



Balancing rights and public safety: A comparative review of Arrest and Bail Reform in South Africa, Canada, and India

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ABSTRACT

This paper examines the ongoing debate on arrest and bail reform in South Africa, focusing on the constitutional values of dignity, equality, and personal liberty. It responds to concerns about arbitrary arrests, prolonged pre-trial detention, and the unequal application of bail laws that often disadvantage poor and vulnerable groups. Central to the discussion are the South African Law Reform Commission's proposed amendments to the Criminal Procedure Act, which offer an opportunity to better align legal practice with constitutional principles. This article addresses the following questions: (i) how South Africa's bail procedures fall short of constitutional and international norms; (ii) what the SALRC's proposals offer in addressing fairness, access, and accountability; (iii) how a balanced bail regime can protect individual freedoms and public safety; and (iv) what comparative lessons can be drawn from Canada and India on judicial oversight, risk-based assessments, and custodial review. Using a qualitative, desktop-based research method and drawing on relevant case law, legislation, and existing literature, the article found that meaningful reform requires more than technical amendments. This article recommends clearer legal standards, improved training for police and judicial officers, and the use of evidence-based tools for consistent decision-making. Following on the existing literature, this study contributes by concluding that modernising arrest and bail laws is essential to protect the presumption of innocence and restore confidence in South Africa's criminal justice system.

Keywords: Bail Reform, Arrest, Constitutional Rights, South Africa, Comparative Criminal Procedure

INTRODUCTION

The right to personal freedom and security stands as a cornerstone of South Africa's constitutional framework. Enshrined in Section 12(1) of the Constitution of the Republic of South Africa,¹ this right ensures that no individual may be arbitrarily detained or deprived of liberty without lawful and justifiable cause.² Complementing this, Section 35(1)(f) guarantees that arrested persons are entitled to release

¹ Constitution of the Republic of South Africa, 1996. Section 12(1) state that everyone has the right to freedom and security of the person, which includes the right -not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources; not to be tortured in any way; and not to be treated or punished in a cruel, inhuman or degrading way.

² Constitution of the Republic of South Africa, 1996. Section 12(1).

from custody if it is in the interests of justice, subject to appropriate conditions.³ However, despite these constitutional protections, the practical implementation of arrest and bail procedures often falls short, marred by inefficiencies, procedural flaws, and infringements on fundamental rights.⁴ South Africa's current arrest and bail processes are governed by the Criminal Procedure Act (CPA), a statute rooted in apartheid-era policing, which, although amended over the years, still contains outdated provisions and structural defects that hinder the realisation of constitutional values.⁵ Chapter 9 of the CPA, which sets out the framework for bail, has come under criticism for being overly technical, vague in terms of the accused's entitlements, and out of step with modern constitutional expectations.⁶ One of the most contentious aspects is the reverse onus clause in Section 60(11), which compels individuals charged with serious offences listed under Schedules 5 and 6 to demonstrate why their continued detention is not justified, shifting the burden away from the state.⁷ In *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*,⁸ the Constitutional Court upheld the legality of these reverse onus provisions, but stressed that bail proceedings must be interpreted in a way that preserves the fairness of the process and upholds the presumption of innocence.⁹ Nevertheless, more recent case law and empirical research show a worrying trend where bail is arbitrarily denied, often without adequate examination of an accused's personal conditions, financial capacity, or the actual risk posed by their release.¹⁰ This practice contributes to unnecessary pre-trial detention, exacerbates overcrowding in prisons, and undermines public trust in the justice system.¹¹

In response to these challenges, the South African Law Reform Commission (SALRC) published Discussion Paper 167: Review of South Africa's Bail System in 2025. The report pinpointed several serious issues, among them excessive bail amounts, the absence of legal counsel at initial appearances, and poor verification of an accused's identity and circumstances.¹² To address these, the SALRC proposed reforms that include entrenching a presumption in favour of bail for non-violent crimes, broadening police bail powers, and enabling property-based bail as an alternative to cash, all aimed at reducing unnecessary remand incarceration.¹³ In parallel, the SALRC's Discussion Paper 166: Reform of the Arrest Dispensation recommended stricter limits on warrantless arrests under Section 40(1)(b) of the Criminal Procedure Act,¹⁴ proposing that such powers be confined to violent crimes.¹⁵ The paper also advocated for greater use of written notices or summonses in cases involving minor offences. Additional proposals included revising Section 39 of the CPA¹⁶ to ensure that arrestees are promptly informed of their right to legal aid and amending Section 49 to limit the use of deadly force to situations involving immediate threats, thus reducing incidents of unlawful killings by police.¹⁷ These recommendations reflect a broader shift towards a human rights-oriented and victim-sensitive policing model. The significance of judicial oversight was underscored in *Plaatjies v S*,¹⁸ where the Eastern Cape High Court revisited a bail application based on new facts and highlighted the judiciary's crucial role in upholding both public safety and the rights of the accused.¹⁹ The decision reinforced the SALRC's view

³ Constitution sec 35(1)(f).

