

RE-IMAGINING BAIL DECISION MAKING

REPORT

An Analysis of Bail Practice in Karnataka
and Recommendations for Reform



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GLOSSARY

Bail

The conditional release of an arrested person accused of an offence on the basis of a promise to appear before court on a future date

Bailable Offence

An offence which is listed as 'bailable' under Schedule – I of the CrPC or which has been made bailable by any other law for the time being in force and which is governed by Section 436 of the CrPC

CrPC

Code of Criminal Procedure, 1973

FIR

First Information Report filed with the police under Section 154 of the CrPC which is the first formal report of the commission of a crime

First Production

The first time an accused is produced before the Magistrate within 24 hours of arrest

IPC

Indian Penal Code, 1860

Judicial Custody

Remanding an accused to the custody of the Magistrate where the accused will be held in State prison

NCRB

National Crime Records Bureau

Non-Bailable Offence

An offence which is listed as 'non-bailable' under Schedule – I of the CrPC or which has been made non-bailable by any other law for the time being in force and which is governed by Section 437 of the CrPC

Police Custody

Remanding an accused to the custody of the police where the accused will be detained in police lock up

Pre-trial

The stage of the criminal process from arrest before the charge sheet is filed

SLL

Special and Local Law

Under-trial

The stage of the criminal process after charge sheet is filed until completion of the trial and delivery of the judgment

01

Introduction

Under-trial prisoners constitute a staggering two-thirds of India's prison population.

1.1

Under-trial prisoners constitute a staggering two-thirds of India's prison population.¹

The gravity of this situation has not escaped the attention of the Supreme Court of India, which has been concerned with the detention of under-trial prisoners since the late 1970s.² Three issues form the core of the Court's concern. First, whether lower courts have unnecessarily detained under-trials who should have been released on bail. Second, whether the conditions of detention in Indian prisons are unsafe and inhuman. Third, whether under-trial detention has led to further criminalization of under-trials and recidivism. However, despite the frequent intervention of higher courts, under-trial detention rates have remained at 70% and is a pressing and urgent problem that deserves our collective attention.

Why are under-trial detention levels high?

1.2

In its 268th Report, the Law Commission of India echoed the Supreme Court's concerns. It stressed that urgent measures need to be taken to curtail the length of detention, and concluded that the law relating to bail must be revisited to prevent this.³ In arriving at this conclusion, much of the report focused on a doctrinal analysis of bail provisions and relevant Supreme Court decisions, and devoted only a small section to the disproportionate burden placed by monetary bail system on detainees from marginalised socio-economic backgrounds. Further, limited attention was paid to long periods of under-trial incarceration as a direct consequence of the bail decision making process by courts.

1.3

Civil society organisations that have studied the problem of under-trial detention in India have also traditionally focused on the conditions of detention. Detailed studies of prisons across all Indian states conducted by the Commonwealth Human Rights Initiative have revealed that there is poor monitoring and inspection of prisons,⁴ and patchy

compliance with the Supreme Court's directions on establishing Under-Trial Review Committees which facilitate periodic review of detention levels and the availability of legal representation for under-trial prisoners.⁵

1.4

A 2017 report released by Amnesty International marshalled information gathered on the level of under-trial detention across Indian prisons through requests under the Right to Information Act, 2005. The report demonstrated the failure of institutional mechanisms designed to protect under-trial prisoners and supervise jails in India.⁶ It found that despite the average occupancy rate in Indian prisons reaching 114%,⁷ very few prisons have identified under-trial prisoners who are eligible to be released on their personal bond i.e. under-trial prisoners who have spent more than half of the maximum period of imprisonment prescribed for the offence of which they have been accused.⁸ It also presented data on the shortage of police escorts to produce under-trial prisoners in court and the failure of legal aid lawyers to visit prisons regularly, which effectively prolongs their period of detention.⁹

1.5

The reports of the Law Commission and other civil society organisations underscores the pressure exerted by a large number of pre-trial detainees on an already over-stretched system.

With several jails¹⁰ running at 150% capacity,¹¹ excessive prison populations also raise concerns of hygiene and discipline. Further, the demographics of those likely to be incarcerated is also relevant as 70.6% of under-trial prisoners in India as of date are illiterate or semi-literate.

This shows that the economically vulnerable, the illiterate or semi-literate,¹² and persons from socio-religious minority communities are more likely to end up in Indian prisons.

1.6

However, these reports tell us little about the reasons for the high levels of under-trial detention in India – what brings so many individuals into the prison system?

Legal Analysis of Bail Decision Making

1.7

The primary situs of decisions on bail and detention of under-trial prisoners is the trial court, yet it has been neglected thus far. Standard legal commentary¹³ on bail in India only engages in a legal and doctrinal analysis of the statute and related court decisions,¹⁴ such as on the constitutional right to legal aid. For instance, while we can agree that bail in the pre-trial stage should impose the least restrictive conditions to ensure appearance in court,¹⁵ academic literature on bail and under-trial detention in India do not provide any normative view on the process of bail decision making by courts.

1.8

Academic criminology research on the relationship between bail and under-trial detention is also scarce. Available research on under-trial detention has primarily relied on data collected from police stations and prisons, collated and released by the National Crime Records Bureau. These studies have approached the issue from the perspective of institutional failure of the prison system and legal aid, and the burdens placed by a cash bail system on indigent defendants. As a result, suggested interventions in this field also focus on the conditions of detention, access to legal aid, compliance with Supreme Court orders, placing fetters on an over-broad exercise of arrest powers, and strengthening institutional infrastructure and resource allocation.

Court Based Bail Decision Making: A Study

1.9

Civil society interventions, legal policy reform efforts and academic literature,

therefore, have not focused on the process of bail decision making by lower criminal courts in India and its influence on the levels of detention, unlike in the United States.¹⁶ This study attempts to bridge this weakness in studies on under-trial detention, by focusing on the site of decision making on bail and detention – the lower criminal courts – rather than on the site of detention (prisons). In this study, we focus on the State of Karnataka.

1.10

We adopt two distinct approaches to analysing bail decision making, which is motivated by the need to understand how lower courts routinely interpret and apply the law on bail in real cases – first, through in-person court observations of first productions, which is the first time an accused is produced before the trial court within 24 hours of being arrested and second, by studying court records over a period of 6 months to analyse bail decisions in the pre-trial stage (before a charge sheet is filed). We seek to identify the factors relevant to a decision on bail or detention upon production of an accused as well as the frequency of and conditions under which bail is granted. Thus, lower criminal courts were chosen as the primary centres for observation and collection of data on production of under-trial prisoners, to identify both substantive and procedural factors that drive bail decisions. Ascertaining the rationale employed, if any, in a decision to grant or refuse bail or the factors driving a such a decision will consequently help in identifying the areas for reform to control the current levels of under-trial detention.

1.11

This report is organized into seven Chapters. In Chapter II, we describe the methodology for our study and data collection in greater detail, including our choice of sites and the mixed-method approach to the study. In Chapter III, we define the scope and extent of the problem of under-trial detention in India, and survey data on crime, arrest and under-trial statistics in the State of Karnataka. In Chapter IV, we introduce the important analytical distinction

between pre-trial and under-trial detention.¹⁷ We explore the various stages in the criminal trial where bail may be granted and the factors that shape a bail decision, which is informed by contemporary law and policy debates on bail reform in the US and the UK. In Chapters V and VI, we review the data on bail outcomes in Karnataka at first production and in the pre-trial stage. In particular, we assess the extent of influence of various substantive and procedural factors, such as the nature of the offence, availability of legal representation, and interaction with the court. In Chapter VII, we conclude by assessing key findings of this study and make recommendations on streamlining the bail decision making process to control the level of under-trial detention in India.

1.12

The objective of this study is to shift attention from conditions of detention to court based bail decision making to understand and explain the levels of under-trial detention in India. It proposes a range of new policy approaches to under-trial detention that address issues of legal arbitrariness and social justice, which must motivate and sustain legal reform efforts in this field.

References

¹'Prison Statistics 2016' (National Crime Records Bureau, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 20 September 2019.

²At present, the Supreme Court is monitoring the conditions of prisons in India through a suo moto public interest litigation in *Re Inhuman Conditions in 1382 Prisons*, Writ Petition No. 406 of 2013.

³Law Commission of India, *Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (268th Report, May 2017).

⁴'Looking Into the Haze: A Study on Prison Monitoring in India' (Commonwealth Human Rights Initiative, 2016) <<https://humanrightsinitiative.org/publication/looking-into-the-haze-a-study-on-prison-monitoring-in-india-2016>> accessed 23 November 2019.

⁵'Circle of Justice: A National Report on Under Trial Review Committees' (Commonwealth Human Rights Initiative, 2016) <<https://www.humanrightsinitiative.org/publication/circle-of-justice-a-national-report-on-under-trial-review-committees>> accessed 23 November 2019.

⁶'Justice Under Trial: A Study of Pre-trial Detention in India' (Amnesty International India, 2017) <<https://amnesty.org.in/justice-trial-study-pre-trial-detention-india/>> accessed 23 November 2019.

⁷It has touched 233.9% in certain states.

⁸Code of Criminal Procedure (CrPC), 1973, s 436A

⁹'Justice Under Trial: A Study of Pre-trial Detention in India' (Amnesty International India, 2017) 23 <<https://amnesty.org.in/justice-trial-study-pre-trial-detention-india/>> accessed 23 November 2019.

¹⁰In the states of Assam, Chhattisgarh, Jharkhand, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Rajasthan, Uttar Pradesh and Delhi.

¹¹*Re - Inhuman Conditions in 1382 Prisons*, (2016) 10 SCC 17

¹²'Prison Statistics 2015' (National Crime Records Bureau, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 18 April 2019.

¹³Sarkar, *Commentary on the Code of Criminal Procedure*, 1973 (2007); P. Venkatesh, *Law of Bails* (2008); R.V. Kelkar, *Criminal Law and Procedure*, Vol. XIV Annual Survey of Indian Law, 185 (1978).

¹⁴Vrinda Bhandari, 'Inconsistent And Unclear: The Supreme Court Of India On Bail' (2013) 6 NUJS L. Rev. 549; Vrinda Bhandari, 'Pretrial Detention in India: An Examination of the Causes and Possible Solutions' (2016) *Asian Criminology* 11:83–110.

¹⁵'Administration of Pre-trial Release and Detention: A Proposal for Unification' (1973) *Yale Law Journal*, Vol. 83(1), 153.

¹⁶'Incarceration's Front Door: The Misuse of Jails in America' (Vera Institute of Justice, 2015).

¹⁷CHRI's recommendations to the National Crime Records Bureau's Annual Report – Prison Statistics of India (Commonwealth Human Rights Initiative, 2017) <<http://www.humanrightsinitiative.org/download/1498107712CHRI%20Submission%20to%20NCRB%20on%20Prison%20Statistics%20India.pdf>> accessed 23 November 2019.

02

Methodology

2.1

In order to understand the reasons for high levels of under-trial detention in India, we set out to study the nature of bail decision making in the trial courts – the primary site of bail decision making. Our budget allowed us to focus on a single state. We chose the State of Karnataka.

As per the Crime in India Report, 2017 released by the National Crime Records Bureau, Karnataka ranks 13th in terms of overall crime rate in India. At the same time, Karnataka ranks 13th in terms of overall prison (over) occupancy, recording an occupancy rate of 107.9 as per the Prison Statistics Report, 2016. 71% of Karnataka's prison population comprises of under-trial prisoners.

2.2

We undertook this study of bail decisions in Karnataka for a period of six months beginning from mid-April 2017 to mid-October 2017. In order to ensure a representative sample of cases, we chose

three districts from three different parts of the State i.e. Bengaluru Urban, Dharwad and Tumakuru.

2.3

Figure a shows the average crime rate per district in the State of Karnataka from 2010-2013. We chose one district with a low average crime rate (Dharwad) and two districts with high average crime rates (Bengaluru and Tumakuru).

2.4

Bengaluru is the capital of Karnataka and is a metropolitan city, while both Dharwad and Tumakuru are smaller urban centres located in the north and south east parts of the State. Further, Tumakuru is a high crime district when compared to Dharwad, with Bengaluru recording the most crimes among the three districts. (Figure a).

2.5

As we adopted random sampling techniques to select courts and cases, we had to ensure that we had an adequate number of observations in each district. Courts in both Tumakuru and Dharwad receive several cases from the neighbouring rural

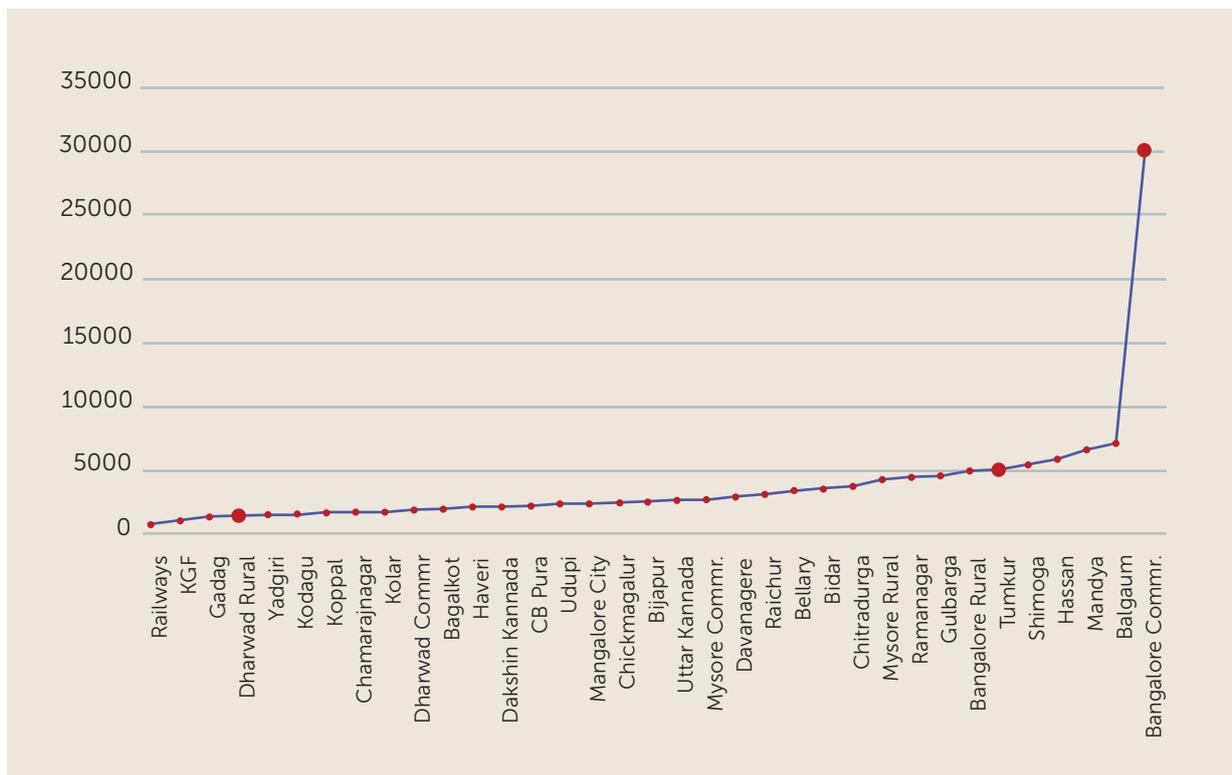


Figure a: Average crime rate per district in Karnataka from 2010-2013

and semi-urban pockets around the cities, providing a mix of cases for the study. Therefore, the three districts represent varying levels of reported crimes, urbanisation and are also likely to present a variety of criminal offences.

2.6

This study adopts a mixed method analysis of data on bail decision making in lower criminal courts through Court Observations (qualitative) and review of Court Records (quantitative).

The first phase was to carry out ‘Court Observations’ over 45 days in ten Magistrate courts chosen randomly in each district, where we observed all cases where accused persons were produced for the first time in court.

This helped us gather data on whether accused persons were produced in court in handcuffs, whether they had engaged a lawyer, the extent of their interaction with the court, and the approximate time spent on each case by the judge. When courts were selected through this ‘equal probability sampling’ method in these districts, we found that

only five and eight of the ten courts were functional in Dharwad and Tumakuru respectively. Therefore, two additional Magistrate and two additional Sessions Courts were chosen for Dharwad and Tumakuru respectively.¹ We observed the following cases in each district:

DISTRICT	CASES
Bangalore	284
Tumakuru	54
Dharwad	40

Table 1: Overview of the number of cases observed

2.7

CLPR designed the questionnaire for the Court Observations and partnered with law schools in all three districts to engage law students as interns for a period of six weeks. The team conducted a one-day training workshop for the interns, to guide them on conducting the Court Observations and to familiarize them with the courts in the respective districts. The interns personally observed all first production cases in the identified courts and filled

in questionnaires over a period of 45 days in each district. To further ensure that all first productions before the courts were covered, case numbers from the court records were verified independently on a weekly basis. The questionnaire for the Court Observations is annexed to this report as Appendix – A.

2.8
 Next, ‘Court Records’ were procured from the selected courts over a period of 6 months. While Court Observations data allowed us to gain insights into the process of first production, Court Records were procured to understand bail decision making throughout the pre-trial process.

Court records reveal details such as the case number, number and details of the accused, date of arrest and first production, bail orders, and any other orders.

2.9
 Initially we set out to obtain court records of first production cases from January 2017 to June 2017 from the FIR Register maintained by the pending branches of identified courts. To procure these

court records, we prepared notarised affidavits and filled up ‘third party application’ forms for the selected cases. The FIR Register in the Bengaluru courts clearly recorded first productions. However, in Dharwad and Tumakuru, the FIR Register was not limited to first production cases and contained all cases before the selected courts for that period. Hence in Dharwad and Tumakuru, we collected court records of all cases registered from January 2017 to June 2017. To this extent, the cases listed in Bengaluru cover a narrower range of first production cases, while the records from Dharwad and Tumakuru cover all cases.

2.10
 Thereafter, we sorted the data month wise and generated a random series of the crime numbers that we sought to study for each district. A 10% random sample was chosen from each district to represent the entire population. A separate and distinct coding sheet was designed to record data collected from court records, which is annexed to this report as Appendix – B. Therefore, we procured, coded and analysed the following number of records in the three districts (Table 2):

DISTRICT	TOTAL CASES i.e. POPULATION (January to June 2017)	10% SAMPLE	NUMBER OF ACCUSED
Bengaluru	1294	129	274
Dharwad	587	58	111
Tumakuru	1300	130	98

Table 2: Overview of the number of case records obtained

2.11

As bail decisions in criminal cases may affect individual accused in a single case differently, we chose the accused as the appropriate unit of analysis rather than the case. For both parts of the study, each question from the questionnaire in Appendix – B was coded and plotted for empirical analysis based on which questions for analysis were framed and shared with an external data analysis team.

2.12

We did not pool the data obtained from the Court Observations and Court Records phases. Although the data is not identical, it is broadly comparable as they were obtained from the same courts in the same districts and within the same time period. The main point of difference is that the Court Observations data is restricted to first production cases while Court Records cover the longer trial period.

2.13

The court records maintained by lower criminal courts in the three districts were often incomplete or contained limited information on the case. For instance, the reasons for granting or rejecting bail were often not evident from the court records. This could impact the accuracy and completeness

of the data collected from the court records. The Court Observations phase attempted to overcome this limitation through in-person recording of data based on court proceedings, which was conducted by a diverse team of students overseen by on-site supervisors and the CLPR team. However, court proceedings are often unclear and inaudible, leading to observational errors. We tried to overcome this limitation by confirming the observations made with the respective court records maintained by the Registry.

2.14

Despite these limitations, a mixed method approach to data collection through the Court Observations and Court Records phases allowed us to gather data on bail decision making that would otherwise have not been readily apparent from the court records alone, such as whether an accused was handcuffed while being produced and the level of interaction between the court and the accused. As a result, we were able to compare and develop a sharp insight into the process of bail decision making in lower criminal courts.

References

¹ Courts that were not functional were those courts who which either a judge or a police station was not assigned.

03

Crime, Arrests and Detention: A Quantitative Baseline

3.1

To understand the nature of bail decision making in the trial courts, it is essential to first develop a broader account of crime, arrests and under trial detention in India, and more particularly, in Karnataka. In Chapter I, we briefly reviewed the public concern with under trial detention in India. In this Chapter, we examine the scope and extent of the problem of under trial detention in India in greater detail. We analyse data on crime, arrest and under-trials in the State of Karnataka to provide background context for the study on bail decision making in lower courts in Karnataka, reported in Chapters V and VI of this Report.

3.2

The NCRB releases two annual reports titled 'Crime in India' and 'Prison Statistics'. These reports are the primary source of data on the criminal justice and prison system at a national scale. The Prison Statistics for 2015 show that although 84,93,826 persons were arrested for offences under Indian Penal Code, 1860 (IPC) and Special and Local Laws (SLLs), only 4,19,623 persons were in prison at the end of the year.¹ Of those detained, 2,82,076 were

'under-trial' prisoners, constituting 67.2% of the total prison population.² In 2016 as well, the proportion of under-trial prisoners remained the same, even though fewer arrests were made during the year.³ In other words, 2 out of every 3 people detained in India at the end of 2016 have not been convicted of any offence. In fact, for many of these detainees, the trial is yet to begin. However, the NCRB Report does not separately identify the number of prisoners whose trial is yet to commence.

3.3

Therefore, while the overall incarceration rate at 33 per 100,000 persons⁴ in India is not alarming, the 'under-trial' incarceration rate at 22 per 100,000 persons⁵ is high and deserves closer attention.

With this broader context at the national level we now turn to analyse the Karnataka data in greater detail.

A. Karnataka – An Overview Of Crime And Arrests

3.4

With a population of 6.11 crores,⁶ Karnataka is the 8th most populous State in India and the 7th largest by land area. As of January 2016, the investigative leg of its criminal justice system comprises 114.15 police personnel per lakh population against a sanctioned strength of 177.36, which is substantially lesser than the national average of 180.597. The criminal court system includes district trial courts (Judicial Magistrates and Civil Judges), Sessions Courts and the High Court. Judicial Magistrates have jurisdiction over criminal offences which are punishable with imprisonment of up to five years. Sessions Judges who preside in the Sessions Courts, have the power to try criminal offences punishable with imprisonment above five years up to the death penalty.⁸

3.5

Karnataka has 8 central jails and 19 district jails, with a capacity of 13,759 persons. However, prisons in Karnataka are running over their full capacity and as of 2016, 107.9% of the total capacity of prisons in the State was occupied.⁹

3.6

As per the NCRB data, in 2016, around 71% of the prison population in Karnataka were under-trial prisoners. The NCRB adopts the census method to account for the prison population. Hence, while we know the number of prisoners at the end of the year, we have no estimate of the prisoners who were detained in the prison at some point during the year.

3.7

Further in the Prison Statistics, 2016, the NCRB has excluded any analysis of prisoners on the basis of their caste and religion, unlike the prison statistics of the previous years, and without offering any explanation for this change.¹⁰ Therefore, in order to ensure consistency in comparison across different themes, we study and analyse data on prison statistics in Karnataka between 2010-2015.

3.8

In Figures b and c, we compare the number of under-trial prisoners in Karnataka at the end of the year with the number released on bail in each year.

