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Reforming Pre-Arrest Bail in Pakistan: Lessons from India

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ABSTRACT

This paper compares the legal frameworks governing pre-arrest bail (PAB) in Pakistan and India. It has focused on the statutory provisions, judicial interpretations, and procedural practices that have shaped its application in both countries. PAB is part and parcel of liberty and fair trial. The evolution of PAB in Pakistan and India has diverged considerably despite their shared colonial heritage and similarities in procedural laws. This study examines the key trends in its evolution and similarities and differences in the administration of PAB. It explores how these frameworks are impacting the rights to liberty and justice. This research identifies areas where the Pakistani Criminal Procedure Code (CrPC) needs amendments by thoroughly analyzing relevant legal provisions and landmark case laws. In the end, this paper proposes specific amendments for the CrPC of Pakistan to align it with contemporary legal standards and best practices observed in India. The study contributes to the ongoing discourse on bail reforms. It offers valuable insights that could enhance the protection of individual rights and ensure the effective administration of justice in both nations.



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1. Introduction

The concept of bail arises from the fundamental principle of the criminal justice system (CJS), which is due process or by law. This legal doctrine guarantees that persons accused of crimes are entitled to fair treatment. It also ensures that the presumption of innocence, until proven guilty, will remain attached to them throughout the process. The bail in this process serves as an independent mechanism that ensures that accused persons remain present for their trial at the same time as they preserve their liberty. By permitting them to have pretrial release under certain conditions, the concept of bail helps them save themselves from being innocent of unjust incarceration. It ensures that they have a fair opportunity to defend themselves (Carroll, 2020). However, it is also true that the issue of bail versus incarceration in India and Pakistan has consequences that have deep roots in their colonial past, where even for minor charges, people were often led to imprisonment by their colonial authorities. This practice became ingrained in the law enforcement systems of both countries. This has now evolved into a common aspect of criminal investigations. Historically, accused individuals could be subjected to torture or coercion while in custody for various reasons, including forcing a confession, fabricating evidence, refusing to pay bribes or personal vendettas. Sometimes, the mere display of power and authority led to such abuses. But this is not possible now after independence. Although the social context, relationships, and crime patterns have evolved over the past few decades, and the arbitrariness in using judicial discretion in the subjects of bail has reduced in both countries, yet the fundamental issues remain relevant (Narula & Mukerji, 2020).

The concept of bail is also recognized in various international covenants and human rights instruments. For example, the International Covenant on Civil and Political Rights (ICCPR) in Article 9(3) emphasizes that detention should not be the norm for the accused awaiting trial. In contrast, release, being an option, should be available under specific guarantees to appear in court. Similarly, Article 10(2)(a) of the ICCPR asserts that accused persons should not be treated the same as convicts (Mairaj et al., 2024). Furthermore, scholars argue that the legal foundation of bail is rooted in the concept of liberty. Constitutional provisions extend this protection to pre-trial arrest and custody.

Consequently, courts must handle any pre-trial detention method with extra caution and sensitivity. Although the law recognizes the powers of arrest, these powers must never be exercised arbitrarily. An arrest should only be justified when there is prima facie evidence, in addition to sufficient actionable material that directly links the accused with the alleged crime, and when no less invasive alternatives are available (Mehmood et al., 2024).

Prevention of the misuse of arrest is vital, particularly when it could be used as a tool for oppression or harassment. Internationally recognized best practices demand substantial implicating evidence to allow justification of deprivation of someone's liberty. Arbitrary use of arrest and the powers which will enable it constitutes an abuse of the same (Sultan et al., 2024). In this context, the constitutional provisions, Article 14(2) of the Indian Constitution, fundamentally ensure the availability of presumption of innocence until proven guilty to all accused persons, and it also places the burden of proof on the prosecution; hence, it safeguards the accused from pre-judgment. This norm underscores the need for an unbiased trial for all. In Pakistan, the Constitution similarly upholds personal liberty under Article 9 and guarantees the right to a fair trial under Article 10-A (Mairaj et al., 2024).