⁴ De Villiers, W 'Problematic Aspects with Regard to Bail Under South African Law' (2014) University of Pretoria 3.

⁵ Criminal Procedure Act 51 of 1977.

⁶ SALRC 'Discussion Paper 167: Review of South Africa's Bail System' 2025, Chapter 1.

⁷ Criminal Procedure Act, Section 60(11).

⁸ *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC); 1999 (2) SACR 51 (CC) (3 June 1999).

⁹ *S v Dlamini*, *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC); 1999 (2) SACR 51 (CC) (3 June 1999, paras 10-12).

¹⁰ APCOF 'Study on the Use of Bail in South Africa' (2018) 7-9.

¹¹ Centre for Applied Legal Studies, Barred (In)Justice (2014) 4-6

¹² SALRC, Discussion Paper 167, Chapter 2, 14-90.

¹³ SALRC, Discussion Paper 167, Chapter 2, 57-70.

¹⁴ Section 40(1)(b) of the Criminal Procedure Act 51 of 1977 states that a police officer may, without a warrant, arrest any person whom they reasonably suspect of having committed a Schedule 1 offence.

¹⁵ SALRC, Discussion Paper 166: Reform of the Arrest Dispensation, (2025) 3-12.

¹⁶ Section 39 of the Criminal Procedure Act states that a person being arrested must be informed of the reason for their arrest.

¹⁷ Section 49 of the Criminal Procedure Act states that the use of force, including deadly force, is permitted when effecting an arrest, but only if it is immediately necessary to protect life or prevent serious harm.

¹⁸ *Plaatjies v S* (CA &R 51/2024) [2024] ZAECBHC 41.

¹⁹ *Plaatjies v S* (CA &R 51/2024) [2024] ZAECBHC 41, paras 1-5.

that courts must be guided by constitutional principles and ethical accountability when handling bail matters.²⁰ Looking beyond South Africa, comparative jurisdictions offer helpful lessons. For instance, in Canada, the integration of algorithm-driven risk assessment tools and structured judicial guidelines has brought greater fairness and uniformity to bail decisions.²¹ India, meanwhile, has introduced legal presumptions against arrest for less serious crimes and implemented judicial oversight mechanisms to limit custodial abuse and protect liberty.²² These international approaches illustrate how legal systems can blend data-driven methods with rights-based values to reform pre-trial procedures. Following the introduction in Part I, Part II examines the evolving debates on arrest and bail reform in South Africa's constitutional landscape, highlighting the tensions between individual liberty and crime-control objectives. Part III analyses the extent to which South Africa's current bail procedures comply with constitutional guarantees and international human rights standards, identifying key shortcomings in practice and implementation. Part IV explores the proposals advanced by the South African Law Reform Commission (SALRC) to reform the bail system, with particular emphasis on enhancing fairness, accessibility, and accountability. Part V advances the argument for a balanced bail regime that simultaneously protects individual freedoms and promotes public safety. Part VI considers comparative lessons from Canada and India, focusing on judicial oversight mechanisms and risk-based approaches to bail decision-making that may inform South African reform efforts. The final part presents the study's conclusion and recommendations.

METHODOLOGY

This study adopted a qualitative research methodology, primarily using a desktop-based approach to gather and analyse data. The research relied on existing literature sourced from academic databases such as Google Scholar, including journal articles, books, legal commentaries, and comparative case studies. By critically examining these sources, the study explored legislative developments and judicial interpretations related to arrest and bail reform in South Africa, with comparative insights drawn from Canada and India. This approach allowed for an in-depth understanding of systemic issues and best practices, providing a foundation for informed recommendations without the need for primary data collection.

DISCUSSION

Evolving Debates on Arrest and Bail Reform in South Africa's Constitutional Landscape

South Africa's bail system stands as a profound betrayal of the Constitution's promise of equality, dignity, and justice. Instead of embodying the transformative aspirations of the democratic era, it entrenches the criminalisation of poverty and reproduces the very injustices the post-apartheid order sought to dismantle. The scale of the problem is not merely administrative; it is constitutional, moral, and deeply human. The devastating consequences of South Africa's tough on crime approach illustrate this failure. Research shows that punitive bail policies have created an 'Alice in Wonderland' system where fewer people are convicted while more are deprived of liberty without trial. Within five years of the 1997 amendments, the remand population tripled, and overcrowded prisons contributed to thousands of preventable deaths, a human rights catastrophe that reveals how a system meant to protect the public has become a source of fatal harm.²³

Courts frequently deny bail on the basis of poverty, effectively transforming the justice process into a wealth-based hierarchy. When judges treat lack of financial means as evidence of 'flight risk,' the system punishes individuals for their socio-economic status rather than their conduct. This produces an unconstitutional two-tiered dispensation where freedom depends not on innocence but on income, an outcome both legally indefensible and morally unconscionable.²⁴ Meaningful transformation remains

²⁰ *Plaatjies v S* (CA &R 51/2024) [2024] ZAECBHC 41, para 19.

