Transcending the 'One-Size-Fits-All' Approach in Law-Making

SPRF.IN

07
22

Twin Conditions Restricting Bail

| Nitika Khaitan

Issue Brief

TABLE OF CONTENTS

If you have any suggestions, or would like to contribute, please write to us at contact@sprf.in

July 2021

ISSUE BRIEF

Transcending the 'One-Size-Fits-All' Approach in Law-Making:

Twin Conditions Restricting Bail

| Nitika Khaitan

ABSTRACT

When confronted with complex challenges of law and order, governance, or social reform, Indian lawmakers routinely resort to enacting statutory provisions copied verbatim from previous laws. For example, the provision that imposes harsh conditions on bail is the same for the Narcotic Drugs and Psychotropic Substances Act of 1985 [NDPS Act], the Drugs and Cosmetics Act of 1940, and the Wildlife Protection Act of 1972. Lawmakers have exacted the provision despite the laws being diverse, both in subject area and time period.

The provision has sparked intense legal debate, given its constitutional ramifications and implications on personal liberty. It has been widely criticised for making pre- or under-trial bail near impossible, especially when over two-thirds of the prison population comprises those under trial. However, an interdisciplinary and comprehensive policy perspective is missing from the discourse. Most such analyses tend to focus only on one specific law, ignoring the effect of the same provision's presence in multiple laws.

The paper aims to explain the legal criticism of this provision and its impact on personal freedom and rights while also examining the stated legislative intentions of introducing it into various laws.

KEYWORDS: Bail, Criminal Justice, Legal Reform, Parliamentary Debates

INTRODUCTION

Indian headlines are dominated by news of high-profile bail cases that read 'Supreme Court junks bail plea in PMLA case,' or 'SC grants bail to UAPA undertrial in custody for 8 years, observing trial will take a long time.' Most such high-profile cases share a striking similarity: a near-identical and verbatim set of restrictions on bail. Such restrictions that govern these cases are reproduced across laws which criminalise offences ranging from drug possession to terrorist activity. These conditions also make release on bail extremely difficult, if not impossible, for undertrials. The circumstances, therefore, raise serious constitutional and human rights concerns, besides the question of what justifies the lengthy imprisonment of a person who has not yet been found guilty.

In general, long years in custody is a problem which plagues the entire criminal justice system. A striking 76% of India's prison population comprises prisoners still under trial who have not yet been convicted (National Crime Records Bureau, 2021, p. xi). However, enacting laws imposing special bail restrictions deserves focused consideration. Bail restrictions exacerbate existing problems in a deeply flawed system. Moreover, the same restrictions are replicated in response to diverse issues, with little consideration for how to tailor these restrictions to meet different ends.

The alarming ramifications of such standardised restrictions on bail have attracted little attention in public policy discourse. Policymakers have refrained from an in-depth quantitative or qualitative engagement with the bail regime, leaving the task up to legal practitioners and academics. Existing scholarship on bail tends to analyse the constitutionality or legal implications of developments in bail law (Bedi et al., 2019; Bhandari, 2013; Das, 2019; Dubey and Ranjan, 2021; Krishnaswamy et al., 2014; Ul Kubra, 2020). Moreover, it is directed at lawyers and courts, often devoid of an interdisciplinary or holistic perspective that can help formulate bail law and policy. The present discussion paper hopes to highlight the urgency of filling this void. The issue brief traces how this reproduction occurs without considering the cost of prolonging incarceration for unconvicted prisoners and concludes by recommending necessary steps for reform.

BAIL IN INDIA

Criminal offences in India are of two kinds: bailable and non-bailable. Anyone arrested under a bailable offence has the right to be released on bail under the Code of Criminal Procedure (1973a). However, in non-bailable offences, a court may grant bail to individuals if deemed fit, but it is not a right (Code of Criminal Procedure, 1973b). The Code of Criminal Procedure [Cr.P.C.] is the primary law governing the criminal investigation and trial process. It contains the basic bail provisions that apply to all offences. While these provisions do not lay down any criteria for courts to consider before granting bail, they list some important restrictions.