Furthermore, the examination of the legal frameworks of India and Pakistan reveals that their respective Codes of Criminal Procedure (CrPC) also mandate that an arrested person should not be subjected to unnecessary restraint beyond what is required to prevent his or her escape. CrPC of both countries emphasizes personal liberty and the rule of law, which are central to their criminal justice systems (CJS). The cornerstone of this CJS in both countries is the presumption of innocence. This principle directly influences the debate over whether an accused individual should be granted bail during the pendency of

his or her trial (Raifeartaigh, 1997). Yet it is essential to understand that the issue of liberty transcends CrPC. It is a guaranteed right to every individual in both nations. This right underscores the importance of bail in CJS. Though the presumption of innocence supports the right to bail during the pendency of the trial, certain compelling circumstances may justify the denial of bail to ensure a fair trial for the complainant party and protect social interests. Thus, the challenge remains in finding a delicate balance between liberty and incarceration (Qasem, 1952).

Pre-arrest bail (PAB) is one of the most essential types of bail. It is a legal protection that permits an accused of a crime who anticipates being arrested to seek bail before any actual arrest occurs. The primary purpose of this type of bail is to secure the release in advance (Mehmood et al., 2024). However, it is essential to note that procurement of PAB does not stop law enforcement agencies from interrogations or investigations related to the alleged offenses. In practical terms, if someone believes that he or she is at risk of being arrested for a non-bailable offense, then he or she can apply for PAB from the Courts. The key reason for introducing PAB is to safeguard innocent individuals and ensure that they are not subjected to unnecessary humiliation or mistreatment, especially in situations where influential persons might misuse the legal system to accuse their rivals falsely (Danjuma & Barau, 2024).

2. Research Objectives

The primary objective of this study is to conduct a thorough analysis of the legal frameworks governing PAB in Pakistan and India to gain insights through comparison. By examining the relevant statutes, judicial interpretations, and procedural practices in both countries, this study aims to identify and highlight key trends, similarities, and differences in how PAB is applied. Based on this analysis, this study aims to propose amendments to the CrPC of Pakistan, which has remained primarily unchanged since the pre-independence era.

3. Research Questions

- I. What are the essential legal provisions and their judicial interpretations governing PAB in Pakistan and India?
- II. How do the legal frameworks in both countries impact the decision to grant or deny PAB?
- III. What similarities and differences exist in the application of PAB between Pakistan and India?
- IV. What specific amendments could be proposed in Pakistan's CrPC to modernize its approach towards PAB, considering its comparative analysis with India?

4. Research Methodology

This study has adopted a comparative legal research methodology to analyze the frameworks that govern PAB in Pakistan and India. The study has involved an in-depth examination of both countries' statutory provisions, case laws, and judicial interpretations. A qualitative approach has been employed while focusing on the critical analysis of relevant legal texts: the CrPC of Pakistan. This study has also incorporated a review of prevailing literature, including academic articles, legal commentaries, books, and reports, to contextualize the legal analysis. Through this methodology, this study has identified key trends, similarities, and differences that have informed the proposed amendments in the CrPC of Pakistan. This methodology has ensured a comprehensive comprehension of the subject matter and enabled us to offer well-grounded recommendations for legal reforms relating to PAB in CJS of Pakistan.

5. Legal Frameworks Governing Pre-Arrest Bail

Initially, the bail law in Pakistan and India shared the same foundations. It stemmed from their common colonial legal legacy. However, India took steps to amend its bail laws, mainly through provisions like PAB, after recognizing the evolving needs of justice and the importance of caring for individual rights. These amendments reflect Indian responsiveness towards contemporary legal challenges. In contrast, Pakistan has lagged in modernizing its bail laws, since the pre-independence era, leading to rising calls for reforms.

5.1 Indian Experience

The law of bail in India is codified under Chapter XXXIII of CrPC. This chapter covers various aspects related to bail and bonds. It depends on sections 436 to 450. However, Section 438 is the relevant section for our subject. It provides for PAB.