²¹ Sibbald, B 'Data-Driven Justice: Bail Algorithm Use in Canada' (2022) 55(1) Canadian Criminal Law Review 17-29.

²² Law Commission of India, Report No. 268: Bail Reform (2017) 12-18.

²³ Jean Redpath, "Unsustainable and Unjust-Criminal Justice Policy and Remand Detention since 1994," *SA Crime Quarterly* 2014, no. 48 (2014): 25-37.

²⁴ Jameelah Omar, "Penalised for Poverty: The Unfair Assessment of flight Risk'in Bail Hearings," *South African Crime Quarterly*, no. 57 (2016): 27-34.

impossible while poor and marginalised defendants bear a disproportionate burden of detention. Calls to implement cashless bail mechanisms highlight that reform is not merely administrative but historical and ethical, as the current model mirrors colonial-era biases cloaked under constitutional.²⁵ South Africa's legislative framework also fails to adequately protect remand detainees. The absence of automatic bail review, maximum custody limits, and enforceable safeguards against arbitrary detention leaves thousands languishing in prison without justification. This is not a technical oversight; it is a systemic abdication of constitutional responsibility.²⁶

For instance, too many people in South Africa spend months, sometimes years, in remand detention, waiting for trials that move far too slowly. With every passing day behind bars, their constitutional right to personal liberty becomes more heavily burdened, and the State's obligation to justify that detention grows stronger. What may have been a legitimate reason for initial detention can quickly lose its weight as time drags on, yet detainees continue to bear the cost of systemic delays.²⁷ Unlike the more rigorous approaches seen in the European Court of Human Rights and other international bodies, where prosecutors must constantly account for ongoing detention and demonstrate real investigative progress, South African jurisprudence has not yet evolved to demand this level of accountability. Courts seldom probe the State's reasons for continued deprivation of liberty or scrutinise the actual status of investigations, leaving vulnerable detainees at risk of unjustified, prolonged incarceration.²⁸

The persistence of these injustices reflects a deeper social and constitutional failure.²⁹ Despite extensive rights protections, suspects and accused persons remain among the most vulnerable in the criminal justice system. When individuals presumed innocent die in state custody, the constitutional commitment to human dignity becomes an empty promise.³⁰ Global evidence confirms the inequities of cash-based bail systems. Such systems create income-driven disparities where the poor are detained while the wealthy purchase their freedom. In South Africa, one of the world's most unequal societies, these injustices become even more stark, transforming bail hearings into assessments of wealth rather than assessments of justice.³¹ South Africa's bail system is not merely dysfunctional; it is constitutionally indefensible. Detaining the poor while wealthier accused persons walk free violates the principles of equality, dignity, and freedom at the heart of the constitutional project. Incremental reform is no longer adequate. What is needed is a complete re-imagining of bail as a human right rather than a financial privilege.³² South Africa now stands at a crossroads: it can either honour the constitutional vision of equal justice under law or continue upholding a system that reproduces the injustices of the past under democratic guise. The moral and constitutional stakes could not be higher.

Failures of South Africa's Bail Procedures to Meet Constitutional Standards and International Norms

South Africa's bail procedures reflect a deep constitutional failure, one that systematically denies fundamental rights and entrenches discrimination against the poor and marginalised. Far from advancing the Constitution's promise of dignity, freedom, and equality, the current system reinforces structural injustices and erodes public faith in the rule of law. The most striking illustration of this systemic injustice lies in the treatment of individuals charged with Schedule 6 offences. These accused persons must prove "exceptional circumstances" to secure release, a requirement that effectively reverses the presumption of innocence and imposes an impossible burden on those without legal or financial

²⁵ Untalimile Crystal Mokoena and Emma Charlene Lubaale, "Decolonising Prisons in South Africa. The Need for Effective Bail Affordability Inquiries," *South African Crime Quarterly*, no. 66 (2018): 31–40.

²⁶ C. Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform.," *South African Journal of Criminal Justice* 25, no. 1 (2012): 24–43.

²⁷ Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform.,"

²⁸ Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform.,"

²⁹ However, in 1994, South Africa became a democracy founded on a progressive Constitution which embraced the principle of constitutional supremacy. The Constitution of the Republic of South Africa 1996 ("Constitution") includes a Bill of Rights which protects both traditional liberal individual rights as well as socio-economic rights.