Magistrates' courts, the lowest level of criminal courts in India, are barred from granting bail to persons accused of offences punishable with death or imprisonment for life if there are "reasonable grounds for believing" the accused person is guilty of such an offence (ibid.). No such restrictions exist on higher levels of courts, namely, Sessions Courts, High Courts or the Supreme Court of India (Code of Criminal Procedure, 1973c).

The criteria governing the grant of bail are instead mentioned in judgments. These judgements lay down a non-exhaustive list of factors for courts to consider. These factors include the nature of allegations, the prior criminal record of the accused, stage of the investigation, mitigating personal factors, etc. (Gudikanti Narasimhulu and Others v. Public Prosecutor, 1978; Gurcharan Singh and Others v. State, 1978; Sanjay Chandra v. Central Bureau of Investigation, 2011). The Supreme Court has summarised the most important of these factors in the "triple test." It evaluates whether the accused person is likely to evade trial, tamper with evidence, or influence witnesses (P. Chidambaram v. Directorate of Enforcement, 2019). The underlying rationale is that since the accused is yet to be convicted of a crime, there is little justification for incarceration except to ensure that they will not abscond and interfere with a fair trial.

Yet, in practice, the denial of bail does not always reflect these narrowly tailored ends. There exist a plethora of judgments emphasising that bail should be the rule and jail the exception, which also mention the criteria under which courts should ordinarily grant bail (Court on its Own Motion v. Central Bureau of Investigation, 2004; Dataram Singh v. The State of Uttar Pradesh and Another, 2018; Gudikanti Narasimhulu and Others v. Public Prosecutor, 1978). However, this decision is ultimately left almost entirely to the discretion of the judge hearing the case. Judges' wide discretionary powers in adjudicating bails lead to widespread arbitrariness, exemplified by unequal access to courts. Access to courts and lawyers is costly. Hence, only a select few can afford multiple bail pleas and appeals to the High Court and Supreme Court if the lower courts deny bail. Moreover, delay in trials and convictions puts pressure on the police and prosecutors to over-arrest and push for the denial of bail to appear tough on crime. Court judgments on bail often reflect similar reasoning.

Such systemic issues with the bail regime in India raise grave concerns about protecting personal liberty. Laws on bail determine whether a person must suffer years of incarceration before they are found guilty. Hence, they assume importance in India, where trials may take several years to effectively start, let alone conclude.

However, neither the judiciary nor the legislature has noticed the severe concerns posed by the prolonged incarceration of undertrial persons or initiated the massive overhaul necessary to reform the bail regime. On the contrary, India has witnessed a proliferation of laws in the last few decades that impose special, additional restrictions on the grant of bail in the past few decades, as discussed in the next section.

SPECIAL RESTRICTIONS ON BAIL IN INDIA

The standard text of the clause that provides for these special restrictions on bail is found across laws including the Anti-Hijacking Act (2016), the Drugs and Cosmetics Act (1940), the Narcotic Drugs and Psychotropic Substances Act (1985), the Suppression of Unlawful Acts against Safety of Civil Aviation Act (1982), the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act (2002), and the Wild Life Protection Act (1972). The basic structure of this standard clause, found in all the above laws, reads as follows:

1. Notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable under this Act shall, if in custody, be released on bail or on his own bond unless

(a) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(b) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

2. The limitations on granting of bail as specified in sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973, or any other law for the time being in force, on granting of bail.

The first point's clause 'b' outlines the main issue in adjudicating bail hearings under these laws. The court must find "reasonable grounds for believing" that the accused person is not guilty of the alleged offence and that they are not likely to commit any offence while on bail (ibid.). These are collectively referred to as the 'twin conditions.'

At the very outset, the phrasing of this provision raises concerns. In contrast to the triple test's reasoning, the twin conditions concern themselves more with the truth of the allegations against the accused person and the likelihood of the accused committing crimes. In bail hearings, courts are supposed to refrain from delving deep into the merits of the case to avoid prejudicing the trial. But under laws containing the twin conditions, courts must examine the allegations deeply enough to determine whether the accused person is guilty while not delving too deeply into the merits. Criminal trials involve elaborate procedures with respect to evidence, oral testimony etc., precisely because determining the truth of allegations against a person is a weighty and complex endeavour. Bail hearings under the twin conditions provide for none of these evidentiary safeguards yet entail some kind of determination of the guilt of the accused. As for the second of the twin conditions, there is a danger of inevitable subjectivity in a court concluding whether an accused will commit an offence while on bail.