Furthermore, Section 439 provides the extraordinary powers of the High Court or Court of Session regarding bail. The Indian legal framework for bail aims to balance the rights of the accused with the need for public safety. The administration of justice ensures that bail is neither denied arbitrarily nor granted without due consideration of the circumstances of each case independently (Danjuma & Barau, 2024).

In Indian jurisprudence, the term "anticipatory bail" is commonly used to refer to PAB, similar to the concept of PAB in Pakistan. Although this term is not explicitly mentioned in the relevant section of the law, however, researchers found its usage dates back to when the idea was first introduced by the Law Commission of India in its 41st Report (Bhattacharya, 2016). The Commission suggested permitting a person to be released on PAB, which became popularly known as "anticipatory bail" (Kumar, 2021). The commission observed that despite there was some judicial disagreement on whether courts had the authority to grant such bail under the prevailing provisions, the dominant view was that this power did not exist (Narula & Mukerji, 2020, p. 55); therefore, it led to an amendment in the Indian CrPC to include comprehensive provisions for PAB in 1973 (*Gurbaksh Singh Sibbia v. State of Punjab 1980*). Pakistan has no such provision.

The Supreme Court of India has repeatedly criticized the ongoing practice of vexatious arrests. It noted that the police force has struggled to shed its colonial legacy after decades of independence. The Court observed that the police are often perceived as instruments of harassment and oppression rather than protection for the public. Despite repeated judicial warnings about the need to exercise their powers with caution, these admonitions have largely gone unheeded (*Arnesh Kumar v. State of Bihar 2014*). Therefore, the PAB concept is vital in the jurisprudence of CJS. The court, thus, stressed the importance of avoiding unnecessary restrictions on the scope of PAB. As a procedural provision, PAB is closely tied to the concept of personal liberty of the individual and also with the norm of presumption of innocence since that person has not been convicted of the offense when he is seeking bail. The right to personal freedom should not be contingent upon unreasonable restrictions (*Gurbaksh Singh Sibbia v. State of Punjab 1980*).

The Supreme Court reaffirmed the above judgment later on in its various decisions. The Court emphasized that the safeguards against the misuse of PAB were already embedded within the law itself. Specifically, the provision that the Public Prosecutor must be given a reasonable opportunity to be heard after the grant of interim anticipatory bail before it is regularized into a full-fledged anticipatory bail by the court serves as a vital check on its potential misuse (*Siddharam Satlingappa Mhetre v. State Of Maharashtra 2011*). PAB refers to the power of a court to command the liberation on bail of a person before detention. This power is not anticipatory in the sense of bail before a detention has occurred; rather, it is a preventive measure designed to protect persons from wrongful arrest or harassment (DEVINE, 1990). The court

exercises this power in exceptional cases, where there is a reasonable belief of falsely implicated, a frivolous case, or an unlikelihood of abscission or misuse of liberty if released on bail. This extraordinary power is vested only in the higher courts, i.e., the Court of Session and the High Court. It can be used in cases of anticipated accusations of non-bailable offenses (*Balachand Jain v. State of M.P. 1977*).

5.1.1 Factors to be Considered in PAB

When dealing with a PAB application, courts must thoroughly evaluate all the material evidence against the accused: they must pay close attention to the specific role they are alleged to have played in the case. Further, the nature and seriousness of the charges and the involvement should be clearly understood before PAB is made. The court should also measure the likelihood of the accused absconding chances from justice: it can analyze their past criminal record, particularly if they have previously been convicted. The possibility that the accused might repeat similar or other crimes should also be considered. Moreover, the court must consider the risk of meddling or interfering with witnesses, intimidating the complainant party, etc. In determining PAB, the balance must be between a free, fair, and thorough investigation and preventing undue harassment, humiliation, or unwarranted detention. It is also essential to consider whether the accusations are made with the intent of damaging or embarrassing the accused through detention. Furthermore, the broader impact of PAB, especially in cases of substantial magnitude that might affect many people, should also be considered (Narula & Mukerji, 2020).