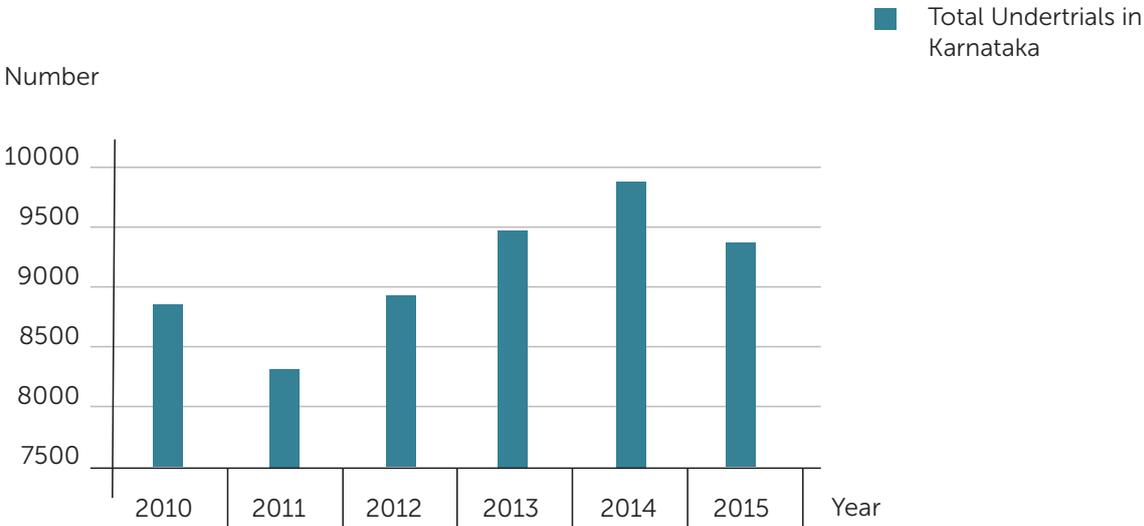


Figure b: under-trial Prisoners in Karnataka (2010 - 2015)

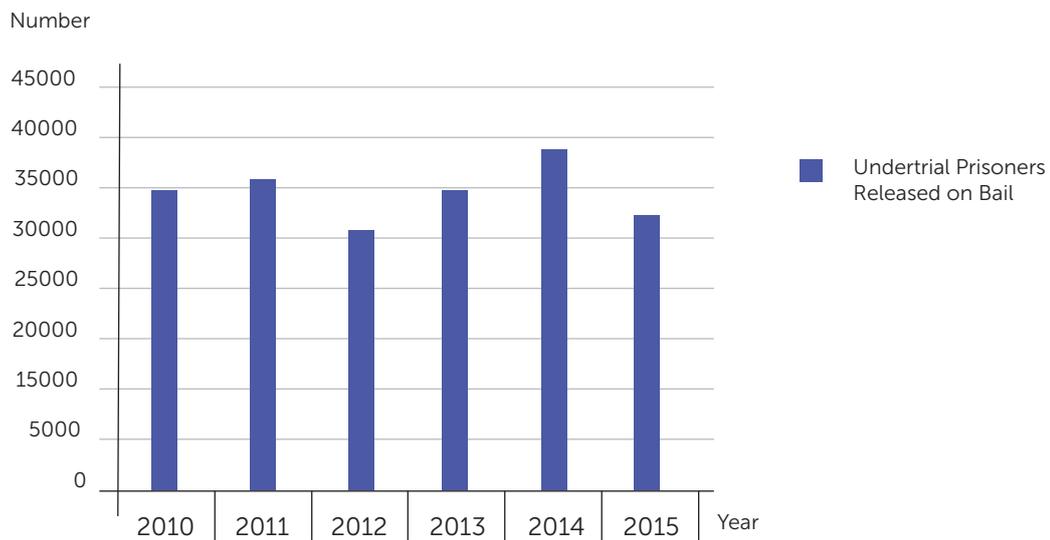


Figure c: Details of under-trials released on bail in Karnataka (2010-2015)¹¹

3.9

While the total number of under-trial prisoners released on bail in 2015 is marginally lower than in the previous years, 2014 boasts of the highest numbers of detainees released in the last 6 years. Hence, no clear trend is discernible. Significantly, the under trial population in Karnataka has steadily increased between 2012 and 2014 but drops in 2015. So, there appears to be no direct relationship between the overall under trial population and the number of detainees released on bail.

3.10

More significantly, we must explain why the number of prisoners released on bail is nearly four times that of the under trial population. As the NCRB report adopts a census method, the number of under trial prisoners recorded by the reports only provides a sense of the 'stock' of detainees in the prison system at a given point in time and not the 'flow' i.e. the number of persons who are arrested and subsequently released in the year.

3.11

Though we have no available data on the overall flow of under trial detainees in any year, from the NCRB Prison Statistics 2015, we can analyse (I) the demographic profile of detainees in Karnataka, (II) the offences for which they have been detained and (III) variations in reporting of crime across the State, if any.

I. DEMOGRAPHIC PROFILE OF UNDER-TRIAL PRISONERS

3.12

In Karnataka, nearly 80% of under-trial prisoners at the end of 2015 had never secured a high school education. Further, more than 30% were illiterate, which is to be seen in light of Karnataka's reasonably high literacy rate of 75.36%.¹²

Hence, it appears that educationally disadvantaged persons are particularly vulnerable to incarceration. We were unable to determine whether this demographic bias against educationally backward persons takes place at the stage of arrest, during bail decision-making or in the system of probation and parole, as we do not have similar demographic data on those arrested.

3.13

A substantial 82% of under trial prisoners in Karnataka are Hindu. With religious minorities such as Muslims and Christians, the number of under trial prisoners coincided with the proportion of Muslim and Christian population in Karnataka.

3.14

SCs and STs constituted about 18% of the under trial population in Karnataka, while the general category constituted almost 80% of the under trial population. As census data on the OBC population and general category was unavailable, we were unable to compare the proportion of under trials in each caste category with the caste category as a proportion of the total population of Karnataka.

Educational Qualifications of Prisoners	Number of Prisoners	Percentage (of Total)
Illiterate	3038	32.62%
Below Class X	4624	49.65%
Class X and above but below graduation	975	10.47%
Graduate	323	3.47%
Post Graduate	172	1.85%
Holding Tech Degree/ Diploma	182	1.95%
Total	9314	100.00%

Table 3: Education profile of under-trial prisoners in Karnataka in 2015¹³

Religion	Karnataka Population As Per Census 2011 ¹⁴	Number Of Under Trials ¹⁵	% Out Of Total Under Trials	% Of Census Category To Karnataka Population	Ratio Of Under Trials To Total Karnataka Population Per 100,000 Population
Hindu	5,13,20,049	7,647	82.10	83.99	12.21
Muslims	78,93,512	1,333	14.31	12.92	2.18
Sikhs	30,548	6	0.06	0.05	0.0098
Christians	11,42,482	308	3.31	1.87	0.50
Others (includes "not disclosed" for the census data)	7,14,815	20	0.21	1.17	0.033
Total	6,10,95,297	9,314	99.99%	100%	

Table 4: Religious profile of under trial prisoners in Karnataka in 2015

Caste	Karnataka Population as per census 2011 ¹⁶	Number of under trials ¹⁷	% Of out of total under trials	% Of census category to Karnataka population	Ratio of under trials to total Karnataka population Per 100,000 Population
SC	1,04,74,992	933	10.02	17.15	1.53
ST	42,48,987	696	7.47	6.95	1.14
OBC	NA ¹⁸	344	3.69	NA	0.56
Others (General)	NA ¹⁹	7341	78.82	NA	12.02
Total	6,10,95,297	9,314	100		

Table 5: Caste profile of under trial prisoners in Karnataka in 2015

II. NATURE OF OFFENCES

3.15

In this section, we develop a broader account of the levels of reported crime and arrests made in Karnataka in recent years based on data collated from the Crime in India Reports of the National Crime Records Bureau between 2010 and 2015. As we observe later in this report, the type of crime has a significant impact on the level of under trial detention and hence this is essential background for this study.

3.16

While overall number of reported crime decreased marginally from 2010 to 2012, it has increased by nearly 13% from 2012 to 2015. In the same period, the number of arrests has remained relatively stable at about 150,000 a year. In 2014, there was a significant increase in arrest though the reported crimes were lower than in 2015. This elementary analysis makes it clear that the levels of arrest do not closely follow the levels of reported crime.

3.17

We may be able to explain some part of this gap between the levels of reported crime and arrests by focusing on the significant variations in the rates of arrest across categories of offences.

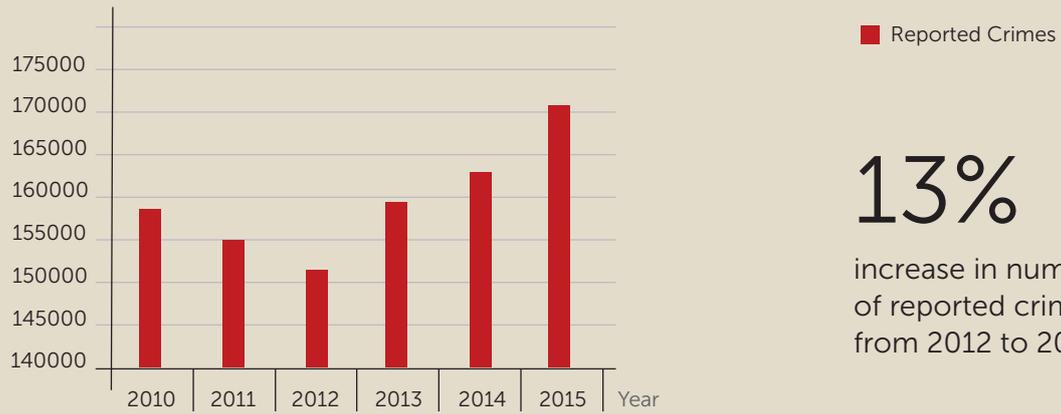
3.18

Under the IPC, crimes are organized²⁰ into categories such as offences against property, offences against the body, offences against the state and public order and other offences. Figure f shows that the number of arrests are higher in 2014 for offences against the state and public order and other offences. As a result, the number of total arrests spiked in that year, as we can see from figure e. More generally, fewer people are arrested for offences against property while far higher numbers are arrested for offences against the body and other offences.

3.19

Hence, the type of offences recorded in the FIR or the charge sheet has a significant bearing on the likelihood of arrest in the criminal justice system.

Number of crimes

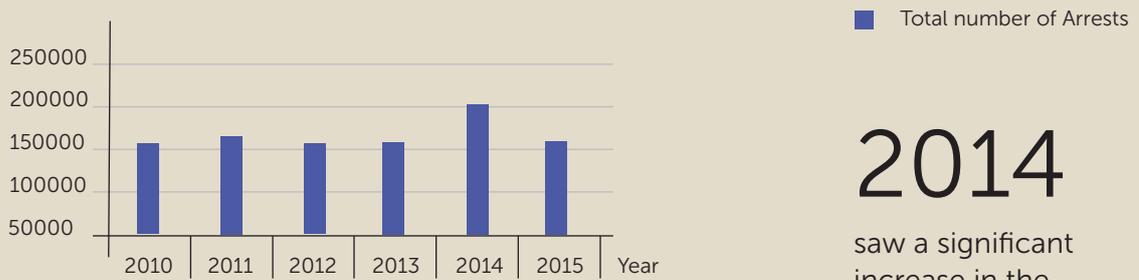


13%

increase in number of reported crimes from 2012 to 2015.

Figure d: Number of reported crimes in Karnataka (2010-2015)

Number of arrests



2014

saw a significant increase in the number of arrests.

Figure e: Number of arrests in Karnataka (2010-2015)

Number of arrests

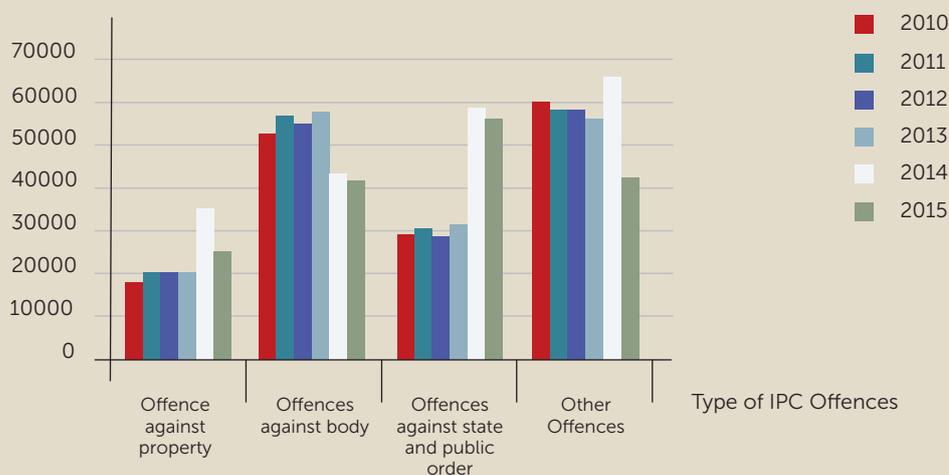


Figure f: Total number of arrests in Karnataka categorised offence-wise (2010-2015)

Number of Crimes

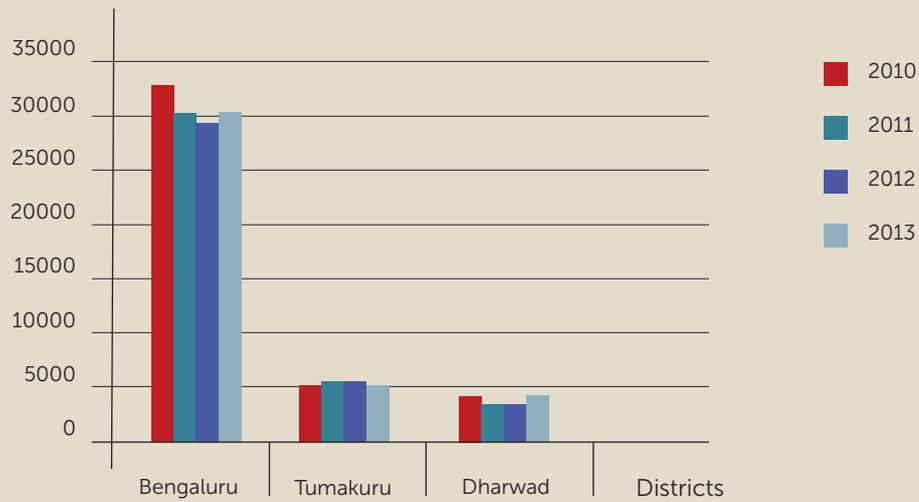


Figure g: District-wise reported IPC Crimes (2010-2013)

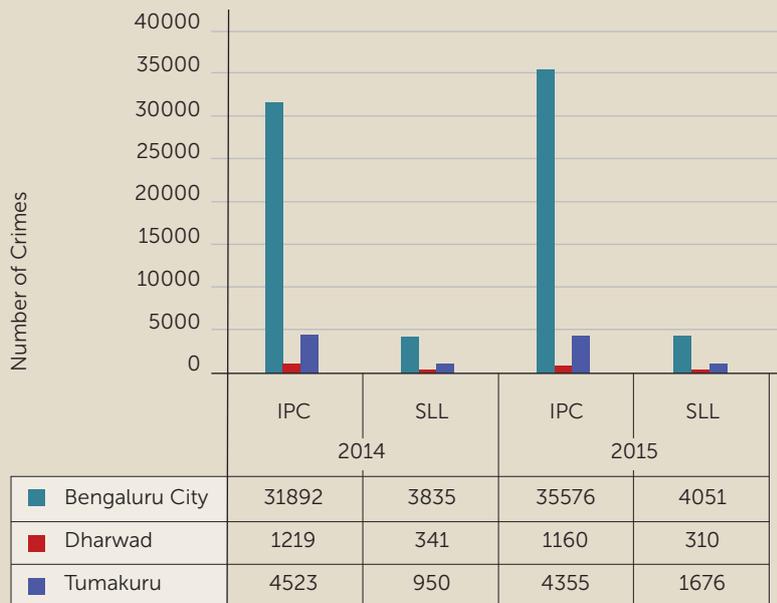


Figure h: District-wise reported IPC and SLL Crimes

III. VARIATION WITHIN THE STATE

3.20

In this study, we exploit the variations across districts within the State of Karnataka to aid our inquiry into bail decision making in the courts in three districts – Bengaluru Urban, Tumakuru and Dharwad – which represent varying levels of crime and urbanisation.

3.21

Bengaluru (which includes the urban and rural parts) has only 3 jails, including 1 Bengaluru Rural jail, despite being the fifth most populous urban area in India.²¹ Significantly, Dharwad and Tumakuru have 5 and 4 jails respectively, which includes one Central jail in each city. Tumakuru has the only Women’s Central jail in Karnataka.

3.22

Among the three districts, Bengaluru reported the highest number of offences under the IPC. Dharwad reported the lowest number of cases among the three districts i.e. less than 8% than Bengaluru while reported offences in Tumakuru were around 13% of those in Bengaluru (Figure g).

3.23

In the last two years, Bengaluru and Tumakuru have seen an increase in offences under SLLs, unlike Dharwad, while only Bengaluru reported a substantial increase in IPC offences.

3.24

When we breakdown the crimes reported in each district, the differences are more obvious. In Bengaluru, other IPC crimes are almost equal to offences against the body, property and State combined. In Bengaluru and Dharwad, offences against property were the next most common offence, while in Tumakuru, it was offences against the body. As we noted earlier, arrests have been made at lower rates for offences against property, which could have an effect on levels of under-trial detention in Bengaluru and Dharwad (Figure h).

3.25

Thus, there is significant variation in crime and under-trial numbers across districts in Karnataka, which led us to identify three different sites for this study – Bengaluru, Tumakuru and Dharwad.

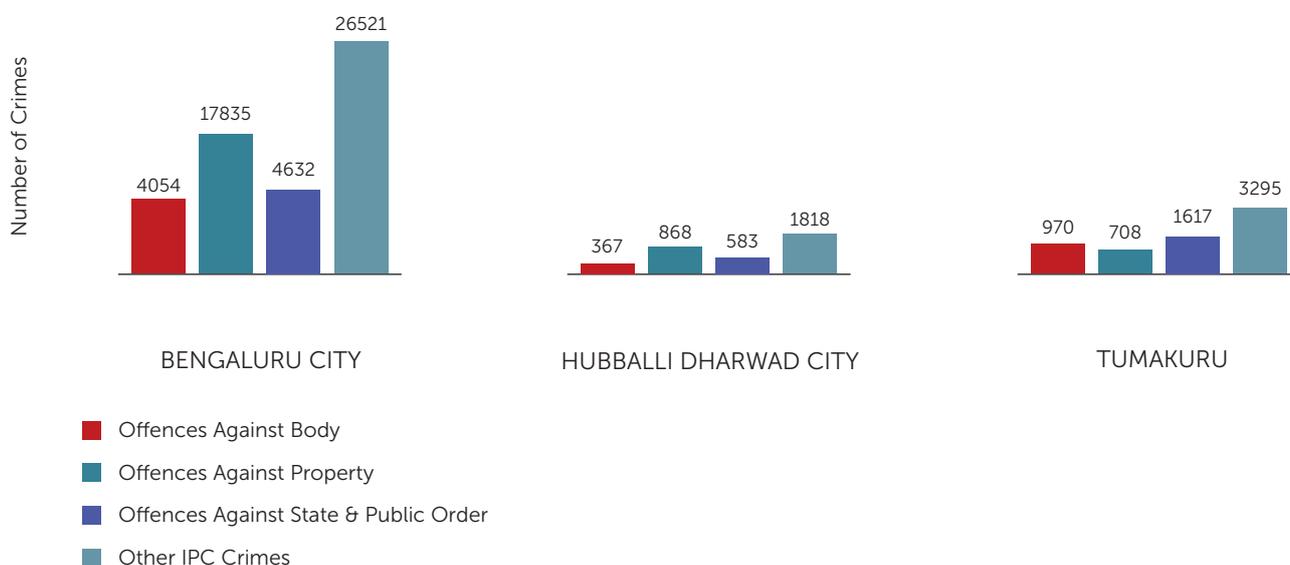


Figure i: District-wise reported crimes in 2015 (Break-up of IPC Crimes)

Conclusion

3.26

The NCRB Reports on Crime in India and Prison Statistics does not record any data on bail decision making in India. Hence, in this Chapter, we develop a quantitative baseline on the number and nature of arrests as well as the levels of detention in India, and more particularly in Karnataka. We noted that while incarceration rates in India are relatively low by international standards, the census method of prison survey understands detention rates to be nearly a quarter of all detention in a year.

3.27

A closer analysis of the Karnataka data suggests that like the rest of India, a majority of detainees in Karnataka are under trials. Further, an overwhelming majority of detainees are from socially and educationally backward sections of society. However, there appears to be little correlation

between the levels of reported offences and arrests in any given year. Some part of this variation may be explained by the differential rates of arrest for different offences under the IPC, with higher rates of offences against the body, offences against the State and other offences.

3.28

We conclude the Chapter by investigating variations within the various districts of Karnataka. We focus on three districts namely Bengaluru, Dharwad and Tumakuru, which are three urban and semi-urban districts that show significant levels of reported crimes in the State. Before we turn to our empirical study of bail decision making in courts in Chapter 5, we review the legal framework that governs arrest and bail in India with an emphasis on recent legal reform in Chapter 4.

References

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- ²ibid.
- ³In 2016, out of 61,30,507 persons arrested, 4,18,536 persons were in prison at the end of the year. See 'Crime in India, 2016' (*National Crime Records Bureau*, Ministry of Home Affairs, India) <<http://ncrb.gov.in/StatPublications/CII/CII2016/pdfs/NEWPDFs/Crime%20in%20India%20-%202016%20Complete%20PDF%20291117.pdf>> accessed 23 November 2019; 'Prison Statistics 2016' (*National Crime Records Bureau*, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 20 September 2019.
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- ¹³'Prison Statistics 2015' (*National Crime Records Bureau*, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 20 September 2019.
- ¹⁴Census, 2011 <http://www.censusindia.gov.in/2011census/PCA/PCA_Highlights/pca_highlights_file/India/Chapter-1.pdf> accessed 23 November 2019.
- ¹⁵'Prison Statistics 2015' (*National Crime Records Bureau*, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 20 September 2019.
- ¹⁶Census, 2011 <http://www.censusindia.gov.in/2011census/PCA/PCA_Highlights/pca_highlights_file/India/Chapter-1.pdf> accessed 23 November 2019.
- ¹⁷'Prison Statistics 2015' (*National Crime Records Bureau*, Ministry of Home Affairs, India) <<http://ncrb.nic.in/>> accessed 20 September 2019.
- ¹⁸Data not available.
- ¹⁹Data not available.
- ²⁰Categorisation of Offences – a) **Offences Against Body:** Murder, Attempt to commit Murder, Culpable Homicide not amounting to Murder, Attempt to commit Culpable Homicide, Rape, Attempt to commit Rape, Kidnapping & Abduction, Grievous Hurt, Dowry Deaths, Assault on Women with intent to outrage her Modesty, Insult to the Modesty of Women, Cruelty by Husband or his Relatives, Importation of Girls from Foreign Country, Causing Death by Negligence, Human Trafficking and Unnatural Offence. From 2014, the following offences were added to this category. b) **Offences Against Property:** Dacoity, Making Preparation and Assembly for committing Dacoity, Robbery, Criminal Trespass/Burglary, Theft, Criminal Breach of Trust, Cheating, Forgery, Counterfeiting, Arson and Extortion. From 2014, the following offences were added to this category. c) **Offences Against State and Public Order:** Riots. From 2014, the following offences were added to this category - Offences against State, Unlawful Assembly, Offences promoting enmity between different groups, Disclosure of Identity of Victims and Incidence of Rash Driving. d) **Other IPC Crimes:** The NCRB data does not give a definition of what this category contains.
- ²¹INDIA STATS: Million plus cities in India as per Census 2011 (*Press Information Bureau, National Informatics Centre*) <<http://pibmumbai.gov.in/scripts/detail.asp?releaseld=E2011IS3>> accessed 23 November 2019.

04

Arrest and Bail: The Legal Framework

4.1

In India, any person may be arrested by an investigating authority on a reasonable suspicion that an offence has been committed. Such a detainee may secure a conditional release – bail – from the relevant authority. If the offence is categorised as a ‘bailable’ offence, the detainee may secure bail at the police station. However, if the offence is categorised as a non-bailable offence, the detainee must seek bail from the appropriate court.

4.2

In this background, we outline the law applicable to arrest and grant of bail. We introduce the distinction between the ‘pre-trial’ and ‘under-trial’ stages of the criminal process – one that has not been made

in the substantive law, academic analysis or policy literature in India. We argue that this distinction is essential in identifying relevant factors to be considered while making a bail decision and the appropriate weights to be attached to them at different stages of the criminal justice process. Next, we present an outline of the law applicable at the pre-trial and under-trial stages of the criminal justice process and briefly review the theoretical considerations that shape this area of law as well as the recent efforts of the Supreme Court at reform. The Chapter concludes with a review of the latest attempts to reduce under-trial detention rates in India and highlights how existing law has failed to substantively regulate bail decision making in courts.