Moreover, as emphasised in (2) of the standard clause, the twin conditions override provisions in the Cr.P.C. on bail. The Cr.P.C. mandates the release of under-trial prisoners if they have been incarcerated for half of the maximum term of imprisonment for their alleged offence, except in case of offences punishable with death. But since the twin conditions override the Cr.P.C., persons accused under laws containing these conditions can spend all or even more than the maximum possible sentence they could receive, even before conviction.

Worryingly, these twin conditions have been inserted into an increasing number of laws over the years. For instance, in 1981, additional restrictions on bail were inserted into the Essential Commodities Act (1955). These restrictions, inserted by way of an amendment, contained the first of the twin conditions and otherwise mimicked the standard text clause. During the parliamentary debates over the amendment, certain members raised concerns that even relatively minor offences under the Act were being made non-bailable (Lok Sabha Debates, 1981a). They questioned whether the amendment would succeed in bringing down black marketing. In response, Brajamohan Mohanty, the Deputy Minister in the Ministry of Civil Supplies, the Ministry responsible for introducing the amendment, said that even offences criminalising theft had not succeeded in bringing down theft over the years. Still, the government needed the power to "immediately punish" those indulging in black-marketing for it to serve as a societal deterrent (Lok Sabha Debates, 1981b).

This response completely neglected that such severe bail restrictions did not apply to offences such as theft and hence needed supplementary justifications. Additionally, it conflated the denial of bail with punishment. The latter can only legitimately be inflicted once a person has been convicted. Moreover, while introducing the amendment, the Civil Supplies Minister Rao Birendra Singh glossed over the harshness of the restrictions that the amendment was introducing. He stated, "the Special Courts will be able to give bail if they find there is a case for bail… [and] it is not difficult for anybody to approach [the] High Court for bail. So, there is nothing harsh about [the bail restriction]" (Lok Sabha Debates, 1981c). There was little to no discussion on the severe limitation placed on the Special Court's power to grant bail or that socio-economic factors severely limited many people's access to the High Court.

The amendment to the Essential Commodities Act, 1955 in 1981 was temporary, meant to last only 5 years. The twin conditions were meant to be temporary even when they appeared in the Terrorist and Disruptive Activities (Prevention) Act, 1987 [TADA]. TADA was enacted with a sunset clause, which would lapse unless renewed by the Parliament within a certain period. TADA was enacted as a temporary measure. The government recognised that the Act's provisions were fairly harsh and justified imposing such extraordinary provisions because the country was facing extraordinary threats by insurgents in the 1980's in several areas.

But within a few years, such harsh provisions appeared as permanent measures in other laws. The Narcotic Drugs and Psychotropic Substances Act (1985) [NDPS] was amended in 1989, and the twin conditions were made applicable to certain grave offences under the Act. The 1989 NDPS Amendment Act made several other significant changes to the law. A few of them were introducing the death penalty for certain offences, setting up special courts to try NDPS offences, and providing drug users one chance for immunity from prosecution if they volunteered to undertake deaddiction treatment. The debate over these changes dominated discussion in Parliament, and hence the amendments to bail under the NDPS Act received little attention (Lok Sabha Debates, 1988a). The amendment was passed with barely any discussion of the twin conditions, except a passing justification by the Minister of State in the Department of Revenue, A.K. Panja, that the bail restrictions were necessary as "drug traffickers often succeed in obtaining bail on minor grounds" (Lok Sabha Debates, 1988b).

In subsequent years, the twin conditions were similarly inserted in 1994 into the Anti-Hijacking Act of 1982, the Suppression of Unlawful Acts against Safety of Civil Aviation Act of 1982, the Wildlife Protection Act of 1972, the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act of 2002, and the Drugs and Cosmetics Act of 1940. While TADA had lapsed in 1995 amidst criticism of its widespread misuse, the twin conditions were revived in its successor, the Prevention of Terrorism Act, 2002 [POTA], in a slightly modified form.