5.2 Pakistani Experience

The CrPC remains primarily unchanged in Pakistan compared to India's updated version. Chapter XIX talks about bail. Section 498, though, provides explicitly the power to direct the admission to bail or the reduction of bail; however, it is utilized for PAB in our country (Mughal, 2011). Additionally, Section 498A is also pertinent to our discussion.

Although the law for determining bail applications, whether PAB or post-arrest, has been clearly defined over the last decade by numerous High Court and Supreme Court case laws, e.g., tentative assessment rather than a deeper evaluation (Zahoor et al., 2022a). However, the use of Section 498 for pre-arrest bail remains unsettled, even though legal precedents support the interpretation that this provision grants courts the power to grant PAB. Even the court observed that PAB in a cognizable and non-bail offense is an extraordinary judicial intervention in an ongoing or imminent investigative process. It clogs the very mechanics of State authority to investigate and prosecute violations of law designated as crimes. To prevent the arrest of an accused where it is so required by law is a measure with far-reaching consequences that may include loss or disappearance of evidence. The statute does not contemplate such a remedy, and it was judicially introduced in 1949 (*Ghulam Farooq Channa v. The Special Judge ACE (Central-I) Karachi & another 2020*).

5.2.1 Evolution of PAB in Pakistan

In 1949, the interpretation of the powers granted under Section 498 of the CrPC was questioned for the first time. Before that, in the *Jairam Das* case, the Privy Council had ruled that Chapter XIX of the Code, along with Section 426, provided a comprehensive and exhaustive statement of the High Court's authority to grant bail and that the court had no inherent power beyond what was specified in these sections (*Jairam Das and others v. King Emperor 1945*). In this context, a reference was made to a Full Bench of the Lahore High Court to interpret Section 498 and determine whether that Court could grant relief to someone as of PAB. The primary argument of the Crown was that Sections 496 and 497 of the CrPC referred only to those who appear before the court in response to a summons. They contended that bail could only be granted to release someone from custody, whether actual or imminent. The Full Bench agreed that a voluntary appearance before the court does not give the court the authority to take the person into custody to grant bail. However, the court rejected the rest of the Crown's argument. Justice Cornelius, who was

speaking for the court, explained that the wording in Section 498, which supplements Sections 496 and 497, suggests that the High Court has the power to review decisions by public officers and lower courts that have denied bail, particularly in cases specified in Section 497. This includes situations where bail is denied to individuals who are not minors, females, or sick/infirm and against whom there is reasonable cause to believe they have committed an offense punishable by death or life imprisonment. Furthermore, the Full Bench noted the significance of the phrase "admitted to bail" in Section 498 instead of "released on bail" in Sections 496 and 497 (*Malik Tariq Hanif Awan v. The State 2020*).

However, In the Khushi Muhammad case, the superior court overturned the earlier ruling. They observed that although the legislature had used different terminologies in Sections 497 and 498, the court found them synonymous. The court further clarified that the concept of "bail" implies the release of an individual from police custody and, after that, their delivery into the custody of sureties; those are then considered responsible for the appearance of that person in court when required. The court held that Section 498 does not expand the categories of eligible persons for bail. Consequently, this section cannot grant bail to someone unless he or she is already in actual custody or is facing an imminent threat of restraint under a warrant of arrest.

Moreover, the court also noted that the powers under Section 498 are not merely revisional but are concurrent with those of the court of first instance (*The Crown v. Khushi Muhammad 1953*). But, in a subsequent case, the court reaffirmed the reasoning of the Hidayat Ullah case while stating that, in principle, there appeared to be no distinction between an individual against whom a warrant of arrest had been issued and one who was on the verge of being arrested by the police without a warrant unless the court intervened. The court further noted that though the certainty of arrest in the case of a warrant served as the basis for exercising the power of bail, the inevitability of such an arrest could be considered equivalent to actual restraint or custody (*Sadiq Ali v. The State 1966*).