A. Legal Framework of Arrest and Bail

4.3

Under Section 41, the investigating authorities may arrest a person on a reasonable suspicion that an offence has been committed, whether bailable or non-bailable. The provisions applicable to a bail decision differ based on whether an offence is classified as bailable or non-bailable in Schedule – I of the CrPC.

While the power of courts and police to grant bail in case of a non-bailable offence is discretionary,⁶ a person arrested for a bailable offence has a right to be released on bail by the

police. This may take place within 24 hours from the time of arrest. Where an arrested person has been refused police bail for a bailable offence, they may approach the court to secure bail.⁷

4.4

Every arrested person must be produced in court within a period of 24 hours of arrest, which is commonly known as 'first production'.⁸ At first production, the court decides whether to release the arrested person on bail or remand them to judicial or police custody.

Although the judiciary has been largely silent¹ on the arbitrariness of the classification of bailable and non-bailable offences, several legal reform efforts have attempted to confront the issue:

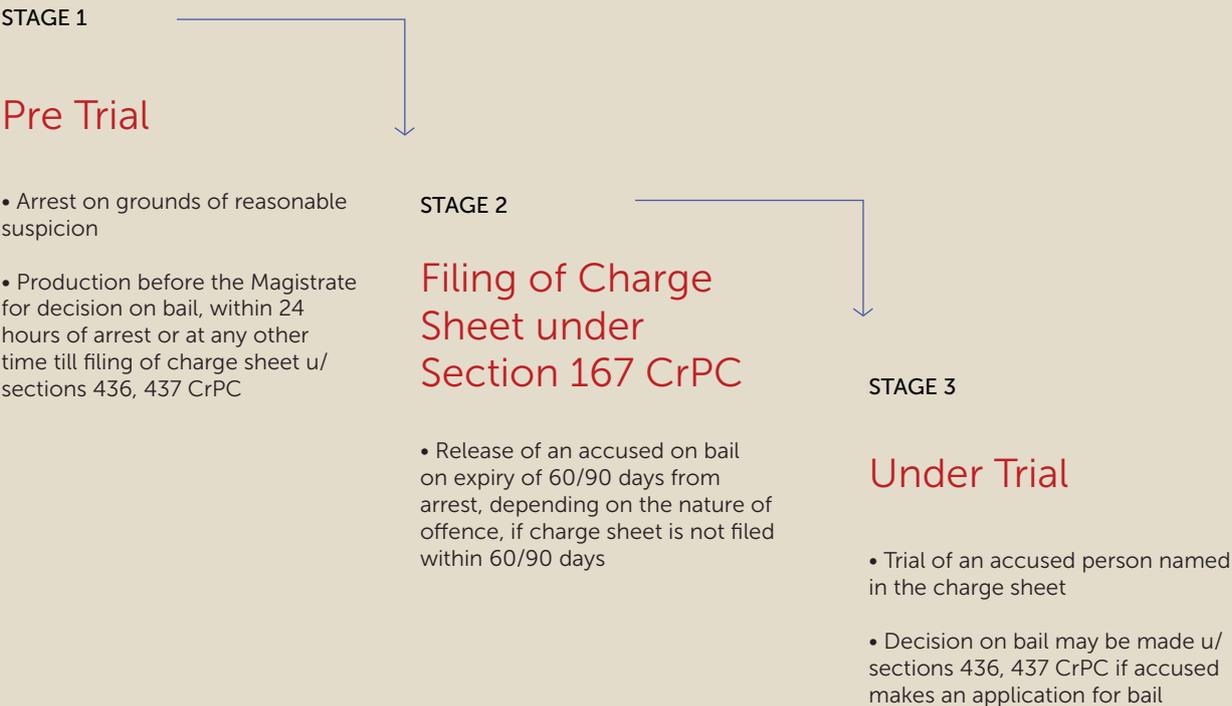
- The Expert Committee on Legal Aid (1973) headed by Justice Krishna Iyer recommended enlarging the category of bailable offences in the CrPC to facilitate grant of bail in a greater number of offences and to ensure expeditious completion of pre-trial procedures.
- In its 154th Report (1996), the Law Commission of India reviewed the law on arrest and supported the finding of the National Police Commission that a substantial number of arrests were made in cases of minor offences and were not necessary for crime control.²
- The Malimath Committee on Reforms of the Criminal Justice System (2003) recommended a

complete overhaul of the criminal justice system, including reclassifying offences into separate codes.³ Significantly, the Committee referred to specific factors such as nature of the crime, degree of violence, injury to victim/property, societal impact, and the possibility of using alternative dispute resolution methods to determine whether an offence ought to be classified as bailable or non-bailable and cognizable or non-cognizable.⁴

- Recently in its 268th Report, the Law Commission of India (2017) also emphasized the need to rationalize the classification of offences and recommended that the seriousness of the offence must reflect in its classification as bailable or non-bailable.⁵

While the power of courts and police to grant bail in case of a non-bailable offence is discretionary,⁶ a person arrested for a bailable offence has a right to be released on bail by the police. This may take place within 24 hours from the time of arrest. Where an arrested person has been refused police bail for a bailable offence, they may approach the court to secure bail.⁷

Stages of the Criminal Justice Process



4.5

An order of remand to *police custody* results in detention of the accused in the police station or any other facility controlled by them. Under the CrPC, the criminal court may remand an accused to police custody for a maximum period of 15 days, whether at once or for multiple smaller periods of time.

4.6

Where an order of remand to *judicial custody* is made, the accused is transferred to the local jail administered by the department of prisons. Judicial custody may be ordered for a maximum period of 60 or 90 days depending on the nature of the offence, subsequent to which the accused person has a right to be released on bail⁹ irrespective of whether the police has filed a 'charge sheet'.¹⁰

4.7

If the accused is remanded to judicial or police custody, bail hearings may take place at multiple points in the criminal process i.e. each time the accused is produced before the court.

4.8

The bail decision is regulated by Sections 436-439 of the CrPC. Section 436 provides that a person arrested or detained for a bailable offence must be released on bail if they are prepared to furnish bail¹¹ while Section 437 applies only to non-bailable offences. Any person who believes that they may be arrested on the suspicion of having committed a non-bailable offence may apply for anticipatory bail under Section 438, CrPC, to the High Court or Sessions Court. The substantive provision on bail discussed above apply at all stages of the criminal justice process. However, it is analytically significant to distinguish between the pre-trial and under-trial stages as the same considerations may bear different weights in bail decision making in each stage.

4.9

The period from arrest till filing of charge sheet may be termed as the 'pre-trial' stage, where the police are operating merely on a suspicion that the person arrested has committed

an offence. Filing of the charge sheet indicates that the investigation phase of the criminal justice process has been completed and the investigating officer is convinced that there is sufficient evidence to support a successful prosecution. The 'under trial' phase commences after a charge sheet is filed and continues until the completion of the trial and pronouncement of the judgment.

4.10

In the rest of this Chapter, we use this distinction to organise the analysis of the statutory provisions that shape a bail decision at each stage. We explore judicial interpretation of these statutory provisions, to highlight how courts have guided the discretion of lower courts in bail decisions.

I. PRE – TRIAL STAGE

(a) Arrest

4.11

We had noted earlier that an investigating officer has the power to arrest any person under Section 41 of the CrPC. Offences are further classified into 'cognisable' and 'non-cognisable' offences and this determines the procedure to be followed in each case. A police officer, either on receiving information or independently coming to know of the commission of an offence, must first determine whether the offence is cognisable or non-cognisable.

4.12

The power to arrest varies greatly depending on whether an offence is categorized as cognisable and non-cognisable. An officer in charge of a police station may arrest a person without a warrant in case of cognizable offences¹² and is empowered to commence investigation and make arrests without the order of a Magistrate.¹³

4.13

However, where a non-cognizable offence is committed, the police cannot make an arrest¹⁴ without a warrant of arrest from a Magistrate. The officer in charge of the police station must note down details of the offence and refer the informant to a Magistrate.¹⁵ The police can exercise their powers of investigation only upon an order for investigation being passed.¹⁶

4.14

The Supreme Court's directions in landmark cases such as *Sheela Barse*,¹⁷ *D.K. Basu*,¹⁸ and recently, in *Arnesh Kumar*¹⁹ have further restricted arbitrary police power with regard to arrest, by requiring the police officer to (i) inform the person of the grounds for their arrest, and their right to apply for bail upon arrest,²⁰ (ii) intimate the legal aid committee of the arrest, (iii) inform a relative or friend about the arrest,²¹ (iv) prepare a memo of arrest containing the date and time of arrest, which is to be attested by at least one witness and countersigned by the arrested person,²² and (v) arrange for a medical examination of the person arrested, to be conducted by a trained doctor for every 48 hours in custody.²³

4.15

In 2009, the guidelines of the Supreme Court in *Joginder Kumar v. State of Uttar Pradesh*²⁴ were codified as an amendment to Section 41 of the CrPC, 1973. The amended provision places limitations on the power to arrest in cases of cognizable offences for which imprisonment of 7 years or less has been prescribed as punishment²⁵ by requiring a police officer to record the reasons for a decision on arrest, in writing.²⁶

4.16

Further, amendments to the CrPC²⁷ have limited the police's power of arrest and reiterated the various guidelines of the Supreme Court.²⁸ In particular, Section 41A was introduced as an alternative to arrest to ensure that a person who is not arrested is available for investigation. It permits a police officer to issue notice to such person, requiring them to appear at a

specified place. If the person does not comply with the terms of the notice or is unwilling to be identified, the police officer may arrest such person for the offence mentioned in the notice.²⁹

4.17

Section 41B requires that the police officer must bear an accurate, visible and clear identification of the accused person's name to facilitate easy identification, prepare a memorandum of arrest which is attested by at least one witness and countersigned by the person arrested, and inform the person arrested that he has a right to have a relative or a friend named by him to be informed of his arrest. Further, the newly introduced Section 41C mandates the establishment of control rooms in every district and in every State to compile the list of all persons arrested along with relevant details. Upon arrest, the person has the right to meet an advocate of their choice during interrogation by the police under Section 41D. However, despite these reforms, the overall number of arrests in India has not seen a substantial reduction. Now we turn to assess the legal regulation of police bail in India, upon arrest.

(b) Police Bail For Bailable Offences

4.18

A person arrested for a bailable offence has a right to bail under Section 436. Within the first 24 hours of arrest, the arrested person is entitled to secure bail at the police station. The arresting officer is required to inform the person of this right so that the person may furnish bail or arrange for sureties.³⁰ The police officer must release a person who has signed their bail bond³¹ and the requirement to furnish surety may be done away with if the officer sees fit.³² Significantly, an indigent person is required to be granted bail without the requirement of a surety.³³

(c) First Production

4.19

Once a person is arrested and detained in custody, whether for a bailable or non-bailable offence, they must be produced before the nearest

Bail Bond Business in the United States

A contemporary area of concern in the US is the emergence of a new stakeholder in the criminal justice system i.e. bail bond agents. Commercial sureties step in to make payment towards the bail bond to secure the release of those who cannot furnish bail. Bond agents charge a non-refundable fee and also require the accused or their kin to provide collateral for the full amount.³⁴ Bail bond agents post bail on behalf of the arrested person with a promise to pay the entire bail amount in court in case the person does not appear on the scheduled date of hearing. Therefore, bail bond agents have an incentive to secure the appearance of the person and often employ illegal methods to ensure this. Further, bail bond agents often refuse to post bail for defendants with low money bail amounts as they are not lucrative clients,³⁵ thereby increasing the likelihood of detention.

Bail Schedules: Can bail decision making be standardized?

Bail schedules, which designate a specific bail amount for each criminal charge, have been implemented in various States in the US. Bail schedules were originally developed to standardize the bail decision making process. However, it has been criticized for perpetuating the status quo of detention of low-level, nonviolent, and often minority defendants who are unlikely to commit a new crime,³⁶ as the system has failed to consider the paying capacity of the individual defendant.

Judicial Magistrate within a period of 24 hours,³⁷ along with copies of the entries made in the case diary.³⁸ This stage is described as the stage of 'first production', which is the earliest stage of intervention by the courts and is the first point at which the judiciary exercises oversight in the criminal process.

At first production, the Magistrate may grant (i) bail under Section 436 (bailable offence) or Section 437 (non-bailable offence) (ii) authorise the detention of the accused in police custody for a maximum of 15 days or (iii) remand the accused to judicial custody.³⁹

4.20

While courts initially took an unnaturally broad view on 'first production' by permitting detention even when accused persons were not physically produced,⁴⁰ over time, the higher judiciary has

restored the textual meaning of Section 167.⁴¹ The current legal position is that a person arrested must be physically produced before a Magistrate within 24 hours of arrest.⁴²

(d) Bail In Bailable Offences

4.21

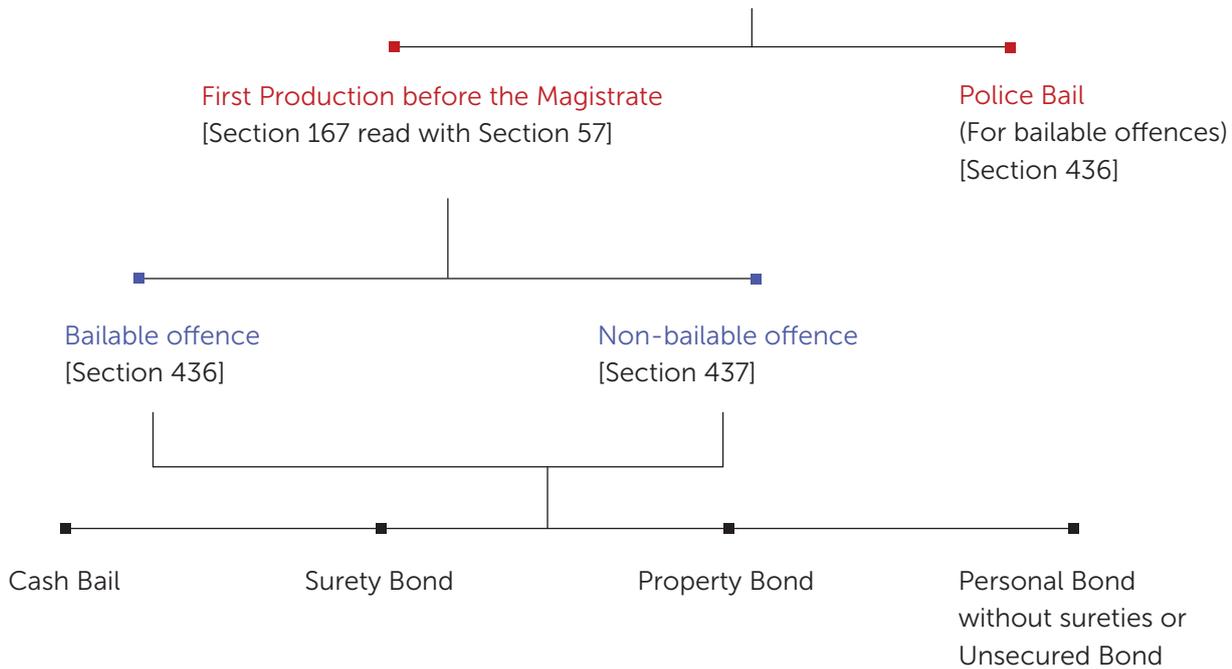
Section 436 provides that a person arrested for a bailable offence has a right to secure bail. Where police bail, as discussed above, is refused to a person accused of a bailable offence, they may seek bail from court at first production. As the CrPC does not lay down a guide for bail decision making, the considerations that shape such a decision are similar, whether at the police station or in the court.

4.22

Even in the case of a bailable offences, the court may refuse to grant bail on a subsequent occasion when the person appears or is brought before court and has failed to comply with the conditions of the bail bond.⁴³

ARREST

[Chapter V, Section 41]



(e) Bail In Non-Bailable Offences

4.23

Under Section 437 of the CrPC, the courts and police officers have the discretion to grant bail to persons accused of a non-bailable offence and the reasons for granting bail under this section must be recorded in writing.⁴⁴ Over the years, courts have identified several key factors which determine whether a person should be granted bail, which includes the nature of the allegation, severity of punishment if the accused is convicted, available evidence, danger of the accused absconding if released on bail, probability of interference with the investigation or prosecution, sex/age/health of the accused, and larger public interest.⁴⁵ Bail that is granted can be revoked and an accused person can be arrested and committed to custody.⁴⁶

4.24

The discretion available to courts to grant bail under Section 437 is limited in several ways. First, where there are 'reasonable grounds for believing that a person is guilty of an offence punishable with death or imprisonment for life' then bail may be refused.⁴⁷ Second, if the person is (i) accused of a cognizable offence and was previously convicted of an

offence punishable with death, imprisonment for life or imprisonment for seven years or more, or (ii) was previously convicted of a non-bailable and cognizable offence on two or more occasions, then the court must refuse bail.⁴⁸ However, these two restrictions do not apply if a person is under the age of sixteen years, is a woman, or is a sick or an infirm person.

(f) Bail After First Production

4.25

At first production, if an accused person was refused bail and was remanded to judicial or police custody, they may still seek bail at a subsequent point in the criminal process. At this stage as well, three principle outcomes are possible – bail, judicial custody or police custody i.e. when the accused is produced subsequently, either in person or through a video conferencing facility,⁴⁹ the Magistrate may either grant bail or re-order police or judicial custody of the arrested person.

4.26

Police custody may be ordered for no more than 15 days, whether at once or in multiple shorter periods of time. Alternatively, if the court decides to order judicial custody, it may do so up to 90

days for cases involving offences punishable with death, life imprisonment, or imprisonment for a period exceeding 10 years.⁵⁰ For all other cases, the maximum period of judicial custody is 60 days.⁵¹

4.27

On the expiry of 60 or 90 days, as applicable, and irrespective of whether a charge sheet has been filed, an accused person has a statutory right to bail, provided they are able to furnish the bail amount.⁵²

(g) Bail Conditions

4.28

Under Section 437 of the CrPC, which deals with bail in case of non-bailable offences, if a person is accused or suspected of committing (i) an offence punishable with imprisonment extending to 7 years or more, (ii) an offence against the State, an offence against the human body, or an offence against property, or (iii) abetment, conspiracy or attempt to commit any of these offences, the court can impose conditions on the bail. Such conditions may be in relation to attending the scheduled hearings in the case in accordance with the bond, refraining from committing the same or a related offence while enlarged on bail and not interfering with the investigation and not tampering with the evidence⁵³ among others.⁵⁴ However, this list of conditions is not exhaustive, and the court has the power to impose any other condition in the interest of justice.⁵⁵

4.29

In addition to the above, a judge making a bail decision may impose a range of financial conditions on the arrested person as set out in Sections 440 to 450.⁵⁶

4.30

While the provisions on bail under the CrPC are applicable equally to offences under the IPC as well as SLLs, some special statutes have introduced additional conditions to the grant of bail. For instance, the Unlawful Activities Prevention Act, 1967 (UAPA) requires that the Public Prosecutor be given an opportunity to be heard regarding the

bail application filed by a person accused of certain offences punishable under the Act. In fact, such an accused person shall not be released on bail where the court is of the opinion that a *prima facie* case has been made out against the accused, based on the case diary or the police report.⁵⁷ This provision was introduced despite the fact that courts are not required to go into the merits of the case while making a bail decision, particularly at early stages of investigation and first production.

4.31

Similar restrictions on granting bail are codified under the Narcotic Drugs and Psychotropic Substances Act, 2002 (NDPS Act), under which bail may not be granted in respect of certain offences unless the Public Prosecutor is given a hearing, and where the court is satisfied that (i) the accused is not guilty of the offence and (ii) he is not likely to commit any offence while on bail.⁵⁸ Thus, the provisions on bail under the CrPC are necessarily subject to the applicable provisions under the NDPS Act.⁵⁹ As we will see in Chapter 5, bail is granted less frequently for SLL offences, when compared to IPC offences, which may be explained by the inclusion of such additional conditions to scheme of bail decision making under the CrPC.

4.32

Significantly, the UAPA⁶⁰ and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989⁶¹ (PoA Act) also place a bar on the grant of anticipatory bail under Section 438, CrPC.

II. UNDER – TRIAL STAGE

4.33

Under Section 173, the officer in charge of the police station shall submit a police report (commonly known as the charge sheet) to the court on completion of investigation, making out a case against the accused person. Under Section 190, the court may accept the charge sheet and commence trial, or reject the charge sheet and discharge the accused.

4.34

While Section 167 of the CrPC provides for automatic bail of an accused person where investigation is not completed within 60 or 90 days after arrest, depending on the nature of the offence, special statutes like the UAPA and NDPS Act have considerably extended these timelines. Under both statutes, the period of completion of investigation has been specifically extended from 90 days to 180 days for certain offences, in keeping with the notion that SLL offences are more serious in nature and such statutes have been enacted to combat a particular social ill.⁶² In fact, under the NDPS Act in particular, the court may even extend the time period to complete investigation to 1 year, if the Public Prosecutor submits a report providing reasons for the delay.⁶³

4.35

Irrespective of the applicable law, the pre-trial or investigation phase of the criminal justice process ends once the charge sheet is filed. At this stage, the investigating authority has gathered sufficient evidence against the accused to commence trial or no evidence is forthcoming and the accused is discharged.

4.36

However, the distinction between the pre-trial and under-trial stages of the criminal justice process has not been made in the Indian context in law or in policy reform efforts, despite the fact that the considerations while deciding on continued detention or release of an accused ought to categorically differ. In the context of bail decision making, the consequence of the failure to make this distinction is that the same statutory provisions and case doctrine are applied to the bail decision at both stages. Therefore, even subsequent to filing of the charge sheet, Sections 436 to 439 continue to govern bail decision making.

4.37

On filing of the charge sheet, it is common for an accused who has not yet been released on bail to file an application for bail under Sections 436, 437 or 439. At this stage, the bail application will plead material 'change of circumstances'⁶⁴ to support the release of the accused on bail.

4.38

Section 437 provides that if, at any time after the conclusion of the trial of a person accused of a non-bailable offence, and before judgment is delivered, the court sees reasonable grounds for believing that the accused is not guilty of the offence, it can release the accused on the execution of a bond without sureties for his appearance to hear the judgment delivered.⁶⁵ Further, where the trial of a person accused of a non-bailable offence is not complete within sixty days from the first date fixed for taking evidence, and the accused has been in custody for the entirety of that period, the court may release such accused on bail.⁶⁶

4.39

In the event that an accused has not been released on bail through the course of trial, Section 436A imposes a statutory limit on detention where trial has not commenced. If an accused person has undergone more than half of the maximum period of imprisonment prescribed for the offence, whether during the period of investigation into, inquiry or trial of the offence, the accused must be released on his personal bond, with or without sureties.⁶⁷

4.40

On the completion of a trial,⁶⁸ the accused is either convicted and sentenced or acquitted and set free.⁶⁹ Where a custodial sentence is imposed, the accused has the right to appeal and apply for bail during the pendency of the appeal.⁷⁰ For the purposes of this study we are not concerned with post-conviction bail decisions or with other forms of early conditional release and parole for convicted prisoners.

4.41

Thus, bail decisions at all stages of the criminal justice process are ultimately guided by four main considerations – (i) preventing the accused from absconding during the investigation and trial, (ii) preventing the commission of further crime on release, (iii) preventing tampering with evidence or intimidating witnesses and (iv) preventing public disorder that may result from releasing an accused involved in a serious crime.⁷¹

The stringent provisions on bail under SLLs may be correlated to the ‘public disorder’ purpose, where additional fetters have been placed on bail being granted for SLL offences which are considered to be more serious in nature.

B. Bail Decision Making and Due Process Safeguards

4.42

A decision to grant or refuse bail, like any decision in a criminal justice system,⁷² is guided and influenced by dual considerations of ‘crime control’ and compliance with due process protections⁷³ that are constitutionally guaranteed to accused persons. As we observed in the previous section, while the procedural and bail provisions under the IPC uphold these constitutional protections, the enactment of similar yet more stringent provisions under SLLs appear to be driven by the ‘crime control’ goal.