Legislative debates over POTA saw a deeper discussion over these bail restrictions than most other laws. Several Members of Parliament raised concerns that the bail provision required courts to prejudge the innocence of an accused person before trial (Lok Sabha Debates, 2002). In response, the Minister of Law, Justice and Company Affairs, Arun Jaitley, invoked the presence of harsh bail restrictions in laws meant to combat "drug smugglers" and "black-marketers and hoarders" to justify its presence in a law meant to prosecute terrorists. He asked rhetorically whether one was to be "so innocent and gullible to assume that if any one of them [terrorists who attacked Parliament on 13.12.2001] who is ready to give his own life, has the luxury of being released on bail, he is going to come back and respect our judicial process and appear in courts?" (ibid.). The Law Minister thus invoked the spectre of terrorism to justify the bail restrictions. He also omitted the issues inherent in prejudging an accused person as a terrorist and sidelined that TADA had been repealed over criti-

cism of the misuse of essentially the same provisions that were being brought back through POTA (ibid.).

Like TADA, POTA had a sunset clause and was meant to be temporary. However, after it was repealed in 2004, the bail restrictions contained in POTA were made even more stringent and made permanent by amending the Unlawful Activities (Prevention) Act of 1967, which remains to this day.

CONCLUSION

The legislative history of the twin conditions shows that they have been replicated across statutes with little consideration, cost-benefit analysis, or monitoring of their effectiveness in statutes where they were previously introduced. In most of these laws, the mere gravity of the offence is treated as adequate justification for such harsh bail restrictions. Despite bail gravely and fundamentally impacting a citizen's personal liberty, lawmakers have not paid adequate attention to whether such restrictions achieve the purposes of the statutes in which they have been introduced.

In the absence of large-scale empirical studies tracking the effect of such special bail restrictions on prisoners, court orders reveal the brutally long periods of incarceration that undertrial prisoners must endure. Periods of incarceration are often measured in years, sometimes even more than a decade. Though such court orders reflect the fundamental problems with special bail restrictions, courts have generally refrained from striking these provisions down or amending them. At most, courts have passed one-time orders directing undertrial prisoners to be released in a 1994 decision on the NDPS Act and a 1996 decision on TADA. The courts recognised that bail restrictions lead to unduly long incarceration and infringe on the fundamental right to personal liberty guaranteed under Article 21. But they also simultaneously clarified that their one-time orders would not affect future cases under these laws.

Given the reluctance of courts to enact much-needed systemic change concerning special restrictions on bail, there is a need for greater advocacy towards legal reform in the public policy and legislative spheres. As a first step, empirical studies are needed to examine the implications of special bail restrictions on undertrial prison populations and the length of their incarceration. Interdisciplinary work is essential to map the potential penological purposes that restrictions on bail are meant to serve. Qualitative studies are needed to understand from judges, criminal defence lawyers, prosecutors, and accused persons whether these purposes are being served. Lastly, research incorporating comparative law and international perspectives is necessary to evolve suitable recommendations for large-scale reform that can be proposed in appropriate forums of law and policy-making. Such work is the need of the hour to ensure that bail can serve as a cornerstone of a fair and just criminal administration.

BIBLIOGRAPHY

The Anti-Hijacking Act, Act No. 32 of 2016, §12, (2016). https://www.indiacode.nic.in/bitstream/123456789/2149/3/a2016--30.pdf

Bedi, S., Khurshid, S., Luthra, S. & Malik, L. (Eds.). (2019). *Taking Bail Seriously - The State of Bail Jurisprudence in India.* Lexis Nexis.

Bhandari, V. (2013). Inconsistent and unclear: The Supreme Court of India on bail. *NUJS Law Review*, 6(3), 549–558.

Code of Criminal Procedure, Act No. 2 of 1974, §436, (1973a). https://www.indiacode.nic.in/bitstream/123456789/16225/1/a1974-02.pdf.

Code of Criminal Procedure, Act No. 2 of 1974, §437, (1973b). https://www.indiacode.nic.in/bitstream/123456789/16225/1/a1974-02.pdf.