³⁰ Pamela J Schwikkard, "Death in Democracy," *SAC LJ* 25 (2013): 736.

³¹ Hafsa S Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative," *DePaul L. Rev.* 70 (2020): 15.

³² Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative."

resources. Instead of affirming that detention should be the exception, the law renders it the norm, creating a system where constitutional rights exist more in theory than in practice.³³ Further inequities emerge when courts assess 'flight risk' through the lens of poverty. Bail is frequently denied because accused persons lack formal employment, fixed assets, or stable income, producing a wealth-based hierarchy of justice. This transforms bail from a constitutional safeguard into a privilege reserved for the financially secure, undermining equality before the law and reinforcing socio-economic exclusion. Judicial decision-making, skewed by undue emphasis on poverty-related factors, becomes fundamentally misaligned with constitutional values.³⁴

Furthermore, address verification requirements compound this injustice by penalising the homeless and impoverished. Individuals unable to provide verifiable addresses often, because they live in informal or unstable housing, are detained for extended periods, sometimes longer than the eventual sentences they would have received. This practice inverts the principle of proportionality and directly contradicts the constitutional imperative to protect vulnerable groups.³⁵ The persistence of these systemic deficiencies becomes increasingly evident when viewed through the lens of international human rights standards. South African courts seldom require the State to justify ongoing detention or demonstrate adequate investigative progress. Without automatic bail reviews or maximum custody limits, accused persons can languish in prison indefinitely, highlighting a legislative vacuum that leaves remand detainees without meaningful safeguards against arbitrary detention.³⁶

In addition, existing studies highlight the significant human cost associated with these systemic failures. A punitive 'tough on crime' posture has created an inverted justice system in which fewer individuals are tried and sentenced, while more are deprived of liberty without adjudication. Severe overcrowding directly exacerbated by excessive pre-trial detention has contributed to thousands of preventable deaths in custody, a humanitarian disaster attributable to unconstitutional bail practices.³⁷ Judicial oversight has not provided the expected constitutional protection. A review of key Constitutional Court decisions reveals a reluctance to apply the same level of rigorous scrutiny to bail limitations that the Court applies elsewhere.³⁸ This deferential posture has allowed unconstitutional practices to entrench themselves across the criminal justice system

For instance, in *S v Dlamini*, *S v Dladla*, *S v Joubert*, and *S v Schietekat*,³⁹ the Constitutional Court was asked to assess whether the restrictive bail provisions for individuals accused of serious offences were compatible with the Constitution.⁴⁰ While the judgment affirmed certain safeguards, its reasoning has long raised concerns. The Court's analysis in *Dlamini* lacked the depth and intensity of scrutiny that has become the hallmark of its rights-limitation jurisprudence. Instead of the careful, evidence-based proportionality analysis seen in other landmark decisions, the Court adopted a more deferential stance, leaving significant gaps in the protection of personal liberty and in the development of principled bail standards.

South Africa's failures are the product of policy choices rather than structural inevitabilities.⁴¹ Excessive judicial discretion, lengthy delays, and de facto pre-trial detention as the default rule mirror the shortcomings condemned by international tribunals, except that South Africa lacks the external accountability mechanisms that constrain such abuses elsewhere.⁴² The broader constitutional

³³ Clement Marumoagae and Boyane Tshehla, "Right to Bail? Odds Stacked against the Accused Person in South African Bail Law," *South African Journal on Human Rights* 35, no. 3 (2019): 257–73.

³⁴ Omar, "Penalised for Poverty: The Unfair Assessment of 'flight Risk' in Bail Hearings." 27-34.

³⁵ Palesa Rose Madi and Lubabalo Mabhenxa, "Possibly Unconstitutional? The Insistence on Verification of Address in Bail Hearings," *South African Crime Quarterly*, no. 66 (2018): 19–30.

³⁶ Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform. ."

³⁷ Redpath, "Unsustainable and Unjust-Criminal Justice Policy and Remand Detention since 1994."

³⁸ H. S. Axam, "If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail.," *South African Journal on Human Rights* 17, no. 3 (2001): 320–40.

³⁹ *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC).

⁴⁰ *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat* paras 1-5.

⁴¹ It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. Honoring the presumption of innocence is often difficult; sometimes we must pay substantial social costs as a result of our commitment to the values we espouse. But at the end of the day the presumption of innocence protects the innocent; the shortcuts we take with those whom we believe to be guilty injure only those wrongfully accused and, ultimately, ourselves.'