4.43

Constitutional due process guarantees place fetters on an overbroad exercise of powers by the police and courts under the CrPC. Due process is at the heart of Article 21 of the Constitution, which guarantees to every person the right to life and personal liberty, except by procedure established by law. A specific codification of one such protection is Article 22(3),⁷⁴ which prohibits the detention of a person in custody beyond 24 hours without the authority of a magistrate,⁷⁵ which has also been incorporated under the CrPC.⁷⁶

4.44

The right to procedural protections in the criminal justice process, before and during trial, have been upheld as an inalienable part of the right to free and fair trial.⁷⁷ Over the years, courts have broadened and defined the ambit of this ‘right to include several ‘substantive and procedural due process rights’, which apply equally to bail decision making. In this section, we briefly review the extent to which some of the due process rights relating to bail decision making has been shaped by court decisions.

I. RIGHT TO SPEEDY TRIAL

4.45

The Supreme Court, in *A.R. Antulay v. R.S. Nayak*,⁷⁸ held that the right to speedy trial applies to all stages of a criminal proceeding, including investigation, inquiry, appeal, and revision. This right was reiterated in *Supreme Court Legal Aid Committee Representing Under trial Prisoners v. Union of India and Another*,⁷⁹ where the Supreme Court held that unduly long periods of under-trial incarceration violates Articles 14 and 21 of the Constitution. The Court directed that an accused person who has served half the maximum sentence specified for the offence of which he has been accused should be released on bail, subject to fulfilling the conditions of bail imposed on him. This standard was incorporated in the CrPC in Section 436A through an amendment in 2005.⁸⁰

4.46

Recently, in *Husain and Anr v. Union of India*,⁸¹ the Supreme Court issued directions to guide Magisterial decision making on bail and directed the High Courts to frame annual action plans for (i) fixing a tentative time limit for subordinate courts to decide criminal trials of those in custody and (ii) monitoring the implementation of such timelines periodically. The Court recommended that Magistrates should dispose of bail applications within one week. Further, High Courts were directed to ensure that bail applications before them are decided within one

month and criminal appeals, where accused have been in custody for more than five years, are concluded at the earliest.

II. RIGHT TO LEGAL COUNSEL

4.47

In *Mohd. Ajmal Amir Kasab v. State of Maharashtra*,⁸² the Supreme Court reiterated the legal position in its earlier judgments that the right to counsel, including right to free legal aid begins at the stage of first production. The Court defined the purpose behind guaranteeing this right within the pre-trial framework as an “*accused would need a lawyer to resist remand to police or judicial custody and for granting of bail; to clearly explain to him the legal consequences in case he intended to make a confessional statement in terms of Section 164 CrPC; to represent him when the court examines the charge-sheet submitted by the police and decides upon the future course of proceedings and at the stage of the framing of charges*”.

4.48

This right was placed on a high pedestal in *Khatri (III) and Ors. v. State of Bihar and Ors.*⁸³ by making it obligatory for the Magistrate to inform an accused person of their right to seek counsel, and if indigent, of the right to free legal aid. For an indigent and illiterate accused, the Court noted that “*even this right to free legal services would be illusory...unless the Magistrate or the Sessions Judge before whom he is produced informs him of such right.*” Failure of the Magistrate to discharge this duty could make them liable to disciplinary proceedings, or vest in the accused, a right to claim compensation against the State.⁸⁴

4.49

However, despite the statutory and judicial recognition of the right to counsel even at the pre-trial stage,⁸⁵ the 268th Law Commission Report noted that access to legal aid in the pre-trial stage is often limited for accused persons as lawyers are available only after the charge sheet has been filed, and accused persons are often unable to meet the monetary conditions of bail.⁸⁶

III. RIGHT TO BE FREE FROM HANDCUFFS

4.50

Certain rights specific to production of the accused before the court have been recognised, such as the right against handcuffing and right to be heard by the judge. In *Prem Shankar Shukla v. Delhi Administration*,⁸⁷ ‘handcuffing’ by the police was held to be in violation of the constitutional scheme of Articles 14, 19, and 21. The Supreme Court severely curtailed the use of handcuffs and other fetters on the under-trial accused by the police to exceptional cases and only with permission of the Magistrate, making handcuffing of an accused the exception and not the norm. Therefore, when a person is arrested without a warrant, use of handcuffs is permissible in exceptional cases and only till he is produced before the Magistrate. Thereafter, handcuffs may only be used with the court’s permission.⁸⁸

IV. RIGHT TO BE HEARD

4.51

The right of the accused to be heard implies a positive duty on courts to ensure that the accused person is given a full and fair hearing in each case and the matter is given sufficient and due consideration, in keeping with the principles of natural justice. Therefore, even at the stage of first production and during bail hearings, the court is required to hear the accused person.

V. CONDITIONS OF DETENTION

4.52

The conditions of detention in prisons has captured the imagination of the Supreme Court right from the *Sunil Batra* decisions⁸⁹ since which it has time and again issued various directions to monitor and improve the conditions in jails. Yet, overcrowding and hygiene issues remain a persistent feature of Indian prisons.⁹⁰ In this section, we look at laws applicable to conditions of detention in Karnataka as well as policy efforts and decisions of the Supreme Court that have attempted to address this issue.

Timely presentation of the accused before the magistrate is crucial for the case to progress and avoid unnecessary and prolonged confinement. However, in Karnataka, it was found that between September 2014 and February 2015, a monthly average of 2,490 under-trial accused were not produced in court due to shortage of police escorts.¹³² For every 100 police escorts requested, only 70 were sent for production of the accused.¹³³

Model Prison Manual

In 1972, a Working Group on Prisons emphasized the need to have a national policy on prisons.⁹⁴

This was also echoed by the All India Committee on Jail Reforms (1980-83) headed by Justice A.N. Mulla⁹⁵ which made several recommendations for the benefit of under-trial prisoners, such as confinement in separate institutions,⁹⁶ amending the CrPC to allow for the release of an under-trial prisoner who has been in detention for half of the maximum sentence awardable to him if he was convicted,⁹⁷ and liberalising rules around interviews with relatives, friends and lawyers for prisoners.⁹⁸ Based on the recommendations of the Supreme Court,⁹⁹ a Model Prison Manual was drafted in 2003 as a guide for States to draw from, and adopt best practices.¹⁰⁰

In 2016, the Ministry of Home Affairs approved a new Model Prison Manual.¹¹³

While it is largely based on the Prison Manual, 2003 there were a few changes with respect to under-trial prisoners'. The manual has expanded the categories of under-trial prisoners on the basis of 'security', 'discipline' and 'institutional programme'.¹¹⁴ However, the categorisation still does not reflect the difference between a pre-trial and an under-trial prisoner. The biggest change in the Prison Manual is the inclusion of a chapter on legal aid, providing for appointment of jail visiting advocates, legal aid clinics in every prison, and constitution of under-trial review committees.¹¹⁵ It remains to be seen whether these changes in the Model Prison Manual reflect in the State Manuals, and manifest as visible progress in the prisons as not all States have adopted the Model Prison Manual in its true spirit.¹¹⁶

Prison Laws in Karnataka

The Prisons Act, 1894 is the central law for prisons in India.⁹¹ It deals with maintenance of prisoners, appointment of officers of prison and their duties, admission, removal and discharge of prisoners, prisoner discipline and employment of prisoners. However, prisons, reformatories, and borstal institutions are State subjects under the Constitution of India, 1950.⁹² Thus, each State has both legislative and executive power over prisons. Prisons in Karnataka are governed by the Karnataka Prisons Act, 1963, the Karnataka Prisoners Act, 1963, the Karnataka Prison Rules, 1974, the Karnataka Prisons Manual, 1978,⁹³ the Borstal School Act, 1963 and the Borstal School Rules, 1969.

(a) Segregation Of Prisoners

4.53

Section 5 of the Karnataka Prisons Act, 1963 mandates the State Government to construct and regulate prisons so as to facilitate separation of different categories of inmates.¹⁰¹ Women are to be separately housed from the men, male prisoners under the age of 21 years should be separated from the other prisoners, under-trial criminal prisoners must be separated from convicts, and civil prisoners must be kept apart from criminal prisoners.¹⁰² The Act allows prisoners under trial to see their legal advisers without the presence of any other person.¹⁰³ The Model Prison Manual 2003 also mandates the separation of prisons according to categories of prisoners.¹⁰⁴ It defines an 'under-trial' prisoner as one who has been committed to custody in prison, pending investigation or trial,¹⁰⁵ thereby clubbing 'pre-trial' and 'under-trial' prisoners.¹⁰⁶

(b) Overcrowding In Prisons

4.54

In an attempt to deal with overcrowding, in *Re Inhuman Conditions in 1382 Prisons*¹⁰⁷ the Supreme Court directed the Inspector General of Prisons to identify the jails where overcrowding is 150% and above and prepare an action plan to reduce overcrowding. The Manual tackles the overcrowding problem by providing for a court hall to be set up in the prison to dispose of cases of under-trials

Higher courts in India have also failed to engage with the competing purposes of a bail decision, despite having upheld the cardinal rule of *'bail not jail'* on more than one occasion.¹⁴⁸ As under-trials are legally presumed innocent with little evidence to suggest guilt, any time spent in prison deserves justification. Excessively long prison time, even prior to establishing guilt of the detainee is a matter of individual and societal concern due to its long-term debilitating effects on a person's health, income and employability, as well as costs to the family and the society at large.¹⁴⁹ Research in the US¹⁵⁰ and other jurisdictions¹⁵¹ has confirmed these consequences and suggests that detention at this preliminary stage *'puts many on a cycle of incarceration from which it is extremely difficult to break free'*.¹⁵²

involved in petty offences.¹⁰⁸ Under-trial prisoners must be produced before the court either in person or through electronic media and a court diary must record instances of production, on the basis of which police escort should be requested in advance.¹⁰⁹

4.55

Further, the Manual provides that under-trials whose cases have been pending for more than three months should be sent on the fifth day of each month to the Sessions Judge or District Magistrate with relevant extracts to the court concerned.¹¹⁰ Timely presentation of the accused before the magistrate is crucial for the case to progress and avoid unnecessary and prolonged confinement. However, in Karnataka, it was found that between September 2014 and February 2015, a monthly average of 2,490 under-trial accused were not produced in court due to shortage of police escorts.¹¹¹ For every 100 police escorts requested, only 70 were sent for production of the accused.¹¹²

(c) Periodic Review Mechanism

4.56

In *Bhim Singh v. Union of India*,¹¹⁷ the Supreme Court directed the establishment of District-level Under-Trial Review Committees (UTRCs), in furtherance of the series of decisions by which the it had renewed its attention on the large numbers of under-trial detainees.¹¹⁸ The Court noted that the Central Government, in consultation with State Governments, must take steps to fast track all types of criminal cases so that criminal justice is delivered in a timely and expeditious manner. The mandate of the UTRC is to exercise oversight over unnecessarily long incarceration of under-trial prisoners, particularly those detained under Section 436A, CrPC, persons who have been granted bail but are unable to furnish sureties and persons detained for compoundable offences.¹¹⁹ Since their establishment, it has been noted that while UTRCs have been formed in quite a few districts and good practices have been observed in some of them, meetings are irregular and compliance with the intended mandate of the UTRC are patchy.¹²⁰

“The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release.”¹²¹

Conclusion

4.57

In its 268th Report, while reviewing the definition and purpose of bail in India, the Law Commission noted that “The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release.”¹²¹ However, despite the lament, the Law Commission failed to weigh competing principles or values that guide bail decision making and suggest an analytical framework.

4.58

In performing the balancing act between crime control and due process concerns while making bail decisions, three challenges of ensuring equity, rationality and visibility are evident.¹²²

4.59

Equity demands that similarly situated accused persons are treated alike in terms of both process and outcome. This leads us to the principle challenge of identifying the driving factor behind a bail decision. Should a positive bail outcome depend solely on the financial capability of the accused? Alternatively, are factors like seriousness of the charge, community ties and circumstances of the accused more relevant? However, this is a difficult determination in any legal system in the absence of consensus on the main purpose behind a bail decision¹²³ or a framework by which competing values may be weighed.

4.60

Rationality and visibility are intricately tied to a discussion on equity in bail decision making. Rationality requires a direct link between the criteria for decision making and the intended bail outcome.¹²⁴ However, where money bail is the predominant mode of securing bail in a legal system, a determination on bail and corresponding period of detention, as well as the factors driving it are ‘low visibility’ occurrences,¹²⁵ as the ability to furnish bail is entirely dependent on the financial strength of the accused person.¹²⁶

4.61

Higher courts in India have also failed to engage with the competing purposes of a bail decision, despite having upheld the cardinal rule of ‘*bail not jail*’ on more than one occasion.¹²⁷ As under-trials are legally presumed innocent with little evidence to suggest guilt, any time spent in prison deserves justification. Excessively long prison time, even prior to establishing guilt of the detainee is a matter of individual and societal concern due to its long-term debilitating effects on a person’s health, income and employability, as well as costs to the family and the society at large.¹²⁸ Research in the US¹²⁹ and other jurisdictions¹³⁰ has confirmed these consequences and suggests that detention at this preliminary stage ‘*puts many on a cycle of incarceration from which it is extremely difficult to break free*’.¹³¹

4.62

An argument may be made that the number of under-trial prisoners in India is the result of the failure to consider how each stage of the criminal justice process differs and consequently, how the prioritisation of considerations while making bail decisions should also vary at each stage. The legal framework governing criminal procedure, from arrest to sentencing, suggests that a useful distinction between the pre-trial (which begins with an arrest and concludes with the filing of charge-sheet) and under-trial (which begins with the filing of charge-sheet and ends with the trial decision) stages ought to be made in the criminal justice process. Nonetheless, at every stage, bail decision making should surface the three core values of equity, rationality and visibility.

4.63

So far, in this Chapter, we have analysed the statutory and doctrinal framework on bail decision making in India and identified certain substantive and procedural ‘due process’ considerations, which have also been recognised and reiterated in judgments of the higher judiciary. We will return to this tussle between competing values at the end of this report, but now we turn to analyse the data on bail decision making at first productions and in the pre-trial stage, collected through court observations and from court records.

References

¹In *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, the Supreme Court briefly touched upon the issue when it noted the contradictory classification of some offences under the IPC. *Talab Haji Hussain v. Madhukar Purshottam Mondkar*, 1958 AIR 376, 1958 SCR 1226 (Supreme Court of India).

²Law Commission of India, *Code of Criminal Procedure*, 1973, (154th Report, 1996).

³Report of the Committee on Reforms of Criminal Justice System' (Ministry of Home Affairs, Government of India, 2003) Volume 1, 184 <http://mha.nic.in/sites/upload_files/mha/files/pdf/criminal_justice_system.pdf> accessed 23 November 2019.

⁴*ibid.*

⁵The Report illustrates the absence of a consistency and rationale in the classification by illustrating that subjecting a woman to cruelty (Section 498A, IPC) is punishable with three years imprisonment and is non-bailable, while committing adultery (Section 497, IPC) is punishable with imprisonment up to five years and is bailable. See Law Commission of India, *Code of Criminal Procedure*, 1973, (154th Report, 1996).

⁶Section 437(1), CrPC: "When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail..."
Section 437(2), CrPC: "If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided."

⁷Section 436(1), CrPC: "When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided."

⁸Code of Criminal Procedure, 1973, s 167 read with Code of Criminal Procedure, 1973, s 57.

⁹Code of Criminal Procedure, 1973, s 167.

¹⁰Code of Criminal Procedure, 1973, s 173.

¹¹Code of Criminal Procedure, 1973, s 436.

¹²Code of Criminal Procedure, 1973, s 2(c). Code of Criminal Procedure, 1973, s 41 allows the arrest of a person without a warrant.

¹³Code of Criminal Procedure, 1973, s 156(1).

¹⁴Code of Criminal Procedure, 1973, s 2(r).

¹⁵Code of Criminal Procedure, 1973, s 155.

¹⁶Code of Criminal Procedure, 1973, s 155(3); As per Section 155(4), a case with both cognizable and non-cognizable offences is considered as a cognizable case.

¹⁷*Sheela Barse v. State of Maharashtra* (1983) 2 SCC 96. The Supreme Court issued guidelines on arrest.

¹⁸*D.K. Basu v. State of West Bengal*, (1997) 1 SCC 216. The Supreme Court issued guidelines on arrest and detention.

¹⁹*Arnesh Kumar v. State of Bihar*, AIR 2014 SC 2756. The Supreme Court issued directions to the Centre and noted that "Our endeavour in this judgment is to ensure that police officers do not arrest accused unnecessarily and Magistrate do not authorise detention casually and mechanically."

²⁰*Sheela Barse v. State of Maharashtra* (1983) 2 SCC 96.

²¹*ibid.* Some of these safeguards have also been codified in Code of Criminal Procedure, 1973, s 50A which requires the person who is arresting another, to convey information of the arrest to a person nominated by the arrestee, to inform the arrestee of this right, and to record the arrest in a book at the police station.

²²*D.K. Basu v. State of West Bengal*, (1997) 1 SCC 216.

²³*D.K. Basu v. State of West Bengal*, (1997) 1 SCC 216.

²⁴*Joginder Kumar v. State of Uttar Pradesh* (1994) 4 SCC 260.

²⁵Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009).

²⁶Code of Criminal Procedure, 1973, s 41(1).

²⁷Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009).

²⁸Sections 41B and 50A reiterated the guidelines in *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 216; *Sheela Barse v. State of Maharashtra* (1983) 2 SCC 96, *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260).

²⁹Code of Criminal Procedure, s 41A(4).

³⁰Code of Criminal Procedure, s 50(a).

³¹See Second Schedule, Form no. 3 (Bond and Bail-bond after arrest under a warrant), and Form no. 28 (Bond and Bail-Bond on a preliminary inquiry before the police officer).

³²Proviso to Code of Criminal Procedure, s 436(1).

³³ *ibid.*

³⁴ 'Moving Beyond Money: A Primer on Bail Reform' (*Criminal Justice Policy Program*, Harvard Law School, October 2016) 12.

³⁵ See 'Law Enforcement's Leadership Role in the Pretrial Release and Detention Process' (*International Association of Chiefs of Police February, 2011*) <<http://www.theiacp.org/portals/0/pdfs/>> accessed 23 November 2019.

³⁶ 'Public Safety Assessment: A risk tool that promotes safety, equity, and justice' (*Laura and John Arnold Foundation*) <<http://www.arnoldfoundation.org/public-safety-assessment-risk-tool-promotes-safety-equity-justice/>> accessed 23 November 2019.

³⁷ Code of Criminal Procedure, 1973, s 167(1).

³⁸ Code of Criminal Procedure, 1973, s 172 mandates the investigating officer to record proceedings related to the case in a diary every day. The details include the time at which the information reached him, the time at which he began and ended his investigation, places visited by him, statement of the circumstances ascertained through investigation, and statements of witnesses recorded during investigation.

³⁹ Code of Criminal Procedure, 1973, s 167(2).

⁴⁰ *Raj Narain v. Supdt. Central Jail*, 1971 AIR SC 178; *Gouri Shankar Jha v. The State of Bihar and Ors.*, 1972 AIR SC 711. The case dealt with CrPC, 1898, which had the same provisions of production within the first 24 hours.

⁴¹ *Joginder Kumar v. State of Uttar Pradesh*, (1994) 4 SCC 260. In this case, the Supreme Court recognised the need for a 'balance' between the rights of the accused and the need to protect the society. The Court said that arrests must not be made in a routine manner and without reasonable justification.

⁴² Constitution of India, 1950, Article 22; Code of Criminal Procedure, 1973, s 167(1); *Raj Narain v. Superintendent, Central Jail*, AIR 1971 SC 178.

⁴³ Code of Criminal Procedure, 1973, s 436(2).

⁴⁴ Section 437(4) CrPC.

⁴⁵ *Rao Harnarain Singh Sheoji Singh v. The State*, AIR 1958 P&H 123; *State v. Captain Jagat Singh*, AIR 1962 SC 253; *State v. Jaspal Singh Gill*, 1984 AIR SC 1503; *Raghubir Singh & Others Etc v. State of Bihar*, 1987 AIR SC 149; *Ram Pratap Yadav v. Mitra Sen Yadav*, (2003) 1 SCC 15.

⁴⁶ Code of Criminal Procedure, 1973, s 437(5).

⁴⁷ Code of Criminal Procedure, 1973, s 437(1)(i).

⁴⁸ Code of Criminal Procedure, 1973, s 437(1)(ii).

⁴⁹ Code of Criminal Procedure, 1973, s 167(2)(b) proviso.

⁵⁰ Code of Criminal Procedure, 1973, s 167(2)(b) proviso.

⁵¹ Code of Criminal Procedure, 1973, s 167(2)(b) proviso.

⁵² Code of Criminal Procedure, 1973, s 167(2)(b) Explanation 1.

⁵³ Code of Criminal Procedure, 1973, s 437.

⁵⁴ Section 438, which deals with grant of anticipatory bail for non-bailable offences, lists out in sub-section (2), the conditions that may be imposed while granting anticipatory bail such as (i) enjoining the presence of the arrested person for interrogation by a police officer when required, (ii) non-interference in the investigation and (iii) approaching the court for prior permission before leaving India.

⁵⁵ Code of Criminal Procedure, 1973, s 437(3).

⁵⁶ Code of Criminal Procedure, 1973, s 440: Amount of bond and reduction; Code of Criminal Procedure, 1973, s 441: Bond of accused and sureties; Code of Criminal Procedure, 1973, s 441A: Declaration by sureties; Code of Criminal Procedure, 1973, s 442.: Discharge from custody; Code of Criminal Procedure, 1973, s 443: Power to order sufficient bail when that first taken is insufficient; Code of Criminal Procedure, 1973, s 444.: Discharge of sureties; Code of Criminal Procedure, 1973, s 445: Deposit instead of recognizance; Code of Criminal Procedure, 1973, s 446: Procedure when bond has been forfeited; Code of Criminal Procedure, 1973, s 446A: Cancellation of bond and bail bond; Code of Criminal Procedure, 1973, s 448: Bond required from minor; Code of Criminal Procedure, 1973, s 450: Power to direct levy of amount due on certain recognizances.

⁵⁷ Unlawful Activities Prevention Act, 1967, s 43D(5) proviso.

⁵⁸ Narcotic and Psychotropic Substances Act, 1985, s 37.

⁵⁹ *Narcotics Control Bureau v. Kishan Lal*, (1991) 1 SCC 705.

⁶⁰ Unlawful Activities Prevention Act, 1967, s 43D(4).

⁶¹ Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, s 18.

⁶² Unlawful Activities Prevention Act, 1967, s 43D(2)(b), UAPA; Narcotic and Psychotropic Substances Act, 1985, s 36A(4).

⁶³ Narcotic and Psychotropic Substances Act, 1985 s 36A(4) proviso.

⁶⁴ *State of Madhya Pradesh v. Kajad*, (2001) 7 SCC 673.

⁶⁵ Code of Criminal Procedure, 1973, s 437(7); Further, a person may be released on bail if at any stage of the investigation, inquiry or trial, the court feels that there are no reasonable grounds to believe that the accused has committed a non-bailable offence, but that there needs to be further inquiry into his guilt. However, where such accused was released prior to filing of the charge sheet, release on bail alone is not a sufficient ground to bring an accused back into custody. See *Basin v. State of Haryana* (1977) 4 SCC 410.

⁶⁶ Code of Criminal Procedure, 1973, s 437(6).

⁶⁷ *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India and Anr.*, (1994) 6 SCC 731, JT 1994 (6) 544; *Re - Inhuman Conditions In 1382 Prisons*, (2016) 10 SCC 17.

⁶⁸ See generally Code of Criminal Procedure, 1973, ch XIX; Code of Criminal Procedure, 1973, s 235; Code of Criminal Procedure, 1973, s 248.

⁶⁹ *ibid.*

⁷⁰ Code of Criminal Procedure, 1973, s 437A.

⁷¹ Andrew Ashworth and Mike Redmayne, *Criminal Process* (4th edn., 2010) 229. These four grounds for refusal of bail have been recognised by the European Court of Human Rights at Strasbourg.

⁷² *ibid* at 228.

⁷³ Safeguards for protection of an accused person's due process rights have also been codified in various international instruments such as the Universal Declaration of Human Rights, 1948 (Article 11(1)), International Covenant on Civil and Political Rights, 1966 (Article 9(3)), European Convention on Human Rights, 1950 (Article 6(2)) and standards such as the United Nations Standard Minimum Rules for Non-Custodial Measures (Rule 6.1), United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 111). Further, these instruments emphasise that detention should be pursued only as a matter of last resort. Also see Eur. Court HR, Case of *Tomasi v. France*, judgment of 27 August 1992, Series A, No. 241-A, p. 36, para. 91, cited in Office of High Commission on Human Rights (OHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, 194.