After that, a five-member larger bench once again revisited the scope of Section 498 in another case. The majority opinion held that this provision has two key limitations: firstly, it only applies to the accused and not to those already convicted of an offense, and secondly, in non-bailable crimes, it is limited to the categories of persons envisioned by Section 497. Sections 496 and 497 allow the court to grant bail only if the individual is in actual custody, appears in response to a court process, or is brought before the court by the police or by another authority. On the other hand, Section 498 can be invoked by the Court of Session and the High Court, even when the court is not directly conducting the proceedings in question and where an arrest has not yet been made. That is why it is PAB and requested during an ongoing police investigation. Accordingly, the power to allow PAB is restricted to the High Court and the Court of Session, exclusive of other courts from its purview (*Muhammad Ayub v. Muhammad Yaqub and another 1966*).

5.2.2 Factors to be Considered in PAB

The courts have now settled the norms for the permission of PAB. They considered it an extraordinary relief. This relief required exceptional circumstances. PAB is designed to protect the liberty of the innocent because some cases in our countries are lodged with malafide intentions. However, despite this, the parties applying for PAB have to satisfy the courts the requirement of section 497 besides 498 CrPC: this is the existence of reasonable grounds to confide that he is not guilty of the crime alleged against him or her and that the case is one of further inquiry (*Ahtisham Ali v. The State 2023*).

Further, the courts observed that extraordinary relief in criminal jurisprudence is a diversion of the usual course of law, i.e., arrest. It protects the innocent being hounded on trumped-up charges through abuse of process of law. Therefore, one seeking judicial protection under the cover of PAB is required to reasonably demonstrate that the intended arrest is calculated to humiliate him with taints of Malafide. Moreover, it cannot be used in every run-of-the-mill criminal case because it hampers the course of the investigation

(*Rana Abdul Khaliq v. The State 2019*).

The courts have summarized the framework and guidelines to exercise the jurisdiction vested in section 498 CrPC. In appropriate cases, the competent court has the authority under the law to order that a person suspected of an offense and who may be subject to arrest by a police officer or court be granted PAB. However, this power should be limited to situations where there is not only a solid prima facie case for it with an additional requirement that if the petitioner were to be arrested and denied PAB, then such an action would likely be motivated by factors other than the pursuit of justice, such as ulterior motives, which are aimed at harming the petitioner, or which are aimed at causing them irreparable harm.

The guidelines for exercising this jurisdiction include:

- I. PAB is an extraordinary remedy. It is reserved for exceptional circumstances to protect innocent individuals from victimization through the misuse of legal procedures for ulterior motives;
- II. PAB should not be used as a replacement or alternative for other bails;
- III. PAB cannot be approved unless the petitioner meets the conditions described by provision 497 of CrPC. Specifically, it includes the demonstration of reasonable grounds to accept as accurate that they are not guilty of the alleged crime and that there are adequate grounds for further inquiry into their responsibility;
- IV. Additionally, the petitioner must demonstrate that their arrest is being sought for ulterior motives, particularly by the police, to cause irreparable humiliation, disgrace, or dishonor;
- V. The petitioner should also prove that they have not engaged in any performance that would debar them from getting discretionary relief, such as preceding criminal record or being a fugitive from the law;
- VI. Finally, except in the absence of reasonable and justifiable cause, a person seeking PAB should first approach the Court of Session, that is, the court of first instance, before petitioning the High Court for this purpose (*Rana M. Arshad v. M. Rafique 2009*).

6 Comparative Analysis

The unique aspects of the Indian legal framework for PAB include: (i) the applicant does not need to be an accused person; (ii) there is no requirement for the applicant to be brought before the court, nor is their appearance a prerequisite; they can apply without being physically present; (iii) the applicant is not required to surrender to the court with physical control or to submit to its custody; (iv) the application must be for PAB in anticipation of arrest, meaning thereby that once the individual is arrested, an application under PAB is no longer valid; and (v) the court cannot order immediate release on bail but can only direct that the applicant should be released on bail if and when arrested (Dhamija, 2009, p. 326). In the Pakistani framework, he is required to be an accused and appear physically before the court (*Shazaib and other v. The State 2021*). It is a mandatory requirement (*Abid Farooq v. The FOP 2023*).