⁴² Caroline L Davidson, "No Shortcuts on Human Rights: Bail and the International Criminal Trial," *Am.ULRev.* 60 (2010): 1.

implications are stark, and the enduring gap between the Constitution's aspirational promises and the lived reality of those caught in the bail process reveals a justice system out of step with the values it is meant to uphold. For many accused persons, dignity, equality, and freedom remain distant ideals rather than enforceable rights.⁴³

SALRC Proposals: Reforming Bail to Enhance Fairness, Access, and Accountability

South Africa's bail system has come to embody a fundamental betrayal of constitutional values and human rights obligations, functioning less as a protective mechanism and more as an instrument of inequality and systemic injustice.⁴⁴ The framework of the Criminal Procedure Act makes release exceedingly difficult, particularly for those charged with Schedule 6 offences who must prove "exceptional circumstances" merely to secure their liberty.⁴⁵ This reverses the presumption of innocence and creates insurmountable obstacles for individuals without legal or financial resources. In practice, the system operates as a form of 'cash register justice,' in which economic status determines freedom rather than actual culpability.⁴⁶

The most visible injustice lies in the way poverty is treated not as a socio-economic reality but as a marker of criminal risk. Courts often rely on a person's lack of assets or stable employment to justify denying bail, effectively criminalising poverty.⁴⁷ These decisions reproduce a discriminatory logic that views impoverished accused persons as inherently unreliable, despite lacking any evidentiary connection to flight risk.⁴⁸ The result is a two-tiered justice system where liberty is purchased, and detention is the default for the poor. This system constructs the very tiered system of differential justice by income that scholars warn against, one in which the inability to post bail becomes the decisive factor determining whether a person awaits trial at home or in prison.⁴⁹ Such systemic discrimination renders access to justice hollow. For instance, thousands of individuals spend months or even years in remand detention, not because they pose a real danger, but because procedural safeguards are inadequate.

South Africa lacks mandatory bail reviews and maximum custody limits, allowing the State to retain individuals in pretrial detention without meaningful justification. Over time, the very reasons that initially justified detention lose constitutional validity, yet the system continues to detain people without requiring renewed, evidence-based assessments of necessity.⁵⁰ This crisis is exacerbated by a severe accountability deficit. Prosecutors wield immense power in bail determinations, often making decisions that shape the trajectory of an entire case. Yet when prosecutorial failures or negligence occur, particularly in cases where bail decisions expose victims or witnesses to harm, accountability mechanisms are virtually nonexistent.⁵¹ This institutional weakness creates fertile ground for rights violations and exposes vulnerable individuals, especially complainants in violent crimes, to unacceptable danger.

Furthermore, gender-based violence cases reveal the most devastating consequences of this system.⁵² Accused persons frequently secure bail despite clear patterns of past violence, resulting in cases where victims are re-assaulted or even murdered by partners who should never have been released. These tragedies do not reflect isolated lapses but instead stem from a flawed and inconsistent application

⁴³ Pierre De Vos, "Prisoners' Rights Litigation in South Africa since 1994: A Critical Evaluation," *Law, Democracy & Development* 9, no. 1 (2005): 89–112.

⁴⁴ Marumoagae and Tshehla, "Right to Bail? Odds Stacked against the Accused Person in South African Bail Law."

⁴⁵ The Criminal Procedure Act makes it particularly difficult for individuals charged with Schedule 6 offenses to secure their release on bail. Under Section 60 (11) (a), accused individuals must prove "exceptional circumstances" to justify their release, which means the burden of proof lies on them to demonstrate that their circumstances warrant a departure from the general rule that bail is denied in such cases.

⁴⁶ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 15.

⁴⁷ Omar, "Penalised for Poverty: The Unfair Assessment of flight Risk'in Bail Hearings."

⁴⁸ Omar, "Penalised for Poverty: The Unfair Assessment of flight Risk'in Bail Hearings."

⁴⁹ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 15.

⁵⁰ Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform." 36.

⁵¹ Richard A Wilson, "Reconciliation and Revenge in Post-Apartheid South Africa: Rethinking Legal Pluralism and Human Rights," *Current Anthropology* 41, no. 1 (2000): 75–98.

⁵² Gender-based violence (GBV) is a serious and systemic problem in South Africa. The government has attempted to address the problem by introducing several initiatives including sexual offences courts, and various laws aimed at protecting women and children. However, the recent reform is not sufficient. Only a limited number of bail reforms were introduced.

of bail principles in GBV matters. The persistent misapplication of legal standards demonstrates a state's failure to uphold its constitutional duty to protect those most at risk of harm.⁵³ Procedural failures further erode the legitimacy of the bail process. Bail hearings often unfold in a mechanical and perfunctory manner, lasting only moments. Decisions are made using preset bail schedules that ignore personal circumstances, financial capacity, and mitigating factors.⁵⁴ This conveyor belt approach strips the process of individualised assessment and violates the core requirement of due process in a constitutional democracy.