Code of Criminal Procedure, Act No. 2 of 1974, §439, (1973c). https://www.indiacode.nic.in/bitstream/123456789/16225/1/a1974-02.pdf.

Court on its Own Motion v. Central Bureau of Investigation, 2004 (72) DRJ 629 (2004).

Das, P. (2019). Detailed Study of Bail in India. *LexForti Legal Journal,* 1(1), 20–30.

Dataram Singh v. The State of Uttar Pradesh and Another, 2018, 3 SCC 22 (2018).

The Drugs and Cosmetics Act, Act No. 23 of 1940, §36AC(b), (1940). https://www.indiacode.nic.in/bitstream/123456789/2409/1/a1940-23.pdf

Dubey, S., & Ranjan, P. (2021). Revisiting the Efficacy of Bail Provisions in India: Empirical Exercise to Assess the Ground Realities of Bail Jurisprudence. *Supremo Amicus*, 24, 1115–1128.

The Essential Commodities Act, act no. 10 of 1955, §12AA (now repealed), (1955). https://www.indiacode.nic.in/bitstream/123456789/1579/1/A1955__10.pdf.

Gudikanti Narasimhulu and Others v. Public Prosecutor, AIR 429, SCR (2) 371 (1978).

Gurcharan Singh and Others v. State (Delhi Administration), AIR 179, SCR (2) 358, (1978).

Krishnaswamy, S., K Sivakumar, S., & Bail, S. (2014). Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches. *Journal of National Law University Delhi*, 2(1), 1–25. https://doi.org/10.1177/2277401720140101.

Lok Sabha Debates. (1981a, August 25). Lok Sabha Debates (Sixth Session). Vol 3 cc. 336. https://eparlib.nic.in/bitstream/123456789/1436/1/lsd_07_06_25-08-1981.pdf.

Lok Sabha Debates. (1981b, August 25). Lok Sabha Debates (Sixth Session). Vol 3 cc. 317. https://eparlib.nic.in/bitstream/123456789/1436/1/lsd_07_06_25-08-1981.pdf.

Lok Sabha Debates. (1981c, August 19). Lok Sabha Debates (Sixth Session). Vol 28 cc. 395. https://eparlib.nic.in/bitstream/123456789/692/1/lsd_07_06_19-08-1981.pdf.

Lok Sabha Debates. (1988a, December 16). Lok Sabha Debates (Twelfth Session). Vol 45 No. 24 cc. 42-125. https://eparlib.nic.in/bitstream/123456789/370/1/lsd_08_12_16-12-1988.pdf.

Lok Sabha Debates. (1988b, December 16). Lok Sabha Debates (Twelfth Session). Vol 45 No. 24 cc. 43-44. https://eparlib.nic.in/bitstream/123456789/370/1/lsd_08_12_16-12-1988.pdf.

Lok Sabha Debates. (2002, March 18). *Combined discussion on Statutory Resolution regarding Disapproval of Prevention of Terrorism (Second) Ordinance (Resolution negatived) and Prevention of Terrorism Bill, 2002 (Bill passed).* Government of India. https://eparlib.nic.in/bitstream/123456789/712948/1/3791.pdf

The Narcotic Drugs and Psychotropic Substances Act, Act. No. 61 of 1985, §37, (1985). https://www.indiacode.nic.in/bitstream/123456789/1791/1/A1985-61.pdf.

National Crime Records Bureau. (2021). *Prison Statistics India 2020.* Ministry of Home Affairs. https://ncrb.gov.in/sites/default/files/PSI_2020_as_on_27-12-2021_0.pdf.