⁷⁴ Article 22, Constitution of India, 1950 directs that the person arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest. Only in two situations can this mandate be obviated:

1. When the person arrested is an 'enemy alien', or
2. When the arrest is under any law for preventive detention

⁷⁵ Constitution of India, 1950, Article 22(3).

⁷⁶ Code of Criminal Procedure, 1973, s 57; Code of Criminal Procedure, 1973, s 167(1). A related right against custodial torture has been recognised by the court in *Nilabati Behera v. State of Orissa*, AIR 1993 SC 1960; *Bhim Singh v. State of Jammu & Kashmir*, AIR 1986 SC 494; *Sheela Barse v. State of Maharashtra*, 1983 SCR (2) 337. In all these cases, the courts have found the police/armed forces/ other public officers culpable of severe forms of custodial violence and awarded exemplary compensation to the victim/their families.

⁷⁷ *Maneka Gandhi v. Union of India*, 1978 SCR (2) 621; *Khatri (II) v. State of Bihar and Ors.*, (1981) 1 SCC 627.

⁷⁸ *A.R. Antulay v. R.S. Nayak*, AIR 1992 SC 170.

⁷⁹ *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India and Anr.*, (1994) 6 SCC 731, JT 1994 (6) 544.

⁸⁰ Code of Criminal Procedure (Amendment) Act, 2005 (25 of 2005).

⁸¹ *Husain and Another v. Union of India*, Criminal Appeal No. 509 of 2017.

⁸² *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.

⁸³ *Khatri (II) and Ors. v. State of Bihar and Ors.*, 1981 SCR (2) 408. Also see *Suk Das v. State of Arunachal Pradesh*, 1986 SCR (1) 590.

⁸⁴ *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.

⁸⁵ *Nandini Satpathy v. P. L. Dani*, (1978) 2 SCC 424; *Hussainara Khatoon (IV) v. State of Bihar*, (1980) 1 SCC 98; *Mohd. Ajmal Amir Kasab v. State of Maharashtra*, (2012) 9 SCC 1.

⁸⁶ Law Commission of India, *Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (268th Report, May 2017); 'Report of the Expert Committee on Legal Aid: Processual Justice to the People' (*Department of Legal Affairs*, Government of India, 1973) <<http://reports.mca.gov.in/Reports/15-lyer%20committee%20report%20of%20the%20expert%20committee%20in%20legal%20aid,%201973.pdf>> accessed 23 November 2019.

⁸⁷ *Prem Shankar Shukla v. Delhi Administration*, (1980) 3 SCC 526.

⁸⁸ *Citizens for Democracy v. State of Assam*, (1995) 3 SCC 743; *Sunil Gupta v. State of Madhya Pradesh*, (1990) 3 SCC 119.

⁸⁹ *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494; *Sunil Batra (II) v. Delhi Administration*, (1980) 3 SCC 488.

⁹⁰ *Sanjay Suri & Anr. v. Delhi Administration & Anr.*, 1988 Supp SCC 160.

⁹¹ The Prisons Act, 1894.

⁹² Constitution of India, 1950, 7th Schedule, list II, item 4.

⁹³ The Karnataka Prisons Manual, 1978 is inaccessible and has not been uploaded on the website of the Karnataka Prisons Department or any other Government website. See 'Conditions of Detention in the Prisons of Karnataka' (*Commonwealth Human Rights Initiative, 2010*) 1.

⁹⁴ See 'Part I of the National Policy On Prison Reforms and Correctional Administration' (*Bureau of Police Research & Development*, Ministry of Home Affairs, Government of India, 2007).

⁹⁵ 'All India Committee on Jail Reform' (*Bureau of Police Research & Development*, Ministry of Home Affairs, 2003).

⁹⁶ *ibid* para 4.34.18.

⁹⁷ *ibid* para 4.34.19 and 12.17.21. This recommendation was implemented in 2005 when Section 436A was inserted into the Code of Criminal Procedure.

⁹⁸ *ibid* paras 6.19.1 & 12.17.16.

⁹⁹ *Ramamurthy v. State of Karnataka*, (1997) SCC (Cri) 386.

¹⁰⁰ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*,

Ministry of Home Affairs, Government of India, 2003).

¹⁰¹ Karnataka Prisons Act, 1963, s 5: Accommodation for prisoners — The State Government shall provide, for the prisoners in the State, accommodation in prisons constructed and regulated in such manner as to comply with the requisitions of this Act in respect of the separation of prisoners. Also see Section 26, Karnataka Prisons Act 1963.

¹⁰² *Sunil Batra (II) v. Delhi Administration*, (1980) 3 SCC 488.

¹⁰³ Karnataka Prisons Act, 1963, s 40.

¹⁰⁴ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rule 2.02.

¹⁰⁵ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rule 1.31. It also includes those whose sentence execution has been suspended by the Court, or is under appeal, those whose sentence has been annulled and are ordered by the Court to be retried, and a warrant for the prisoner's release on bail is not received. (Rule 10.38).

¹⁰⁶ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rule 2.05 (xiv). Mentally sick under-trial prisoners, young under-trial offenders and women under-trials must not be lodged with other under-trial prisoners: Rule 22.01.

¹⁰⁷ *Inhuman Conditions in 1382 Prisons, In Re*, (2016) 14 SCC 815.

¹⁰⁸ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rule 2.06.5. We are unable to find how many prisons have set up courts in the prison premises.

¹⁰⁹ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rules 22.21 and 22.22. Also see Code of Criminal Procedure, s 167(2).

¹¹⁰ 'Model Prison Manual for the Superintendence and Management of Prisons in India' (*Bureau of Police Research and Development*, Ministry of Home Affairs, Government of India, 2003), Rule 22.40.

¹¹¹ 'Justice Under Trial: A Study of Pre-trial Detention in India' (*Amnesty International India, 2017*) 10 <<https://amnesty.org.in/justice-trial-study-pre-trial-detention-india/>> accessed 23 November 2019.

¹¹² *ibid.*

¹¹³ 'Union Home Minister approves New Prison Manual 2016' (*Press Information Bureau*, Ministry of Home Affairs, Government of India) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=134687>> accessed 23 November 2019.

¹¹⁴ The three categories now are:

- 'Red' category: Fundamentalists, Naxalites, extremists, terrorists.
- 'Blue' category: gangsters, hired assassins, dacoits, serial killers/ rapists/violent robbers, drug offenders, habitual grave offenders, communal fanatics, prisoners highly prone to escape or attack other prisoners.
- 'Yellow' category: those who do not pose any threat to the society on release, those involved in murder on personal motives, other bodily offences, property offences, special and local laws, railway offences and minor offences.

¹¹⁵ See Model Prison Manual 2016, ch XVI.

¹¹⁶ Letter of the Joint Secretary No.17014/3/2009-PR (*Ministry of Home Affairs*, 17 July, 2009), <<https://mha.gov.in/sites/default/files/PrisonAdvisories-1011.pdf>> accessed 22 November 2019.

¹¹⁷ *Bhim Singh v. Union of India*, (2015) 13 SCC 603.

¹¹⁸ See Chapter 1, Introduction. Also see *Hussainara Khatoon and Others v. Home Secretary, State of Bihar*, 1979 AIR 1369; *Sunil Batra v. Delhi Administration*, (1980) AIR 1579; *Rama Murthy v. State of Karnataka*, (1997) 2 SCC 642; *Bhim Singh v. Union of India*, 2014 SCC Online SC 682; Re - *Inhuman Conditions In 1382 Prisons*, (2016) 10 SCC 17.

¹¹⁹ 'Circle of Justice: A National Report on Under Trial Review Committees' (*Commonwealth Human Rights Initiative, 2016*) <<https://www.humanrightsinitiative.org/publication/circle-of-justice-a-national-report-on-under-trial-review-committees>> accessed 23 November 2019.

¹²⁰ *ibid.*

¹²¹ Law Commission of India, *Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (268th Report, May 2017).

¹²² John S. Goldkamp and Michael R. Gottfredson, 'Bail Decision Making and Pretrial Detention: Surfacing Judicial Policy', (1979) *Law and Human Behavior*, 3(4) 227.

¹²³ *ibid.*

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ *ibid.*

¹²⁷ *In State of Uttar Pradesh v. Amarmani Tripathi*, (2005) 8 SCC 21 as cited in *Sanjay Chandra v. CBI*, (2012) 1 SCC 40, the Supreme Court listed out a host of considerations to be considered while making a bail decision: (i) whether there is reasonable ground to believe that the accused committed the offence, (ii) the nature and gravity of the charge, (iii) severity of the punishment, (iv) danger of absconding, (v) character, behaviour, means and position of the accused, (vi) likelihood of re-offending, (vii) apprehension of witnesses being intimidated and (viii) danger of justice being thwarted by grant of bail. However, there has been little engagement on the primary purpose behind bail in India and further, no guidance was provided on how the multitude of considerations must be weighed against each other.

¹²⁸ Jayanth, K. and Kumar, C. Raj, 'Delay in Process, Denial of Justice: The Jurisprudence and Empirics of Speedy Trials in Comparative Perspective' (2011) Vol. 42 Georgetown Journal of International Law.

¹²⁹ 'Moving Beyond Money: A Primer on Bail Reform' (*Criminal Justice Policy Program*, Harvard Law School, 2016); 'Incarceration's Front Door: The Misuse of Jails in America' (*Vera Institute of Justice*, February 2015) 5 <<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>> accessed 23 November 2019; 'The Price of Freedom Bail and Pretrial Detention of Low Income Non-felony Defendants in New York City' (Human Rights Watch, 2010) <<http://www.pretrial.org/wpfb-file/the-price-of-freedom-human-rights-watch-2010-pdf/>> accessed 23 November 2019.

¹³⁰ Cape, Ed and Smith, T, 'The Practice of Pre-trial Detention in England and Wales: Research Report' (*University of the West of England, Bristol*, 2016) <<http://eprints.uwe.ac.uk/28291>> accessed 23 November 2019; Bamford, David, 'Factors Affecting Remand in Custody: A Study of Bail Practices in Victoria, South Australia and Western Australia' (*Australian Institute of Criminology, Research and Public Policy Series*, 1999) 23 <http://www.aic.gov.au/media_library/publications/rpp/23/rpp023.pdf> accessed 23 November 2019.

¹³¹ 'Incarceration's Front Door: The Misuse of Jails in America' (*Vera Institute of Justice*, February 2015) 5 <<https://www.vera.org/publications/incarcerations-front-door-the-misuse-of-jails-in-america>> accessed 23 November 2019.

05

Court Observation of Bail Decision Making: Why the type of case matters most

5.1

As we discussed in Chapter 4, 'first production' is the first point of the criminal justice process where there is judicial oversight over the custody of the accused. Here, the court decides whether to grant bail to the person produced before it.

5.2

Briefly, a court must consider four grounds - (i) preventing the accused from absconding during the investigation and trial, (ii) preventing the commission of further crime on release, (iii) preventing tampering with evidence or intimidating witnesses and (iv) preventing public disorder that may result from releasing an accused involved in a serious crime. In this Chapter, we move from law in the books to law in action. In particular, we examine how bail decisions are made in three districts in the State of Karnataka.

5.3

In Chapter 2, we introduced the empirical strategy developed to understand the factors shaping bail decision making in court and its effect on pre-trial and under-trial detention in India. The first strategy was direct court observation of bail decision making in first production cases. A fuller account of the methodology is set out in Chapter 2. In this Chapter, we focus on the results of this approach.

5.4

We observed a total of 378 cases of first production, in 6 weeks of court observations in Bengaluru, Dharwad and Tumakuru,¹ comprising;

Bengaluru – 284,

Dharwad – 54,

Tumakuru – 40.

5.5

Almost all the accused produced in court during the court observation period were men (Figure j). Tumakuru, with 10%, had the highest percentage of accused women, while only 3% of the accused produced in Bengaluru were women. Apart from the gender of the accused, no other demographic information was available.

5.6

At first production of an accused, three outcomes are possible. First, the accused may be released on bail. Second, the court may remand the accused to police custody for further investigation. Third, the court may direct the accused to judicial custody, resulting in imprisonment. Generally, an accused person prefers bail and where bail is refused, to

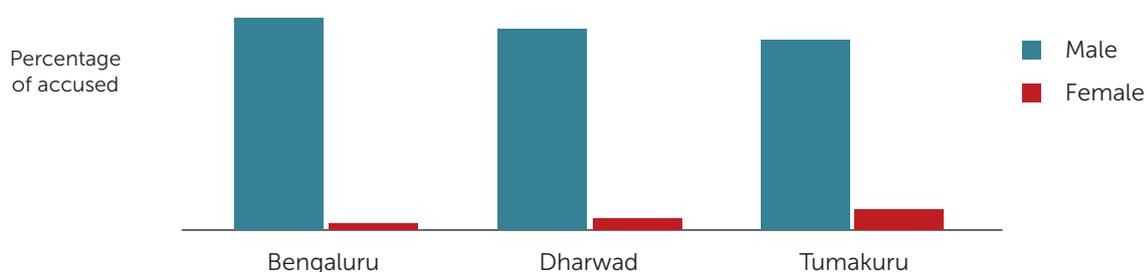


Figure j: Gender of the accused in 3 districts

OVERVIEW	BENGALURU	DHARWAD	TUMAKURU
No. of first productions	284	54	40
No. of Courts	10	7	10
Period of Observation	17 April - 27 May 2017	13 June - 15 August 2017	17 July - 26 August 2017
Bail granted (number)	17	14	10
Bail rate percentage	6%	26%	25%

Table 6: Overview of first productions study

be remanded to judicial custody. Police custody is the least preferred outcome as it could expose the accused to physical and psychological assault by the police.

5.7

Figure k presents an overview of the outcomes at first production in the cases observed in this study. In all three districts, judicial custody was the outcome of first production in more than 50% of the cases. In Bengaluru, 74% of first productions resulted in judicial custody, with Dharwad and Tumakuru recording 67% and 58%, respectively. Police custody was granted only in 1 in 5 cases in Bengaluru and 1 in 50 cases in Dharwad. Notably, in Bengaluru, the number of police custody orders was three times that of orders granting bail.

5.8

This cursory review of the outcomes of first production in the three districts reveals no clear pattern. While the substantive law discussed in Chapter 4 may give the impression that bail is the default option on first production, in the observed cases, judicial custody is the most likely outcome.

Bail was granted in about 25% of the cases in Dharwad and Tumakuru but in only about 6% of the cases in Bengaluru.

This wide variation in the rate of bail being granted between the three districts may be due to the types of cases in each court or the factors that shape bail decision making. We explore these questions in the rest of this Chapter.

A. Explaining First Production Outcomes

5.9

The preliminary figures on bail outcomes at first production reflect stark differences between the 3 districts.

This suggests that the location or situs of the criminal proceedings, and first production in particular, could determine whether an accused is granted bail or is remanded to

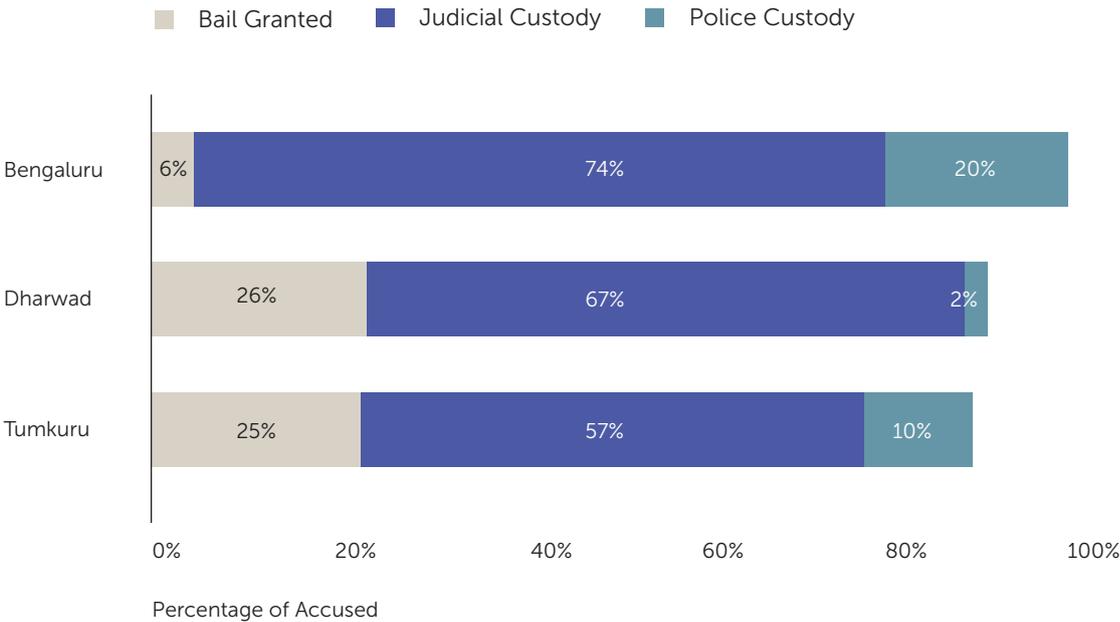


Figure k: Outcome of first productions

judicial / police custody.

However the variations between the 3 districts cannot simply be attributed to geography but is more reasonably explained by differences in policing strategies, court and prosecutorial cultures.

The data collected through the court observations and court records do not provide ready answers on the nature and extent of differences between the three districts on these counts. However, our study allows us to identify and explore some of the substantive and procedural legal factors that may contribute to these differences and are relevant to a bail decision.

5.10

Substantive factors relate to the nature of the offence and its classification. Procedural factors are tied to due process considerations and include effective legal representation and treatment of the accused among others. In the following sections, we will present our findings on how such substantive and procedural factors shape the outcome of a bail decision.

I. SUBSTANTIVE FACTORS

5.11

Our study considered the impact of two substantive factors that could influence a bail decision – (I) statutory basis and nature of the offence, and (II) type of offence i.e. classification of offences as bailable and non-bailable. The IPC and the CrPC, as well as criminal statutes recognise both these factors to be relevant to bail decision making. So, let us examine their effects in turn.

(a) Statutory Basis Of Offence

5.12

Criminal offences can be broadly categorised as offences under the IPC and offences under SLLs. SLLs is a category developed by the NCRB to include a wide variety of non-IPC criminal statutes, which range from laws to protect children to terrorism offences. As a first step, it is useful to review how IPC and SLL offences are dealt with at first production.

DISTRICT	IPC	SLL ²
Bengaluru	240 (84.5%)	44 (15.5%)
Dharwad	36 (66.7%)	18 (33.3%)
Tumakuru	21 (52.5%)	19 (47.5%)

Table 7: Number of IPC Cases and SLL Cases

5.13

The statutory basis of offences in the three districts is widely variant. If the bail decision outcomes differ across these statutes, then this may explain the wide variation in outcomes across the three districts. In Table 7, we notice that while it is equally likely that an offence before a Tumakuru court is an IPC or SLL offence, it is 5 times more likely to be an IPC offence in Bengaluru.

5.14

Among both IPC and SLL offences,³ the most likely outcome of a bail decision was found to be judicial custody. Irrespective of the specific offence, police custody was not granted in the case of any IPC offence in Dharwad and was granted only in 6% of SLL offences. Accused persons were at least three times as likely to secure bail for an IPC offence when compared to an SLL offence. In Bengaluru and Dharwad, accused persons were twice as likely to be remanded to police custody for SLL offences than IPC offences, though in Tumakuru, the chances were similar.

5.15

Between the three districts, most number of SLL offences were registered under the Protection of Children from Sexual Offences Act, 2012 (POCSO) and the NDPS Act. The POSCO does not restrict the powers of the court to grant bail and extends the provisions of the CrPC on bail to offences under it. However, as discussed in Chapter 4, the NDPS Act designates particular offences under it as non-bailable and further places fetters on the powers of the court to grant bail. Further, the general view that offences under such special statutes are grave in nature may also explain the reduced bail outcomes in case of SLL offences.

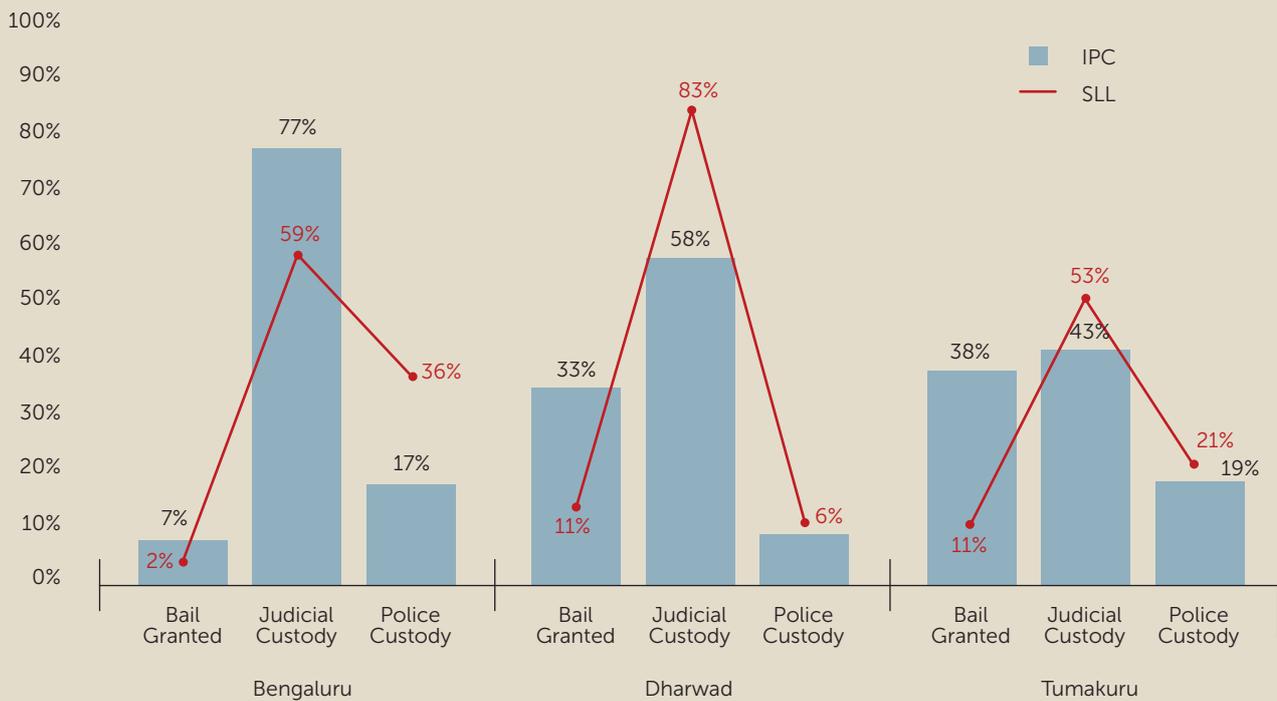


Figure I: Statutory basis of offences and outcomes of first production⁴

5.16

Therefore, two trends stand out from the data collected through court observations. First, the common trend in all three districts was that bail was granted at higher rates for IPC offences when compared to offences committed under an SLL. Second, significant variations in the outcome on first production are visible across the three districts depending on whether the offence committed was under the IPC or an SLL (Figure I).

5.17

IPC offences can be further categorised into offences against the body, offences against the property, offences against the State and public order, and other offences which may be a combination of any or all of them. While data on types of offences and its relationship with bail outcomes could be collected in the court observations in Bengaluru, such an analysis could not be carried out in respect of Dharwad and Tumakuru as the number of IPC offences were too small⁵ to draw any significant conclusions.

5.18

On comparing the nature of offences, we see that in Bengaluru, the lowest rate of bail was in case of offences against property, though we may expect the rate of bail to be the least for offences against the body. Surprisingly, offences against the State have the highest rate of bail being granted (Figure n). Despite concerns that persons accused of such offences may potentially create public disorder, the rate of bail is high, which raises questions on whether such offences may be politically motivated.

5.19

Therefore, there is a significant variation of bail rate across the category of offence and hence this may partially explain the variation across the three districts.