The human rights implications of this system are profound. Cash bail regimes create structural inequalities in detention outcomes and distort the presumption of innocence by coercing defendants into guilty pleas simply to regain their freedom.⁵⁵ Rather than serving as a safeguard, bail becomes a barrier to equal access to justice and a driver of wrongful convictions, poverty entrenchment, and social marginalisation.⁵⁶ Attempts to 'modernise' the system through algorithmic risk assessments only deepen the inequities. These tools frequently embed racial and socio-economic bias, using historically contaminated data to reproduce discriminatory patterns under the guise of objectivity. The outcome is a digital caste system, which scholars term the 'New Jim Code' that introduces algorithmic discrimination into a system already plagued by structural inequality.⁵⁷

South Africa's system mirrors the worst features of wealth-based detention regimes. The United Nations recognises pretrial detention as a core indicator of access to justice, emphasising its centrality to SDG 16 on peace,⁵⁸ justice, and strong institutions. Yet South Africa continues to rely on a bail regime that disproportionately incarcerates the poor and fails to meet international standards of fairness, necessity, and proportionality.⁵⁹ Meaningful transformation requires more than incremental reform. Proposals include extending the reverse onus to serious GBV matters where danger is demonstrably great and subjecting bail decisions in GBV cases to automatic High Court review.⁶⁰ These recommendations reflect an urgent need to recalibrate the balance between constitutional rights, societal safety, and the protection of vulnerable individuals.

Any constitutionally compliant bail system must be grounded in individualised, evidence-based assessments, rather than wealth, social status, or opaque algorithmic predictions. As scholars warn, continued inaction will deepen the collateral consequences of pretrial detention, affecting housing, employment, political participation, and the broader social fabric. A justice system that criminalises poverty while failing to protect those most vulnerable cannot sustain a democratic society committed to equality and human dignity.⁶¹

Towards a Balanced Bail Regime: Safeguarding Individual Freedoms and Public Safety

South Africa stands at a pivotal moment where its bail system must undergo fundamental reform to align with constitutional principles while safeguarding public safety. The current framework, marked by 'extraordinarily restrictive bail measures' introduced through the 1997 Criminal Procedure Second Amendment Act, has precipitated a constitutional crisis that demands urgent action. South Africa's approach to pre-trial detention has not enhanced public safety but has systematically undermined the constitutional values underpinning its democratic transition.⁶² The human cost of the current system is stark. The 'tough on crime' approach has contributed to extreme prison overcrowding, leading to an

⁵³ Windell Nortje and Shane Hull, "Uprooting a Culture of Gender-Based Violence in South Africa: Critical Approaches to Bail, Policing and Awareness," *Obiter* 45, no. 2 (2024): 295–309.

⁵⁴ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 48.

⁵⁵ Cash bail creates a two-tiered system of justice. It splits the criminal legal system into two separate and unequal processes: one for those who have money and one for those who do not.

⁵⁶ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 48.

⁵⁷ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 48.

⁵⁸ This goal is based on the promotion of peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.

⁵⁹ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative." 48.

⁶⁰ Nortje and Hull, "Uprooting a Culture of Gender-Based Violence in South Africa: Critical Approaches to Bail, Policing and Awareness." 53.

⁶¹ Marumoagae and Tshehla, "Right to Bail? Odds Stacked against the Accused Person in South African Bail Law."

⁶² Esther Steyn, "Pre-Trial Detention: Its Impact on Crime and Human Rights in South Africa," *Law, Democracy & Development* 4, no. 2 (2000): 209–20.

estimated 8,500 additional natural deaths in custody. Fewer people are tried and sentenced, while an increasing number are deprived of liberty without ever facing trial, a phenomenon described as an Alice in Wonderland effect, revealing the failure of the bail regime to serve either justice or public safety.⁶³

The constitutional dimensions of this failure are equally significant. The Constitutional Court has not consistently applied rigorous scrutiny under the limitations clause when evaluating bail restrictions in serious cases. Some scholars argue that these inconsistencies reflect a departure from the precision and rigor expected in rights-limitation assessments, thereby allowing unconstitutional restrictions to persist and undermining the principle that rights may be curtailed only when reasonable and justifiable in an open and democratic society.⁶⁴ The system also perpetuates historical inequalities. Poor defendants face disproportionately high detention rates, not because of risk or guilt, but because they cannot afford bail. The cash-based system, rather than remedying past marginalisation, reinforces economic discrimination, undermining the Constitution's promise of equality before the law.⁶⁵

