clear that the basic jurisprudence relating to bail has remained the same (at least in constitutional courts) in as much as the grant of bail is the rule and refusal is the exception, so as to ensure that the accused has the opportunity of securing fair trial.
- But the dangerous mix of arbitrary use of power to arrest by the investigating agencies, followed by uncertainties of bail proceedings before the courts of law afflicted with judicial conservatism have made a declared judicial principle an elusive target.
- The Supreme Court's judgment is a welcome step in setting the bail jurisprudence right again but the redressal may eventually lie in changing the mindset of the investigating agencies and the judges of the trial courts.