(b) Type of Offences: Classification as Bailable v. Non-Bailable

5.20

As we noted in Chapter 4, offences are categorised into bailable and non-bailable offences under the CrPC. Under Section 436, bail must be granted to persons accused of bailable offences, while under Section 437, courts have discretion to grant bail in case of non-bailable offences.

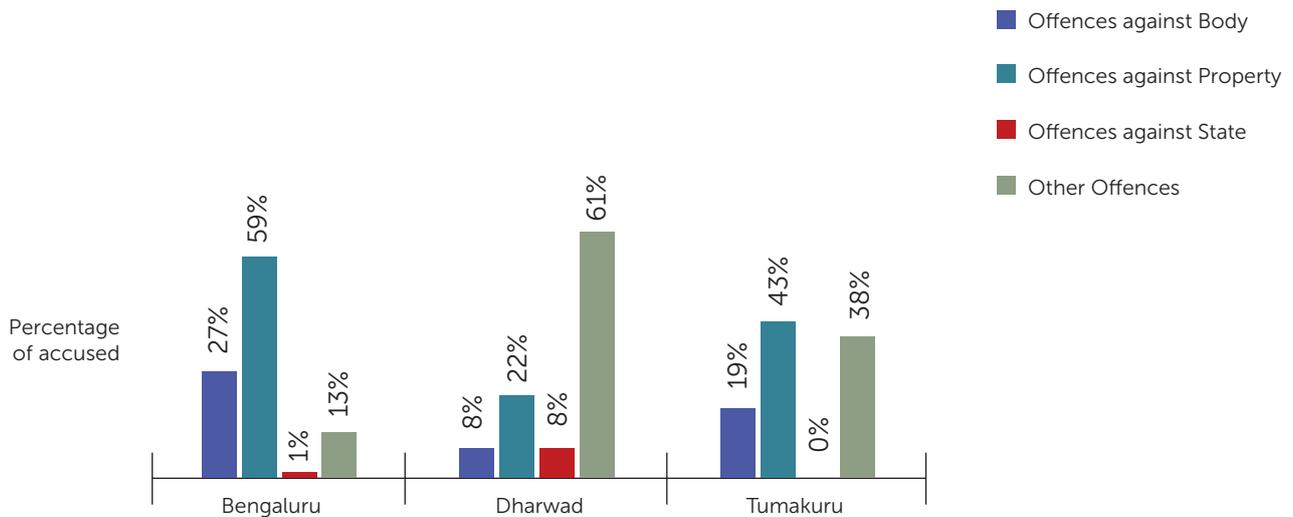


Figure m: Nature of offences in each district

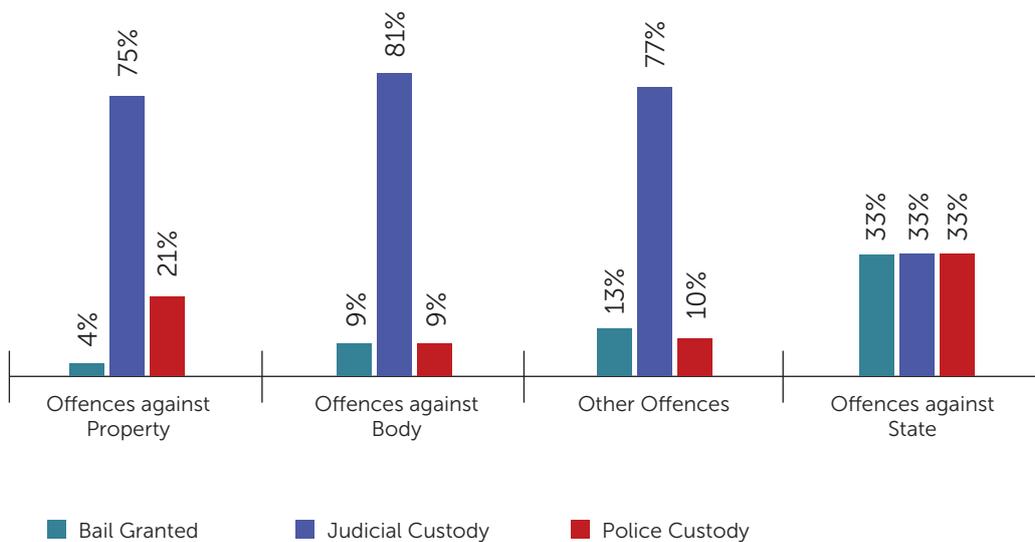


Figure n: Outcome of first productions based on nature of offences in Bengaluru⁶

5.21

Bail may be secured at the police station for bailable offences and only those accused persons who have been refused bail by the police seek bail in court. While this is true of non-bailable offences as well, we see that in practice, police bail is rarely granted and most cases go to court. Consequently, when we undertook this study, we expected only a few bailable cases to reach the criminal courts.

5.22

This expectation was confirmed in Bengaluru (8%) and Tumakuru (8%). However, in Dharwad, 20% of the first production cases were bailable in nature. Non-bailable cases constituted a high proportion of first production cases in all three districts.

5.23

If the classification of offences into bailable and non-bailable in Schedule – I of the CrPC is meant to reflect the seriousness of the offence, then one may presume that bail is more likely to be granted in cases of bailable rather than non-bailable offences at first production. The results from Bengaluru (48%)

and Dharwad (82%) aligned with this expectation. However, Tumakuru courts did not grant bail to any accused in a bailable offence at first production.

5.24

In Bengaluru and Dharwad, bail was predictably granted in far fewer non bailable cases, while in Tumakuru, courts granted bail in a significant 27% of non-bailable cases. Across the three districts, judicial custody was the most common outcome in cases of non-bailable offences – 77% in Bengaluru, 81% in Dharwad and 57% in Tumakuru.

5.25

Therefore, we see that the variation in bail rates between the three districts may be explained by the differences in whether the offence committed is under the IPC or an SLL, the type of offence and its classification as bailable and non-bailable.

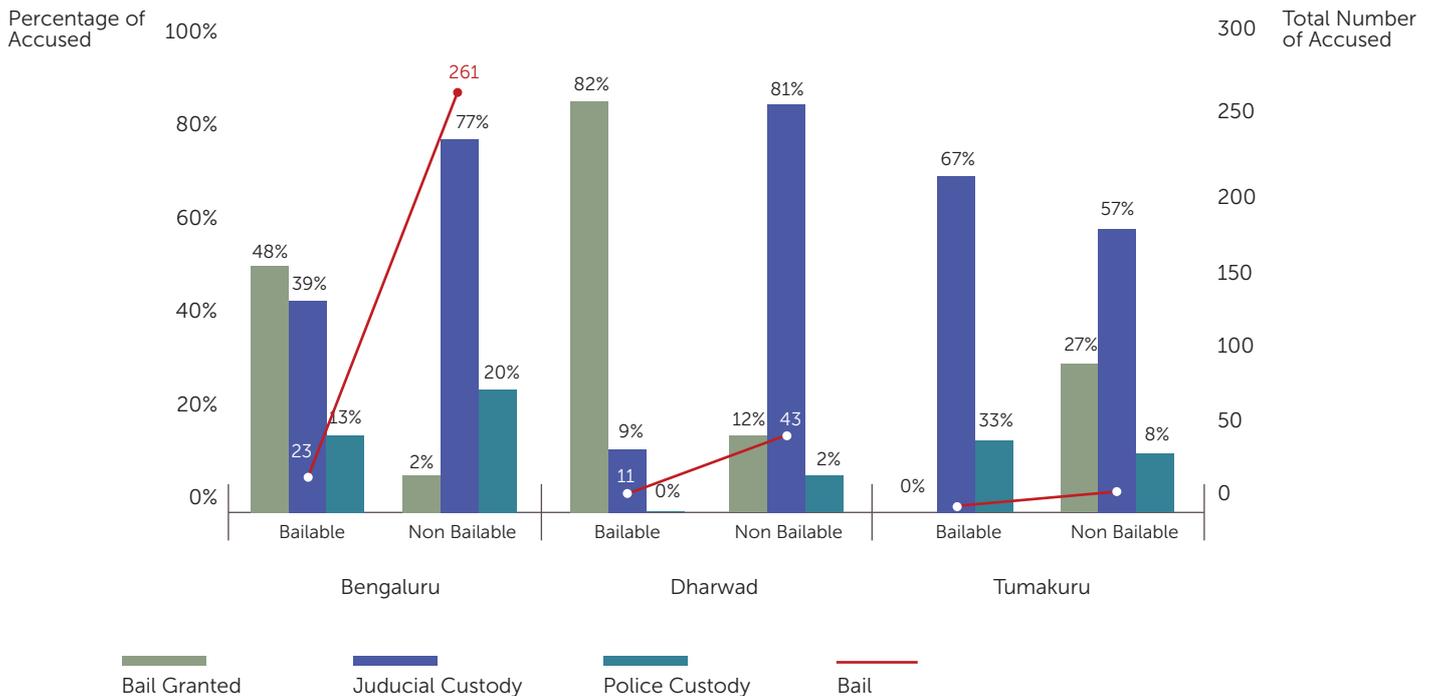


Figure o: Outcome of first productions - Bailable v. Non-Bailable

II. PROCEDURAL FACTORS

5.26

In the analysis of bail decision making in the district courts in this Chapter, we have distinguished between two factors. First, the substantive legal factors that make up the types and categories of criminal offences that are designed to have an effect on bail outcomes. Secondly, we identify the procedural elements of bail decision making that may potentially shape bail outcomes. In this section, we focus on two procedural factors – legal representation and due process in court decision making. We look at each on turn.

(a) Legal Representation

5.27

In all three districts, on an average, more than two-third of the accused had legal representation. This was as high as 85% in Bengaluru going down to 75% and 61% in Tumakuru and Dharwad respectively.

5.28

42% of accused persons in Dharwad and 33% of accused persons in Tumakuru having legal representation secured bail. However, it is significant to note that no person who was unrepresented by a lawyer secured bail. Even in Bengaluru, the accused was 3 times as likely to secure bail if they had legal representation, suggesting that the legal representation in fact leads to a positive bail outcome (Figure p).

5.29

The effects of legal representation on judicial custody were less clear. In Bengaluru, legal representation appeared to have no effect as those without legal representation had an equal chance of being remanded to judicial custody, while more unrepresented accused secured judicial custody orders in Dharwad and Tumakuru.

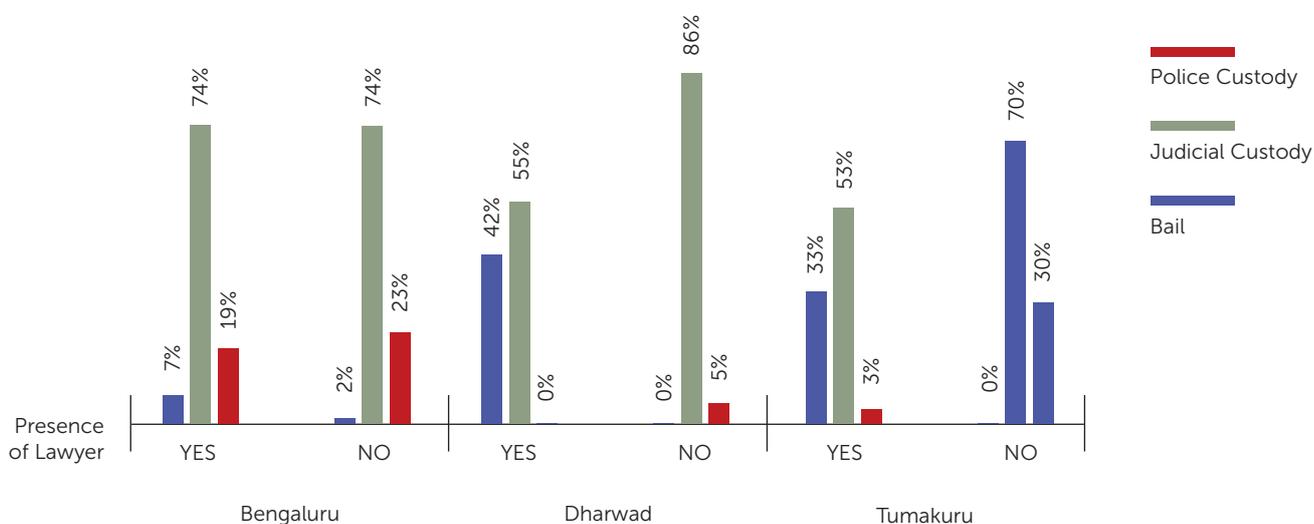


Figure p: Presence of lawyer and outcome of first productions⁷

5.30

Finally, the absence of legal representation appears to have resulted in greater police custody outcomes. In Tumakuru an accused person was 10 times more likely to be remanded to police custody where a lawyer was not present.

While the number of police custody outcomes also increased in Dharwad where there was no legal representation, a clear relationship could not be established as there were too few cases. However, surprisingly in Bengaluru, police custody was granted in a significant 19% of the cases where accused persons were represented by a lawyer.

5.31

Therefore, in all three districts, legal representation had the ability to secure bail orders as the bail rate increased with greater legal representation,

DISTRICT	Accused informed about free legal aid		
	YES	NO	NO INFO
Bengaluru	61	140	83
Dharwad	2	19	33
Tumakuru	0	3	37

Table 8: Accused informed of free legal aid

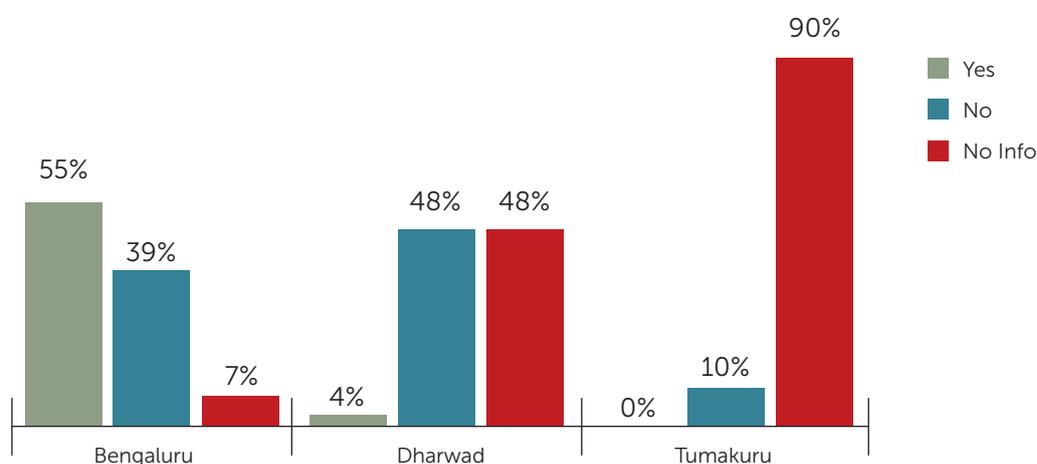


Figure q: Accused had no lawyer and informed of free legal aid

which would have a significant effect on under trial detention. The results with respect to judicial custody and police custody were mixed, suggesting that the inability of legal representation to singularly ensure an order granting bail may be due to the simultaneous influence of factors apart legal representation, such as the nature of the offence.

5.32

As observed above, not all accused persons had legal representation at the time of first production. In Chapter 4, we noted that the Supreme Court has made it mandatory for the Magistrate to inform the accused of their right to free legal aid. In this study, we assessed the extent to which this mandate is being complied with.

5.33

We found that in Bengaluru, 55% of the accused (24) who had no legal representation were informed of the right to free legal aid. As expected, in most cases where a lawyer was already present, there was little discussion about legal aid. Therefore, it is salient to look at only those cases where no lawyer was present to assess whether accused persons were informed of their right at first production (Figure q).

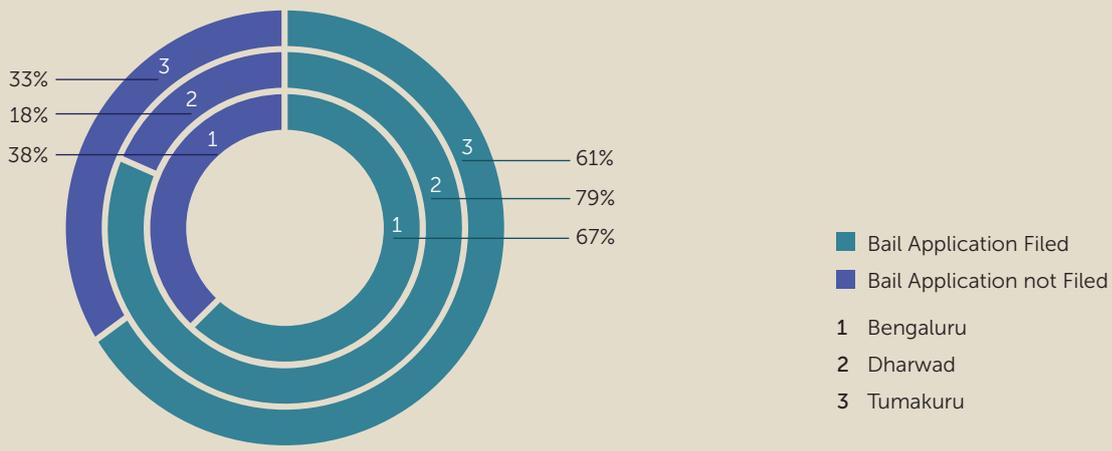
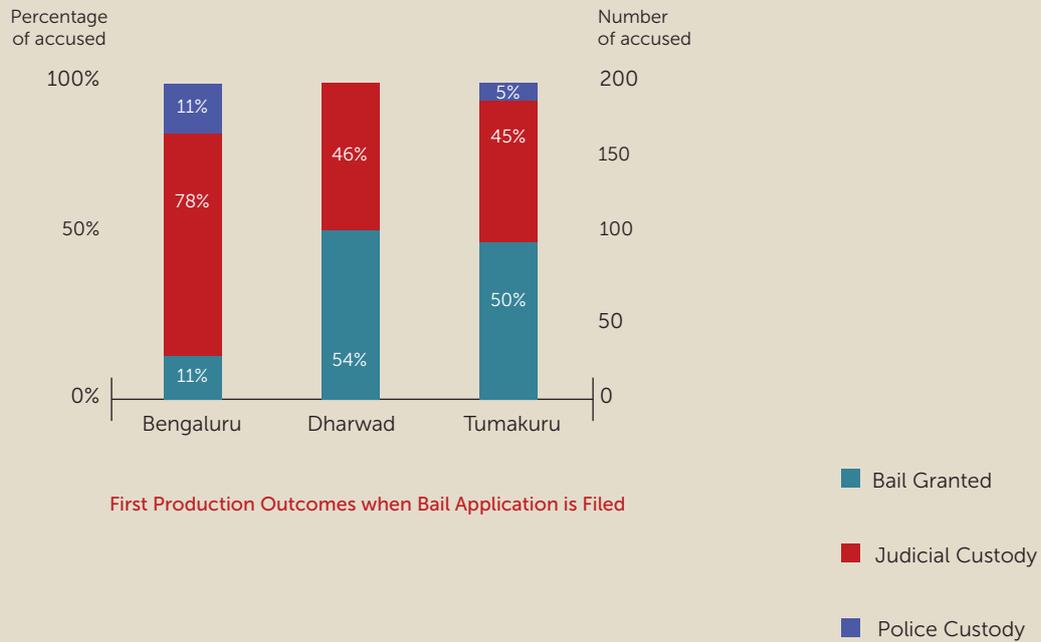
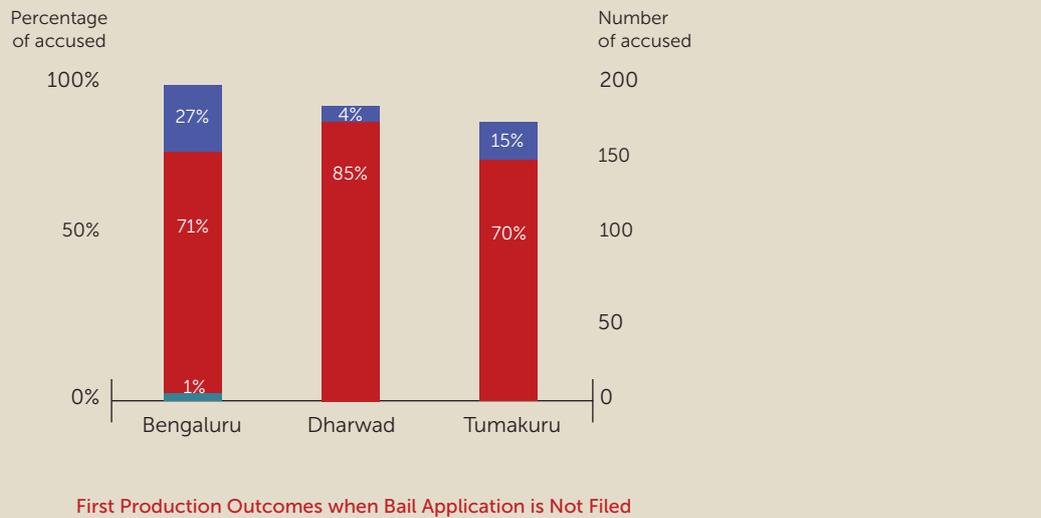


Figure r: Bail application filed where lawyer was present



First Production Outcomes when Bail Application is Filed



First Production Outcomes when Bail Application is Not Filed

Figures s: Bail applications filed and outcome of first production

5.34

However, as information on this aspect was not available in a substantial number of cases, no clear conclusion on the protocol of informing the accused or its influence on bail outcomes could be drawn.

DISTRICT	FILED	NOT FILED
Bengaluru	146	134
Dharwad	26	27
Tumakuru	20	20

Table 9: Number of bail applications filed⁸

5.35

Having noted above that even where a lawyer was present, an accused did not always secure bail at first production, we now turn to examine whether effective legal representation increased the chances of securing bail. Effective legal representation or the quality of legal representation received may be gauged through outcomes or through the procedural steps to secure the outcomes. In this section, we take the filing of a bail application as a symbol of effective legal representation to avoid more subjective assessments of the quality of advocacy.

5.36

In all the cases where an accused had no legal representation, no bail application was filed during first production. Bail applications were filed in a majority of cases i.e. 79%, 67% and 61% of cases where the accused had legal representation in Dharwad, Tumakuru and Bengaluru, respectively (Figure r).

5.37

Figure s shows that in Bengaluru, bail was granted in 11% of cases where bail applications were filed and in 78% of the cases, the accused were remanded to judicial custody despite filing of bail applications on first production.

5.38

In all three districts, filing of bail applications appears to have increased the chances of bail being secured. In fact, in Bengaluru, judicial custody was the most likely outcome irrespective of whether a bail application has been filed, while in Dharwad and Tumakuru, judicial custody was almost the default outcome only when no bail application was filed. It must be noted here that the first production outcomes in Figure r above do not distinguish between whether the offence is classified as bailable or non-bailable. However, the classification of offences should make a difference to the relationship between filing of bail applications and bail outcomes.

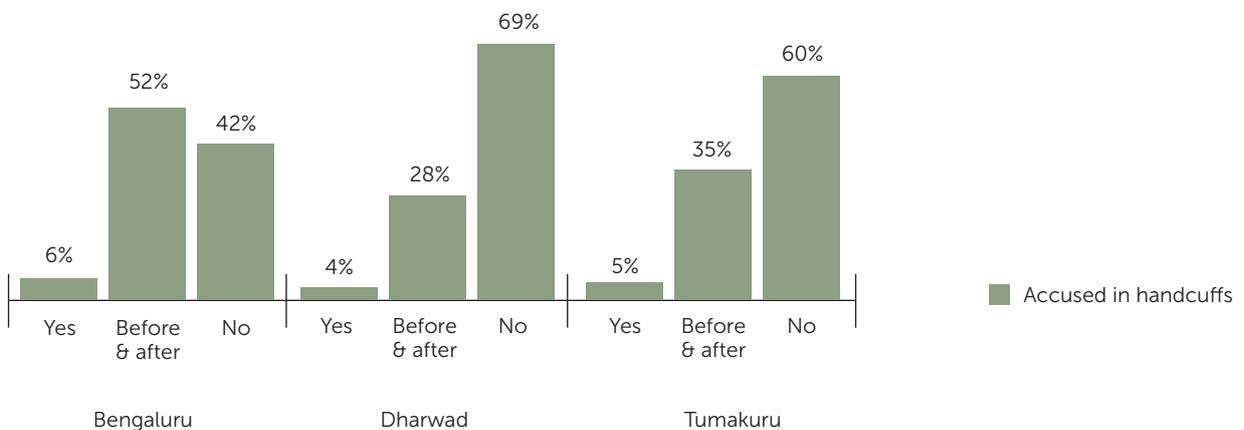


Figure t: Percentage of accused in handcuffs

5.39

As we discussed in Chapter 4, under the CrPC, bail is required to be granted for bailable offences. In Bengaluru alone, out of 18 bailable cases where a bail application was filed, bail was secured in over 50% of cases. However, bail was granted only in 1 out of 5 (20%) bailable cases where no bail application was filed.