Despite the differences, there are some similarities in the application of PAB in India and Pakistan, especially when considering its impact on the CJS. In both countries, it has been observed that granting PAB is regarded as the general rule, whereas refusal is the exception. Economic offenses, even though they carry minimum punishments compared to other crimes, are considered severe (*P. Chidambaram v. The Directorate of Enforcement 2019*). For instance, gas theft is regarded as a serious crime (*Zahir Shah v. The State 2017*). However, there is no absolute rule for PAB in such cases. Eventually, the decision to allow PAB must be made case-by-case (*Rajab v. The State 1992*). For this, the accusation's nature, the punishment's potential severity upon conviction, and the available evidence must be considered. Additionally, the court must consider the reasonable possibility of interference in evidence and witnesses or the chances of threats to the complainant party. Above all, preliminary satisfaction with the charges

that have been forwarded to court is required.

6. Recommendations for Reforms

To tackle the ongoing legal issues surrounding the interpretation and application of PAB under Section 498 of the CrPC in Pakistan, it is imperative to recognize the harm caused to petitioners due to misconceptions about the scope of PAB. The jurisprudence in Pakistan has gradually evolved to affirm that Section 498 includes the provision for PAB. However, this has not always been clear, and the potential for future misinterpretation remains a concern. This uncertainty can lead to inconsistent application of the law, disproportionately affecting the most vulnerable.

In distinction, the Indian legal system has taken proactive steps to eliminate these ambiguities in its jurisprudence regarding the PAB and its scope under the old CrPC. Through acceptance of the recommendations of the Indian Law Commission, their legislature has successfully amended the law related to PAB. They have introduced a new, more comprehensive section. This revised law has clarified the scope of PAB and provided a comprehensive framework and scope for the courts of law that has been further refined through judicial interpretations. Though the Indian approach towards PAB continues to evolve, it offers a more predictable and reliable safeguard for the rights of the accused.

Based on the above-referred judicial and legal comparative analysis, it is recommended that Pakistan must similarly have to update its law relating to PAB. Our CrPC is outdated. Through amendments in the CrPC to clearly define the scope and application of PAB, the Pakistani legal system can prevent future misinterpretations and ensure that this vital remedy is consistently available to those who need it and is used positively. The amendments are required to bring much-needed clarity and fairness to CJS about PAB; further, they will also align CJS with modern standards and protect the fundamental rights of its citizens.

7. Conclusion

In conclusion, this study has provided a comprehensive picture through a comparative analysis of the legal frameworks that govern PAB in Pakistan and India. It also highlights PAB's critical role in safeguarding individual liberty and ensuring a fair trial. Despite their shared colonial legal heritage, the evolution of PAB in both countries has taken different paths. It has led to significant differences in how this legal remedy is applied. This research has underscored the need for reform in the CrPC of Pakistan to address the ambiguities and inconsistencies that have emerged over time about the PAB.

Though the jurisprudence of Pakistan has gradually recognized the scope of PAB under Section 498, the potential for misinterpretation remains a risk to the rights of the accused. On the other hand, the Indian proactive legislative amendments have created a more comprehensive and reliable legal framework for PAB; they are offering better protection for the rights of the accused. Therefore, to ensure that the CJS of Pakistan keeps pace with contemporary standards and effectively protects individual rights, it is essential to amend the CrPC to define the scope and application of PAB. Such amendments would not only prevent future misinterpretations but also ensure that this vital remedy is consistently available for the fairness and efficiency of the CJS.

The philosophy underlying the concept of PAB is rooted in the belief that an accused should be protected from the immediate control of law enforcement agencies and that he may be placed in the custody of sureties instead. This is considered an interim measure that the court can modify or revoke at any point;

however, it depends on the circumstances. Personal liberty is regarded as a fundamental right enshrined in the Constitution of Pakistan, and it is a well-established legal principle that no one should be presumed guilty until proven so (Zahoor et al., 2022b). Therefore, the amendments are *sin qua non* to align the legal framework of PAB in Pakistan with the best practices observed in India. This is an attempt to contribute to the ongoing discourse on bail reforms and to reinforce the protection of fundamental rights in both nations.

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