Legislative safeguards are insufficient, and South African law lacks regular bail reviews and maximum-custody limits, allowing individuals to remain in detention indefinitely without meaningful judicial oversight. Unlike European and international standards, courts rarely interrogate the prosecution regarding ongoing detention, leaving a legislative vacuum that facilitates arbitrary imprisonment.⁶⁶ International evidence further challenges restrictive bail policies. In addition, the United States shows that cash bail and pretrial detention impose substantial economic harms on defendants, while providing minimal public safety benefits.⁶⁷ The marginal reduction in non-appearances does not justify the social and individual costs inflicted by the system.⁶⁸ Gender-based violence (GBV) cases highlight the system's failures most acutely. Despite measures to combat GBV, current bail practices remain insufficient, allowing perpetrators to secure release and reoffend. Reform must ensure protective measures do not become blanket restrictions that undermine constitutional rights.⁶⁹

In this regard, comprehensive reform is required across multiple dimensions. Automatic bail reviews should be mandatory and frequent to ensure detention decisions are regularly scrutinised. Economic inequality must be addressed through alternatives to cash bail, such as community supervision or non-monetary conditions. Clear maximum custody limits should ensure prolonged detention is justified only under compelling circumstances. Procedural safeguards must guarantee individualised assessment rather than categorical exclusion, with courts rigorously applying constitutional scrutiny to all bail decisions.⁷⁰

Comparative Lessons from Canada and India: Enhancing Judicial Oversight and Risk-Based Bail

Canada

Canada's bail system offers a compelling example of how targeted judicial reform can reshape pre-trial detention practices while balancing liberty and public safety. Reform efforts have sought to address a longstanding "culture of risk aversion" in the courts, which has historically relied heavily on sureties and undermined the objectives of the Bail Reform Act.⁷¹ Despite legislative protections, judicial reluctance to embrace risk-based decision-making has limited meaningful change, illustrating how formal legal frameworks can be constrained by entrenched court culture.⁷² Similar laws can produce

⁶³ Redpath, "Unsustainable and Unjust-Criminal Justice Policy and Remand Detention since 1994."

⁶⁴ Axam, "If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail. ."

⁶⁵ Mokoena and Lubaale, "Decolonising Prisons in South Africa. The Need for Effective Bail Affordability Inquiries."

⁶⁶ Ballard, "A Statute of Liberty? The Right to Bail and a Case for Legislative Reform. ."

⁶⁷ The cash bail system in the United States has been criticized for imposing substantial economic harms on defendants while providing minimal public safety benefits. Many individuals are jailed pretrial simply because they cannot afford cash bail, leading to a two-tiered justice system where those with financial means can be released while others face imprisonment. This system disproportionately affects low-income and marginalized communities, exacerbating racial disparities and reinforcing economic inequality. Critics argue that eliminating cash bail could lead to a more equitable pretrial justice system, as it would allow for a more flexible and risk-based approach to pretrial detention, focusing on public safety rather than financial means.

⁶⁸ Will Dobbie and Crystal S Yang, "The Us Pretrial System: Balancing Individual Rights and Public Interests," *Journal of Economic Perspectives* 35, no. 4 (2021): 49–70.

⁶⁹ Mansoor, "Guilty until Proven Guilty: Effective Bail Reform as a Human Rights Imperative."

⁷⁰ Axam, "If the Interests of Justice Permit: Individual Liberty, the Limitations Clause, and the Qualified Constitutional Right to Bail. ."

⁷¹ Marc Rosenberg et al., "To Ensure That Justice Is Done: Essays in Memory of Marc Rosenberg," (*No Title*), n.d.

⁷² Diana Catherine Grech, "Culture before Law? Comparing Bail Decision-Making in England and Canada" (University of Leeds, 2017).

different outcomes depending on broader criminal justice philosophies and judicial approaches. Canada's emphasis on individualised assessment represents a significant advancement, yet systemic biases persist. In this regard, moral character evaluations, often conducted by police or prosecutors, strongly influence bail outcomes. Accused persons with negative assessments are more likely to be detained, which contributes to racial disparities in pre-trial incarceration.

Moreover, detention is sometimes used strategically to encourage guilty pleas, while those released are more likely to have charges withdrawn.⁷³ These findings suggest that progressive legislation alone cannot eliminate the influence of informal and subjective factors in judicial decision-making. Canada's bail system shows how judicial reform can better balance liberty and public safety through individualised, risk-based assessments, despite persistent issues like risk-averse court culture and informal biases in decision-making. It highlights that legislation alone is not enough, as outcomes are also shaped by judicial attitudes and systemic practices. In general, South Africa can learn from Canada by strengthening structured, evidence-based bail assessments while addressing informal practices that may contribute to inconsistency and inequality in pre-trial detention decisions.