Notably, in Dharwad, all persons accused of bailable cases secured bail where an application was filed while surprisingly, in Tumakuru, the none of the 3 persons accused of a bailable offence secured bail, irrespective of whether a bail application was filed.

5.40

In conclusion, we note that effective legal representation can have a significant positive effect on bail being granted and consequently, on under trial detention. However, the persisting variations in outcomes in the three districts, even in bailable offences where bail is to be granted as a matter of right, suggests that there are several other factors that must be investigated.

(b) Due Process Factors

(i) Handcuffing of Accused

5.41

In Chapter 4, we noted that the Supreme Court had ruled that no accused can be produced in court in handcuffs⁹ and handcuffing is only intended for persons accused of serious offences or having a prior history of flight risk. In our court observations we noted two distinct practices relating to handcuffing – first, where the accused is produced before the court in handcuffs and second, where the accused was not produced before court in handcuffs, though they may have been in handcuffs before and after production.

5.42

We found that the police follow the norms relating to minimal and reasoned use of handcuffs at the time of first production.

While all three districts had a small percentage of cases where the accused was produced in handcuffs at the time of first production (Figure 5), Dharwad and Tumakuru recorded a high rate of compliance with the directions of the Supreme Court as 69% and 60% of the accused respectively, were without handcuffs during the entire period that they were present within court premises.

However, in Bengaluru, 52% of the accused were in handcuffs before and after but not during production before the Judge.

5.43

We also probed into whether being produced in handcuffs had any effect on first production outcomes.

DISTRICT	Accused in handcuffs	Bail	Judicial Custody	Police Custody	OTHER
Bengaluru	16	1	12	2	1
Dharwad	2	0	1	0	Adjourned
Tumakuru	2	0	2	0	0

- Accused in handcuffs
- Bail
- Judicial Custody
- Police Custody

Table 10: Accused in handcuffs and outcome

5.44

Judicial custody was granted in 15 out of a total 20 cases in which the accused was produced in handcuffs across the three districts. In two cases in Bengaluru, the accused was sent to police custody and in only one case, the court granted bail to the accused (Table 10). While no definitive conclusions may be drawn on this small sample, at first blush, handcuffing appears to indicate lower bail outcomes.

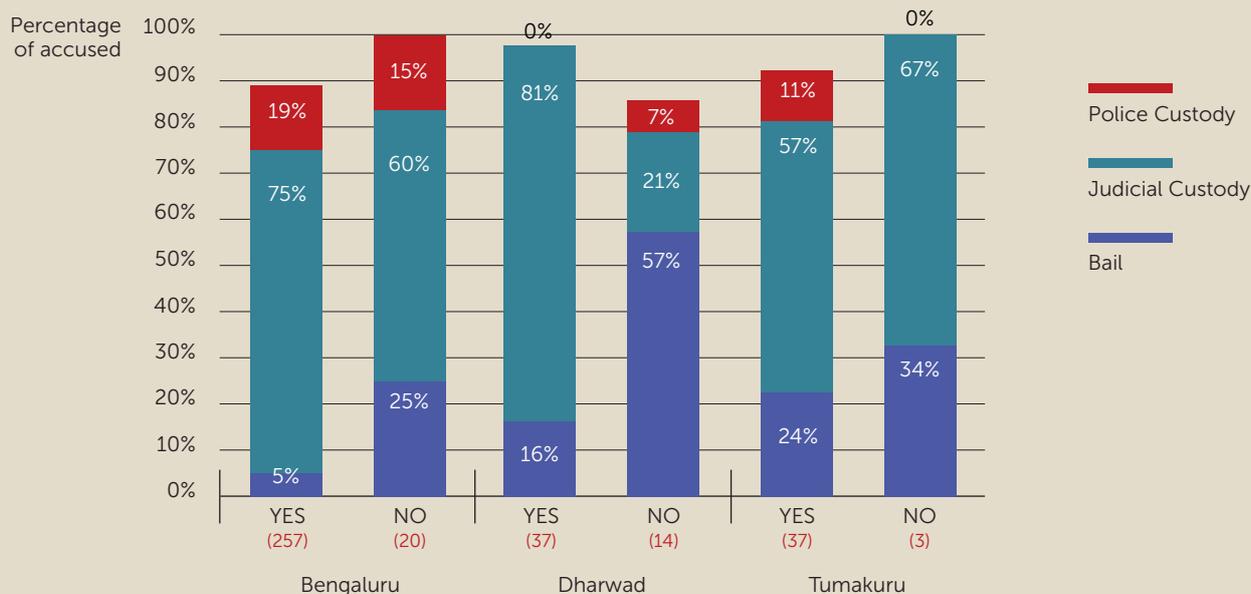


Figure u: Relationship between bail outcomes and whether accused was allowed to address the court

DISTRICT	BENGALURU	DHARWAD	TUMAKURU
Median Time Taken	5 - 10 minutes	Less than 5 minutes	10 - 20 minutes
Average Time	8 min 40 sec	3 min 47 sec	14 min 52 sec

Table 11: Median time and Average time spent by the judge in each district

(ii) Role of The Judge

5.45

The fourth and final procedural factor we also set out to analyse was the influence of the decision making process adopted by the judge on outcomes at first production. In order to assess this, we observed two forms of interaction between the accused person and the court – (a) whether the accused was permitted to address the court directly and (b) amount of time spent on a case.

5.46

We found that in 90%, 69% and 93% of cases in Bengaluru, Dharwad and Tumakuru respectively, the accused was allowed to address the court directly. However, surprisingly, bail was more likely to be

granted in cases where the accused did not address the court, especially in Dharwad (57%).

5.47

The average time spent on each case was 8.67 mins in Bengaluru and 14.87 mins in Tumakuru (Table 11). We note that there is no standardised judicial approach to bail decision hearings at first production across the three districts, which did not appear to be driven by case load in the courts.

5.48

In Tumakuru, no bail orders were passed where the judge spent more time on a case i.e. over 10 mins, though the chances of bail being granted were notably high where the judge spent less time on a case.

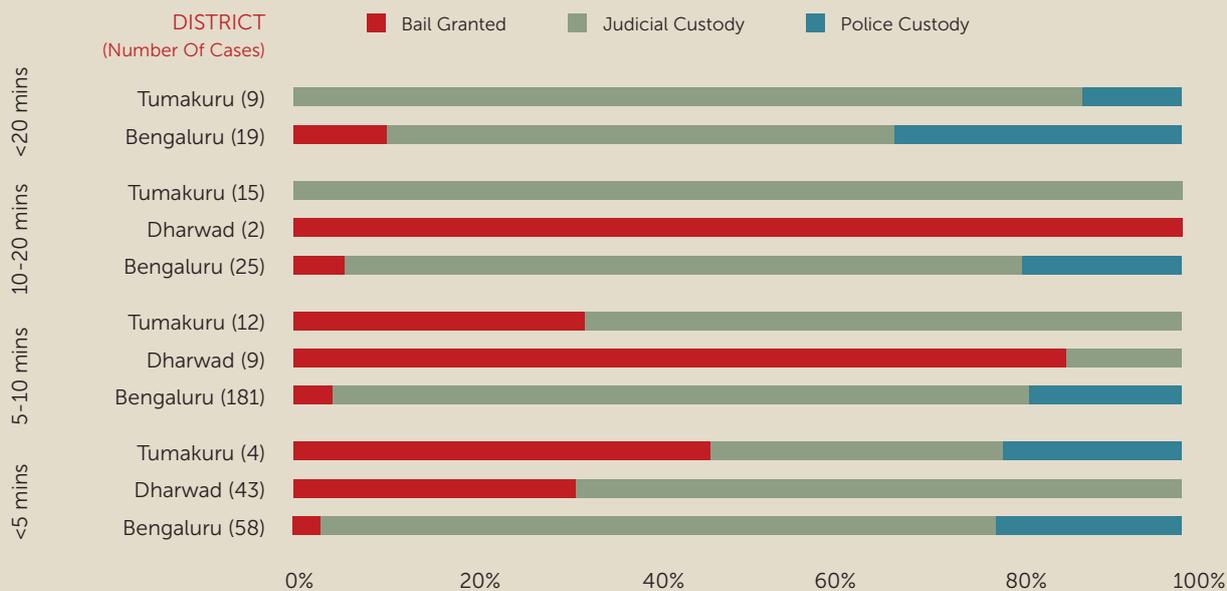


Figure v: Time spent on a case v. Outcome of first productions

However, in keeping with the expectation that devoting more time to a case would result in more positive bail orders (without accounting for who is addressing the court in this period), bail was a more likely outcome in Bengaluru and Dharwad where the court spent over 10 mins on a case.

5.49

Due process has been conceptualised in two ways in the criminal justice process – instrumental and dignitarian. The instrumental model prioritises accuracy in application of substantive rules to the case leading to correct outcomes, while the dignitarian model focuses on the dignity the accused, their self-respect and autonomy.¹⁰

5.50

From an instrumental point of view, an accused being allowed to address the court and the time spent by the court on a case had non-linear effects on bail outcomes and wide variations were observed between the three districts. Therefore, in this section, we observed that bail outcomes were shaped lesser by due process factors when compared to substantive law factors. However, from the perspective of a dignitarian model, factors such as not placing the accused in handcuffs during first production, informing the accused about legal aid and permitting the accused to address the court, are being adhered to by courts.

Conclusion

5.51

Thus far, legal reform, and particularly court decisions, has focused on the dignitarian model of due process. While undoubtedly the effects of due process protections on the under trial population are important, the varied results from the three districts direct that greater attention must be paid to substantive law.

5.52

The nature of the offence alleged against an accused made a significant difference to bail outcomes, as IPC offences were more likely to be granted bail than SLL offences. Using the data on statutory basis for offences in Bengaluru, presented earlier in this Chapter, the number of under trial prisoners who would additionally be granted bail may be projected.

In our sample, if the rate of bail in IPC offences is applied to SLL offences, an additional 1% of under trial prisoners would be granted bail for every 100 under trial prisoners, which would make a significant dent in the under trial population.¹¹ Therefore, we must look deeper into the rationale behind classifying a significant number of SLL offences as non-bailable and the strict conditions imposed in these statutes on bail decision making.

5.53

Along similar lines, bail was a more common outcome in bailable cases when compared to non-bailable cases, suggesting that re-classification of offences under Schedule – I of the CrPC to categorise more offences as bailable is the need of the hour.

5.54

Apart from the type of the offence, presence of 'legal representation' was a factor that increased the chances of a positive bail outcome in all three districts, though the three districts reported widely varying effects. In particular, where bail applications were filed, there was an increased likelihood of bail being granted across districts.

However, to standardise practice in this regard, a bail proforma to be prepared and filed at first production may be created, to be used by lawyers and accused persons alike.

5.55

Finally, the widely varying results across the three districts in Karnataka strengthens the suggestion earlier in this Chapter that bail decisions are intricately tied to varied police, court and prosecutorial cultures that collectively reflect as differences based on 'geographical location'. The reasons for the dissimilarities are not immediately evident from this data set and require further study. However, taking off of these preliminary findings through the Court Observations study, in the next chapter we explore if there is a discernible pattern in these results using data gathered from court records.

References

¹We observed first productions, i.e. where the accused persons were first produced in court for a period of 45 days in these districts. To obtain a reasonable number of observations, we chose district courts that had a significant number of cases from Karnataka. See Chapter II of this report for a detailed explanation on methodology

²The most commonly invoked SLLs invoked in the 3 districts are:

(i) Bangalore – Narcotic and Psychotropic Substances Act, 1985; Immoral Traffic (Prevention) Act, 1956; Arms Act, 1959.

(ii) Dharwad – Protection of Children from Sexual Offences Act, 2012; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; Negotiable Instruments Act, 1881.

(iii) Tumakuru – Protection of Children from Sexual Offences Act, 2012; Immoral Traffic (Prevention) Act, 1956; Karnataka Police Act, 1963.

³For each district, we have calculated the percentage of outcomes within IPC and SLL cases separately (using the numbers mentioned in Table 5). For example, bail granted among IPC cases is 7% of the 240 IPC cases in Bengaluru.

⁴The overall figures do not add up to 100% as the outcomes apart from the three principle outcomes – bail, judicial custody and police custody – have been included in the total.

⁵In Dharwad, of the 36 offences under the IPC, bail was granted in respect of 12 'other offences' while 7 accused were remanded to judicial custody. Further, 14 persons were remanded to judicial custody for offences committed against the body, property and the State. Tumakuru also presented similar numbers with bail being granted to 8 accused for 'other offences' while 13 accused were remanded to judicial custody for offences against the body and

property. No offences against the State were observed in Tumakuru.

⁶The overall numbers do not add up to 100% on account of rounding off.

⁷In Bengaluru, a significant 240 accused persons were represented by a lawyer while 44 persons were unrepresented. Similarly, in Dharwad, 33 persons had legal representation and 21 persons did not. In Tumakuru, lawyers were present in court for 30 accused persons, compared to 10 persons without legal representation.

⁸In some cases in each district, there is no information provided on whether bail application was filed or not.

⁹*Prem Shankar v. Delhi Administration*, AIR 1980 SC 1535 (Supreme Court of India)

¹⁰Hayley Hooper, *Between Power and Process: Legal and Political Control over (Inter)national Security*, Oxford Journal of Legal Studies, Vol. 38(1) (2018).

¹¹The percentage of under trial prisoners who would additionally receive bail is subject to the proportion of IPC and SLL offences.

06

Bail Decision Making: A Review of Court Records

6.1

In Chapter 4, we introduced the distinction between the pre-trial and under-trial stages of the criminal justice process, with a view to understand why and how bail decision making and the factors influencing it should differ in each stage. In Chapter 5 we focused on bail decision making at first production hearings, which is the first stage of intervention by courts in the pre-trial stage. In this chapter we turn to the records of cases procured from courts (Court Records) in the three districts.

6.2

Official records disclose the manner in which a case progresses, and the timeline of events in the case. This includes, for instance, the First Information Report (FIR), the dates of hearing, the outcome on each date of hearing, when the accused was granted bail, reasons for granting or refusing bail, and conditions imposed when bail was granted.

6.3

As we noted in Chapter 5, the Court Observations data only indicated outcomes at the stage of first production as well as the relationship between bail decision making and each of the identified substantive and procedural factors at that stage. However, the Court Records data set collected over a period of 6 months, aided in developing a wider account of the pre-trial stage through the prism of bail decision making. It goes beyond first production to indicate the influence of the identified substantive and procedural factors different stages of the criminal justice process in the pre-trial phase. Further, the Court Records data would help us confirm or cast doubts on the findings of the Court Observations.

6.4

However, the analysis in this Chapter must be caveated by the fact that the data across the three districts is not comparable. As set out in Chapter

2, while the official case records obtained from Bengaluru courts were limited to first production cases, the records obtained from Tumakuru and Dharwad courts included all cases for the 6 month period, including first production cases and cases where no arrests were made or where an accused was granted police bail. A further consequence of the inconsistencies in record keeping in the three districts is that the number of accused who have formed the basis for analysis did not remain constant for every factor. However, while there was inadequate data from Tumakuru and Dharwad on first production cases, the data collected helped develop a broader perspective on the criminal justice system.

6.5

The differences in the scope and comparability of the data suggest a different structure for this Chapter, when compared to Chapter 5. Due to differences in record keeping practices in the three districts, a simple comparison of bail decision making in the three districts could not be undertaken. Therefore, in the first part of this Chapter, we compare bail outcomes from the Court Observations and Court Records data sets of first production cases in Bengaluru. Then we turn to an analysis of bail decision making at the pre-trial stage in Bengaluru based on the Court Records data.

In the second part of the Chapter, we analyse the records obtained from lower courts in Tumakuru and Dharwad, which were not limited to first production cases, to explore bail decision making in the criminal justice system more generally.

A. First Productions and Pre-Trial Bail in Bengaluru

6.6

129 records of only first production cases were procured from the sample courts in Bengaluru, which named 274 accused persons. The unit of analysis for this study is every individual accused rather than each case, as different accused in the same case could be treated differently.

6.7

Based on the court observations study, we identified a set of factors that affected bail decisions at first production, which are equally applicable to the overall pre-trial stage as well. We tested the influence of (i) substantive factors such as the statutory basis for the offence (IPC v. SLL), the nature of the offence under the IPC, and the type of offence or its classification as bailable or non-bailable and (ii) procedural factors such as the availability of legal representation and due process considerations. In this section, we begin by comparing bail outcomes based on the Court Records and the Court Observations data and explore the effect of these factors on bail decision making in Bengaluru.

I. BAIL DECISIONS AT FIRST PRODUCTION IN BENGALURU – COMPARISON OF DATA SETS

6.8

At first production, outcomes in respect of a little over 10% of the accused were different from the three main outcomes of bail, judicial custody and police custody. These other outcomes included failure of the police to produce an accused person, adjournments, compounding as well as cases where no order sheet was available (Table 12).

Not Produced	5	1.82%
Adjourned	1	0.36%
Guilty Plea	5	1.82%
No Order Sheet	9	3.28%
Compounded	5	1.82%
C Report Accepted	3	1.09%
Body Warrant Issued	1	0.36%

Table 12: Other outcomes observed in the pre-trial Study (Only Court Records)

6.9

If we exclude these other outcomes, we find that on first production before a Magistrate in Bengaluru, nearly 10% of the accused were granted bail.

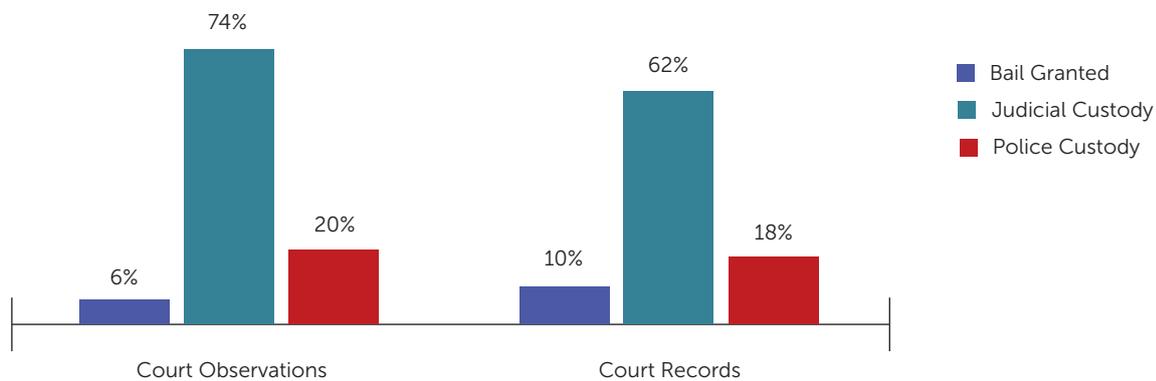


Figure w: Outcome of first production in Court Observations and Court Records

Around 3 out of every 4 accused were remanded to judicial custody and the remaining 20% were remanded to police custody.

6.10

Minor variations were observed in bail outcomes between the Court Records and Court Observations data sets. Nearly twice as many accused received bail in the Court Records cases and 12% fewer accused were remanded to judicial custody.

6.11

Of the various substantive and procedural factors identified in Chapter V, three factors were noted as driving bail outcomes – the statutory basis and nature of the offences, the type of offence (its classification as bailable and non-bailable) and availability of effective legal representation. The Court Observations data set presented interesting results on how a bail decision might vary depending on whether an offence is registered under the IPC or an SLL and depending on whether an accused is represented by a lawyer. Following from these findings, we will test the impact of these factors on bail decision making using data from the court records, and we will compare the results with those from the Court Observations study.

(a) Substantive Factors: Nature and Classification of Offences

6.12

A brief overview of the statutory basis and nature of the offence as well as the type of offence in the Court Records data confirms that with respect to Bengaluru, the proportion of cases in the Court Observations and Court Records is closely aligned.

6.13

IPC cases constituted about 85% in the Court Observations and Court Records cases. Further, 93% of the accused produced in court were arrested for a non-bailable offence, and only about 7% were arrested for bailable offences, as per the data gathered from the court records, which matched the figures of the Court Observations study (Figure x).

6.14

Nearly 60% of the IPC offences related to property i.e. offences of theft, robbery, and criminal breach of trust, followed by offences against the body. Offences against the State and public order comprised only 9% in addition to a small percentage of 'other' offences, which were largely a combination of offences against the body and property (Figure y).