P. Chidambaram v. Directorate of Enforcement, 2020 13 SCC 791 (2019).

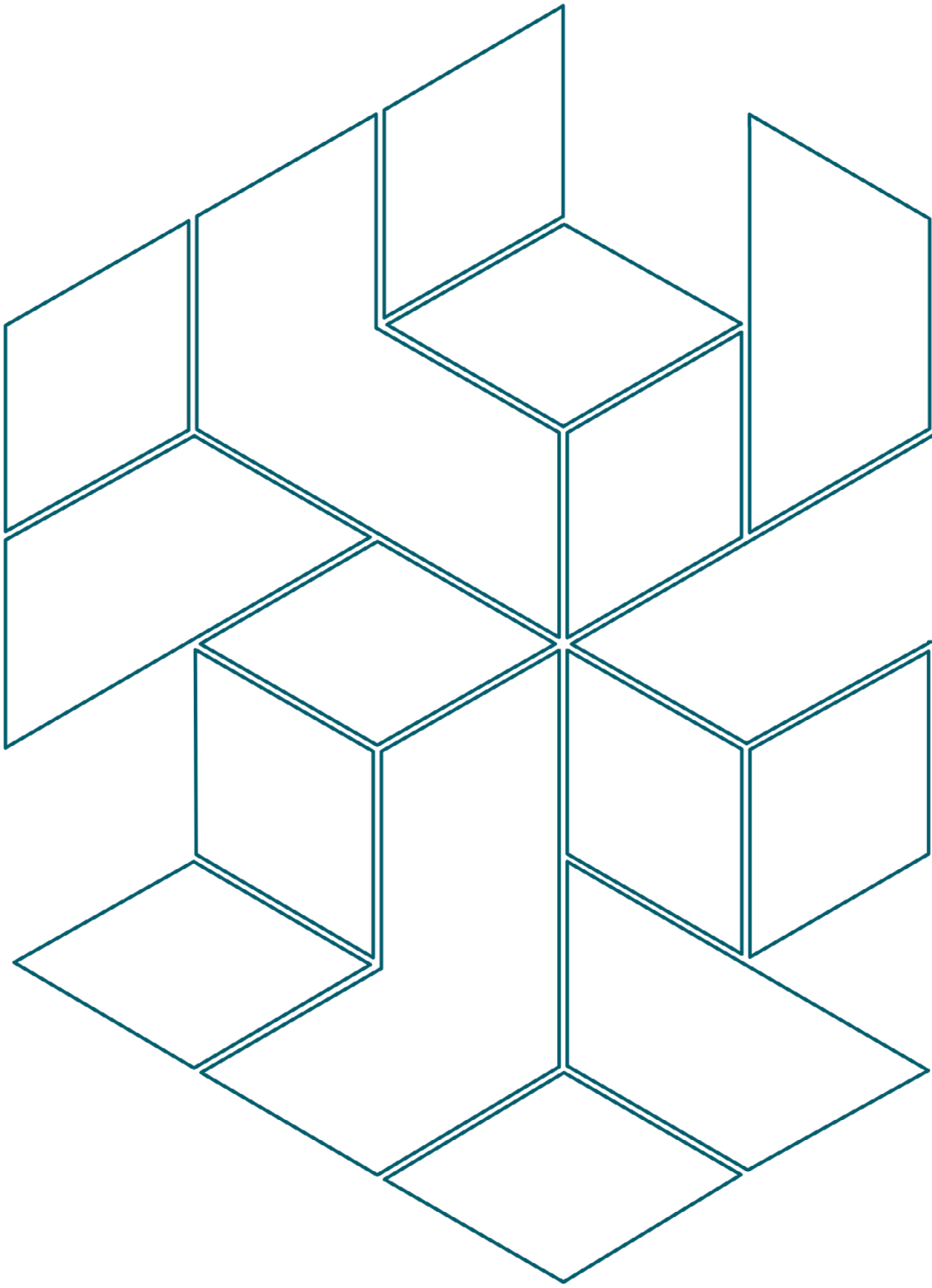
Sanjay Chandra v. Central Bureau of Investigation, 2012 1 SCC 14 (2011).

The Suppression of Unlawful Acts against Safety of Civil Aviation Act, Act No. 66 of 1982, §6A, (1982). https://www.indiacode.nic.in/bitstream/123456789/1795/3/A1982-66.pdf.

The Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, Act No. 69 of 2002, §8, (2002). https://www.indiacode.nic.in/bitstream/123456789/2009/1/A2002-69.pdf.

Ul Kubra, Z. (2020). To Bail or Not to Bail. *Jus Corpus Law Journal*, 1(1), 84–89.

The Wildlife Protection Act, Act. No. 53 of 1972, §51A, (1972).



SPRF.IN