India

India's bail jurisprudence presents a more complex landscape where constitutional guarantees collide with practical shortcomings. Empirical research reveals that judges often import trial-stage considerations into pre-trial decisions, resulting in inconsistent adjudication and undermining the preventive purpose of bail. The lack of clear judicial guidance has produced ad hoc approaches that fail to protect liberty or address public safety effectively.⁷⁴ The over-incarceration of pre-trial detainees in India underscores how inadequate procedural frameworks and inconsistent judicial practices can frustrate even constitutionally progressive systems. Lastly, despite strong theoretical safeguards in India, practical implementation remains a challenge. Excessive criminalisation, inconsistent judicial practices, and insufficient institutional reform weaken the normative commitment to protecting individual rights.⁷⁵

Effective bail reform, therefore, requires aligning procedural safeguards with constitutional principles, comparative jurisprudence, and international human rights obligations to ensure that bail serves its protective function rather than punitive ends. India's bail jurisprudence reflects a gap between strong constitutional protections and weak practical implementation, with inconsistent judicial practices and unclear guidance leading to uneven bail decisions and over-incarceration of pre-trial detainees. It shows how procedural weaknesses can undermine both liberty and effective justice, even in a rights-based system. In general, South Africa can learn from India by strengthening clear judicial guidelines, improving consistency in bail decision-making, and ensuring that pre-trial detention is not used in a punitive manner but remains aligned with constitutional and human rights principles.

Discussion Summary

The discussion highlights that South Africa's arrest and bail system faces persistent challenges, including arbitrary arrests, excessive pre-trial detention, and inequitable bail practices that disproportionately affect vulnerable groups. Comparative insights from Canada and India show that risk-based assessments, stronger judicial oversight, and regular review of detention can improve fairness and efficiency. In this regard, these reforms require not only legislative amendments but also clearer guidelines, evidence-based tools, and better training for law enforcement and judicial officers to ensure constitutional rights are consistently upheld.

⁷³ Gail Kellough and Scot Wortley, "Remand for Plea. Bail Decisions and Plea Bargaining as Commensurate Decisions," *British Journal of Criminology* 42, no. 1 (2002): 186–210.

⁷⁴ Anup Surendranath and Gale Andrew, "Confused Purposes and Inconsistent Adjudication: An Assessment of Bail Decisions in Delhi's Courts," *Asian Journal of Comparative Law* 19, no. 2 (2024): 294–325.

⁷⁵ Muhammad Rizwan Tahir, Hafiz Muhammad Azeem, and Zubair Iqbal, "Reforming Post-Arrest Bail in Pakistan: Lessons from a Comparative Study with India," *Review of Education, Administration & Law* 7, no. 4 (2024): 235–52.

RECOMMENDATIONS

This study proposes the following recommendations:

- Arrest and bail reform in South Africa should move beyond formal legislative change by narrowing the use of arrest to cases where it is strictly necessary, strengthening risk-based rather than wealth-based bail assessments, and institutionalising regular judicial review of pre-trial detention to prevent prolonged and unjustified incarceration.
- Arrest should be used only where strictly necessary and supported by clear legal standards.
- Bail decisions must rely on risk assessments rather than an accused person's financial means.
- Regular judicial review of pre-trial detention should be mandatory to prevent undue incarceration.
- Ongoing training for police and judicial officers is essential to ensure rights-compliant and consistent practice.

CONCLUSION

The study presented exposes a South African bail system that is not merely inefficient but fundamentally at odds with constitutional democracy. For instance, reversed burdens of proof, wealth-based discrimination, arbitrary address requirements, lack of review mechanisms, and weak judicial oversight have created a regime that punishes poverty rather than upholds rights. These entrenched violations demand urgent, far-reaching reform. Without bold and comprehensive intervention, South Africa risks perpetuating a punitive and unequal system that undermines the foundations of democratic governance. The study further demonstrated that reform is both a legal and moral imperative. Addressing economic inequality, strengthening institutional accountability, and enforcing rigorous constitutional compliance can establish a bail system that genuinely balances individual liberty with public safety. The cost of maintaining the status quo, measured in lost lives, disrupted families, and eroded constitutional principles, far outweighs the challenges of meaningful reform. Comparative lessons from Canada and India illustrate that legislative reform alone is insufficient. Judicial culture, discretionary practices, and institutional oversight play a decisive role in pre-trial detention outcomes. Translating progressive legal frameworks into consistent and equitable practice requires a holistic approach. Risk assessment tools, procedural safeguards, and accountability mechanisms must operate together to ensure that bail serves its constitutional purpose rather than perpetuating inequality. Only through comprehensive, evidence-based reform can South Africa's bail system uphold the principles of justice, dignity, and equality. Such a transformation is essential not only to protect individual rights but also to restore public confidence and reinforce the integrity of the nation's constitutional democracy.

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