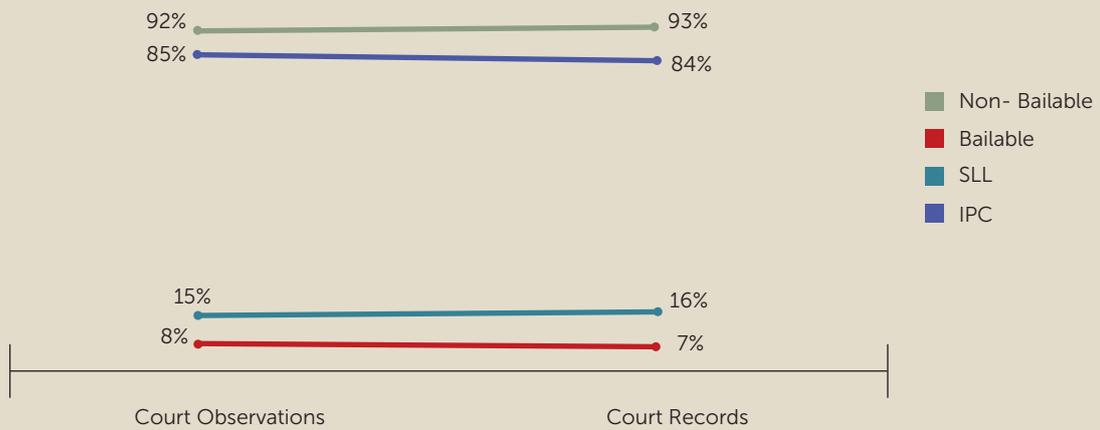


Figure x: Statutory Basis and Classification of Offences: Court Observations and Court Records from Bengaluru

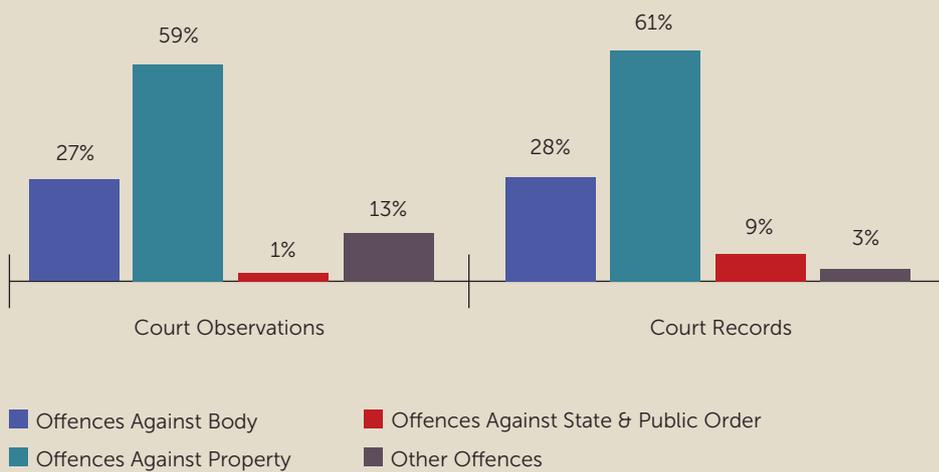


Figure y: Nature of IPC offences in Court Observations and Court Records from Bengaluru

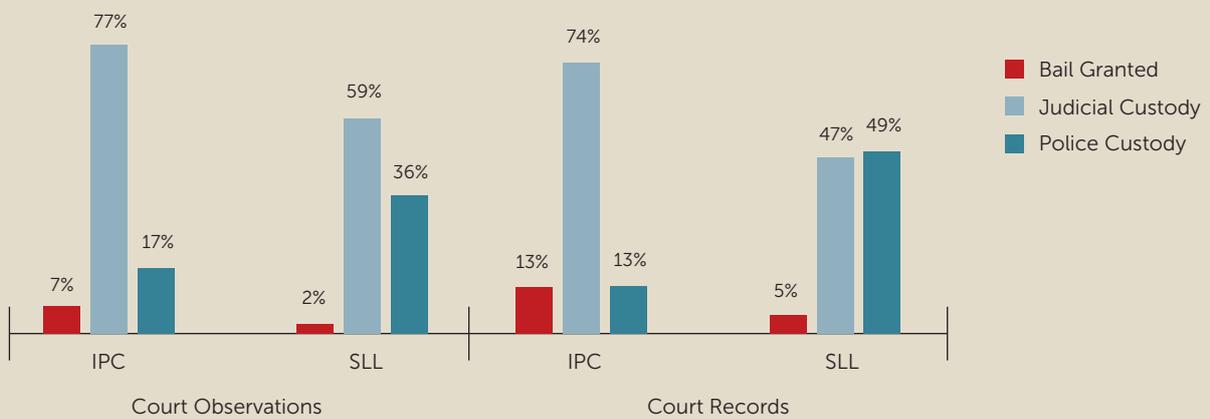


Figure z: Outcome of First Production in IPC and SLL cases in Bengaluru³

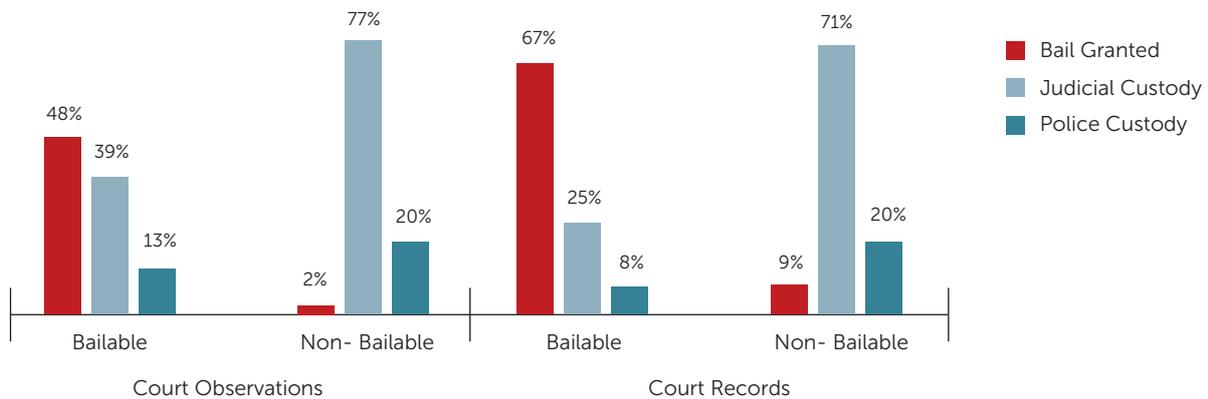


Figure aa: Outcome of first productions in Bailable and Non-Bailable cases in Bengaluru⁴

6.15

As the statutory basis, nature of the offence and type of offences are similar across both data sets, we may expect the bail outcomes to be aligned as well. However, bail was twice as likely to be granted at first production in the Court Records cases when compared to the Court Observations cases, irrespective of the statutory character of the offence.

In both data sets, bail was granted at nearly three times the rate for IPC as for SLL offences (Figure z). Notably, in the Court Records data, almost 50% of those accused of SLL offences were remanded to police custody.

6.16

In Chapter 5, we noted that bail outcomes varied for bailable and non-bailable offences. The Court Observations study suggested that an accused is 24 times more likely to secure bail in a bailable case as opposed to a non-bailable case.

6.17

The Court Records data shows that an accused was only 7 times more likely (Figure aa). However, the overwhelming preference for judicial custody over bail, in non-bailable cases, is confirmed by both the Court Records and Court Observations data as

over 70% of the accused were remanded to judicial custody. So, the single most effective measure to reduce under trial detention in India would be to prune the list of non-bailable offences in Schedule – I of the CrPC and to develop binding guidance to the police to include non-bailable offences in a complaint or charge sheet only where strong prima facie evidence exists.

(b) Procedural Factors: Effective Legal Representation

6.18

The Court Observations data set for Bengaluru suggested high levels of legal representation i.e. 85% of the accused. In over a half of the Court Observations cases (51%), bail applications were filed on behalf of the accused.

6.19

However, the Court Records data indicated lower levels of legal representation, at about 69%, though information about legal representation for approximately 15% of the accused was unavailable. The trend continued with respect to effectiveness of legal representation, where bail applications were filed in only 34% of the Court Records cases, leaving about 56% without effective legal remedy (Figure bb). No information was available on whether bail applications were filed for about 9% of the accused.

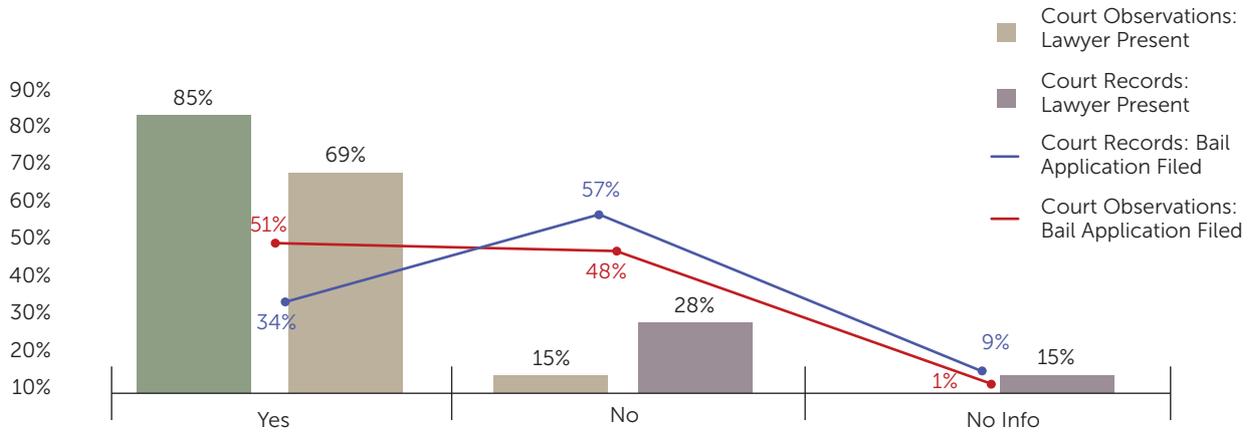


Figure bb: Presence of Lawyer and Filing of Bail Applications in Court Observations and Court Records in Bengaluru

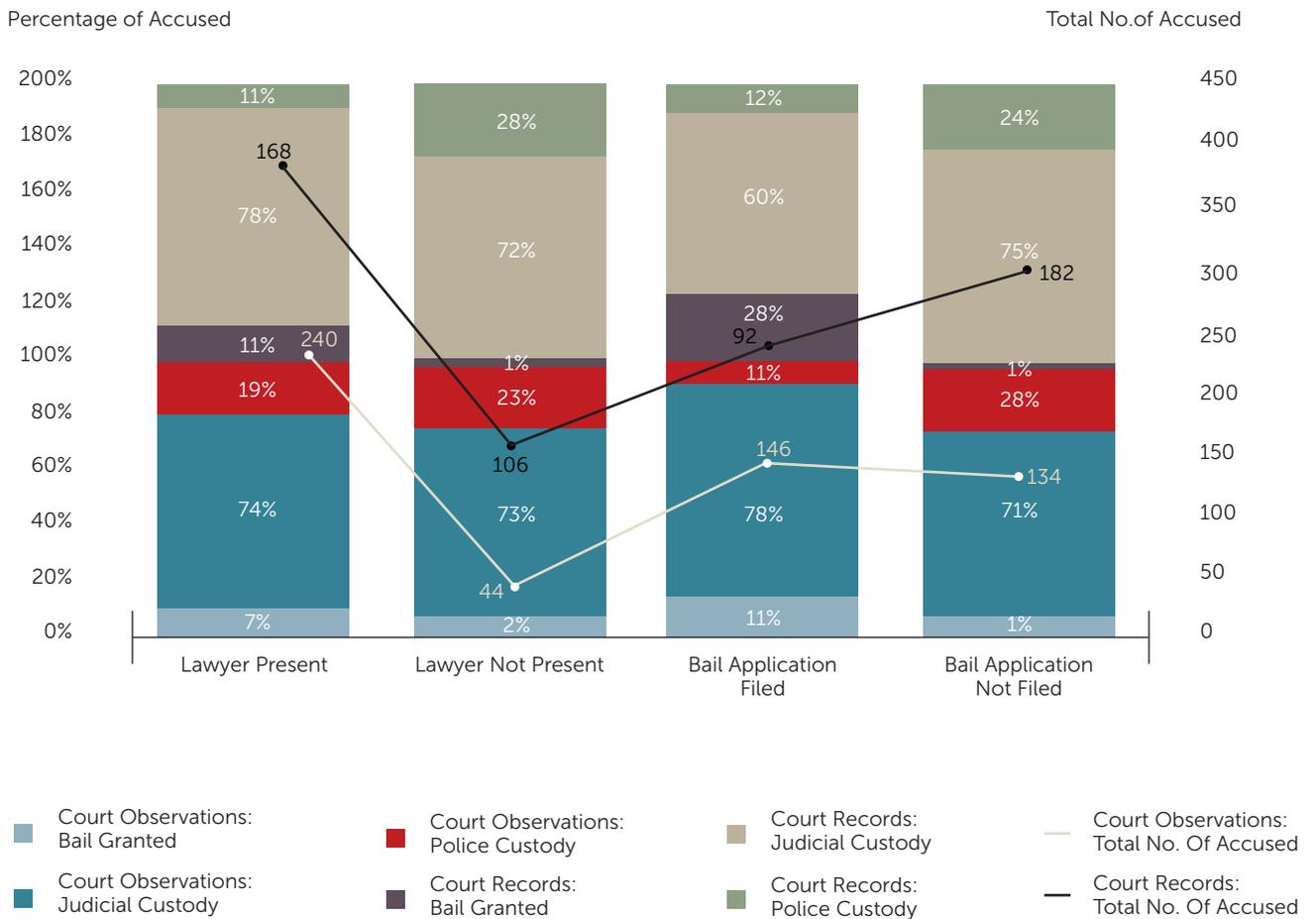


Figure cc: Bail outcomes based on whether lawyer present and bail application filed in Bengaluru

6.20

In the Court Observations study in Chapter 5, we noted that an accused was 3 times more likely to secure bail at first production if they had legal representation and 5 times more likely to secure bail if a bail application was filed i.e. effective legal representation had a significant positive effect on bail outcomes.

6.21

This finding was confirmed by the Court Records data as well, where the availability of legal representation, and particularly effective legal representation, resulted in more orders granting bail.

An accused was 11 times more likely to secure bail if a lawyer was present and was 28 times more likely to secure bail if a bail application was filed on their behalf.

6.22

Irrespective of the availability of effective legal representation, judicial custody was the most likely outcome in both data sets, with over 70% of accused being remanded to judicial custody. In the Court Records data set, the number of judicial custody orders dropped to 60% where bail applications were filed on behalf of the accused. This was due to the significant increase in number of orders granting bail, once again confirming that effective legal representation increases the chances of receiving bail.

6.23

In the Court Records data set, the police custody orders were halved where a lawyer was present and a bail application was filed (Figure cc), except in the Court Observations study for Bengaluru. Further, while police custody orders fell by half where bail applications were filed in both data sets, the fall in police custody orders where a lawyer was present was much sharper in the Court Records data set i.e. only 11% were remanded to police custody where a lawyer was present, in comparison to the 28% who were remanded to police custody where no lawyer was present.

6.24

The precise effect of the levels of effective legal representation on bail outcomes can be measured only by controlling for the effect of other factors such as the statutory basis and nature of offences as well as the type of offence. However, the strong correlation between the presence of a lawyer and the bail decision in the Bengaluru data suggests that merely ensuring universal free legal aid for the accused can reduce under trial detention rates by about 4%.

II. BAIL IN THE PRE-TRIAL STAGE: DATA FROM COURT RECORDS IN BENGALURU

6.25

For 245 out of 274 accused in the Court Records phase, FIRs were filed with respect to all but one case. 94% of accused were arrested and the remaining 6% of accused were either untraceable or absconding (Figure dd). All those arrested were produced before the Magistrate.

6.26

Both the Court Observations and Court Records data sets show that no more than 10% of accused persons secured bail at first production, with over 70% of accused being remanded to judicial custody. However, if an accused is remanded to judicial custody or police custody at first production, they will be produced in court on subsequent occasions. Hence, bail may be sought from the trial court.

6.27

The Court Records go beyond the Court Observation data to give us a skeletal account of court proceedings up to a period of 6 months for some cases. As the Court Observations focused on the 'first production' as a single event of the trial, that data does not allow us to develop a wider perspective on bail decision making at other points of the criminal justice system. In this section we examine bail decisions during the pre-trial process and ask whether 'first production' is the primary or key stage for bail decision making in India.

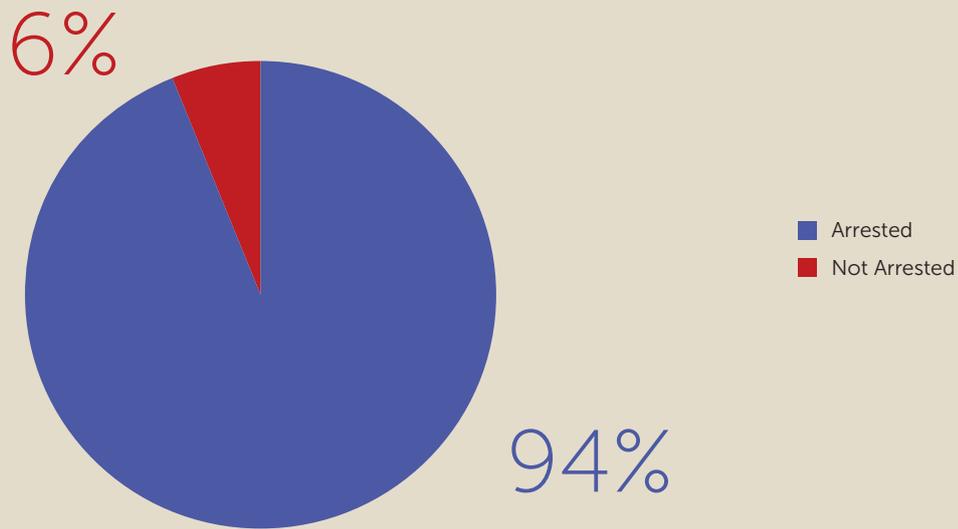


Figure dd: Percentage of arrests made

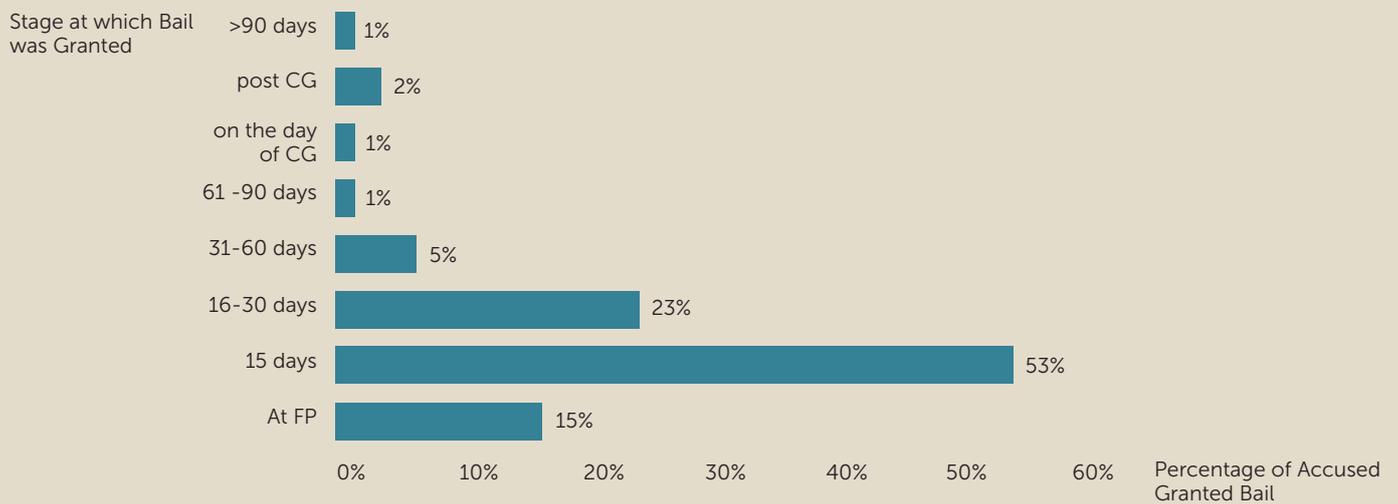


Figure ee: Stages in which bail was granted

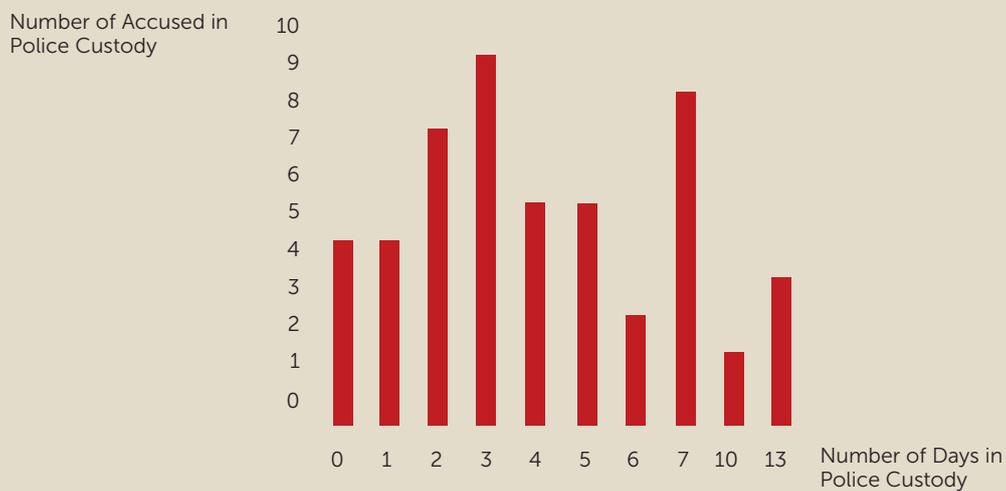


Figure ff: Duration spent in Police Custody

In fact, it is not at first production that bail is most often secured. More than half the accused who secured bail (53%) did so after 15 days in custody in the pre-trial stage, which may be on account of Section 167(2) of the CrPC which permits a Magistrate to remand an accused to police custody not exceeding 15 days. A further 23% were given bail after spending between 15-30 days in custody. By 30 days, nearly 95% of the accused had secured bail (Figure ee).

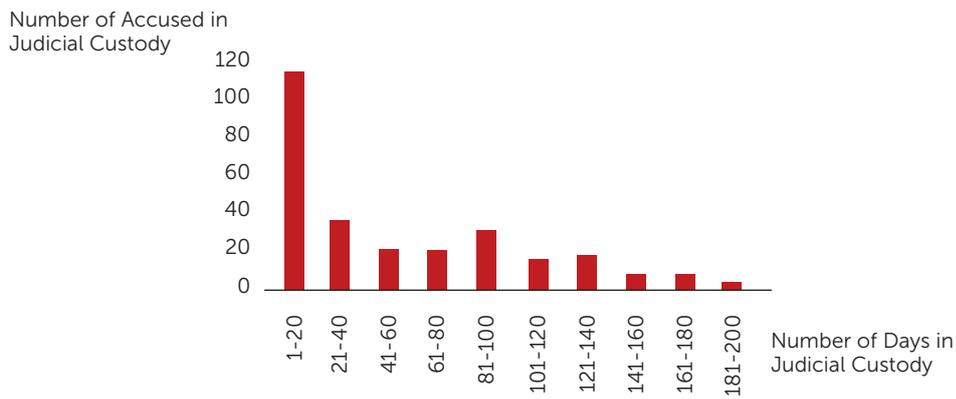


Figure gg: Duration spent in Judicial Custody

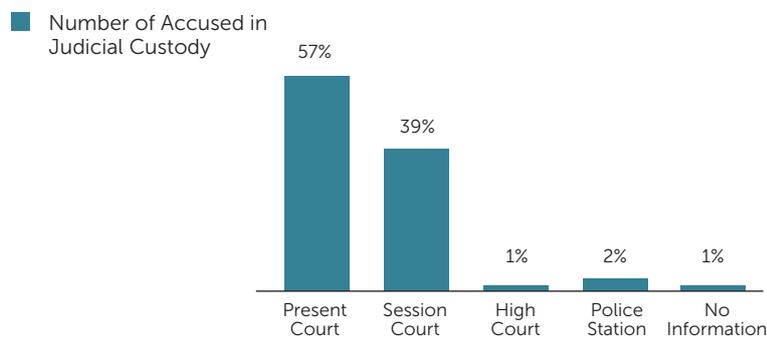


Figure hh: Institution that granted bail

6.28

Out of 198 of 274 accused persons in the Court Records data set who secured bail at some point in the pre-trial stage, around 15% of accused secured bail at first production.

In fact, it is not at first production that bail is most often secured. More than half the accused who secured bail (53%) did so after 15 days in custody in the pre-trial stage, which may be on account of Section 167(2) of the CrPC which permits a Magistrate to remand an accused to police custody not exceeding 15 days. A further 23% were given bail after spending between 15-30 days in custody. By 30 days, nearly 95% of the accused had secured bail (Figure ee).

6.29

As we noted in Chapter 4, as per the CrPC, an accused may be remanded to police custody for a maximum period of 15 days whether at once or in stages. This period is subject to change depending on whether the offence committed is under the IPC or an SLL. In the Court Records data set, 48 accused were remanded to police custody, half of whom spent less than 3 days in police custody. Around three quarters of the accused spent less than 7 days in police custody. Only 3 accused were remanded to the 13 days of police custody, which was the longest period ordered in these set of cases (Fig ff).

6.30

Out of the 274 accused in the courts records data set, 210 accused spent time in judicial custody and more than the half of the accused were released within 20 days. Pre-trial detention longer than 100

days was ordered in only 10% of the cases while only 1 accused was detained in judicial custody beyond 6 months. About 20% of accused persons were held in judicial custody for more than 60 days. This may be explained by the high number of non-bailable offences, which are more serious in nature, captured in the first production data set. As we may recall from Chapter 4, the maximum period for which an accused may be remanded to judicial custody, as per the CrPC, is 60 days or 90 days depending on the offence committed. Under some SLLs, this period has been extended to 180 days.

6.31

A little more than half of the accused who secured bail in the pre-trial stage did so from the court in which they were first produced though not at first production. Around 40% of the accused had to approach the Sessions Court to secure bail. Only 1% of the accused approached the High Court to obtain bail in the pre-trial stage, which also includes those seeking anticipatory bail. The 2% of accused persons who secured police bail are not relevant to this study as the data sets primarily comprise of non-bailable cases.

III. RANGE OF PUNISHMENT AND BAIL OUTCOMES

6.32

The Court Records data set presented information on the potential influence of an additional factor i.e. range of punishment, on bail outcomes. Offences may be broadly classified into four categories based on punishment prescribed – death or life imprisonment, imprisonment of 7 years and above, imprisonment of 4-7 years and imprisonment of 1-3 years. In this section we explore whether the range of punishment has any effect on the period of under trial detention. We analyse the influence of range of punishment on bail decision making in 244 cases from the Court Records data set of Bengaluru.

6.33

Let us begin by categorising the accused by range of punishment. Almost 18% persons were accused of offences punishable with death or life imprisonment (Figure ii). A majority of the accused (70%) were arrested for rather serious offences, punishable with imprisonment of 7 years and above, life imprisonment or death. About 23% were accused

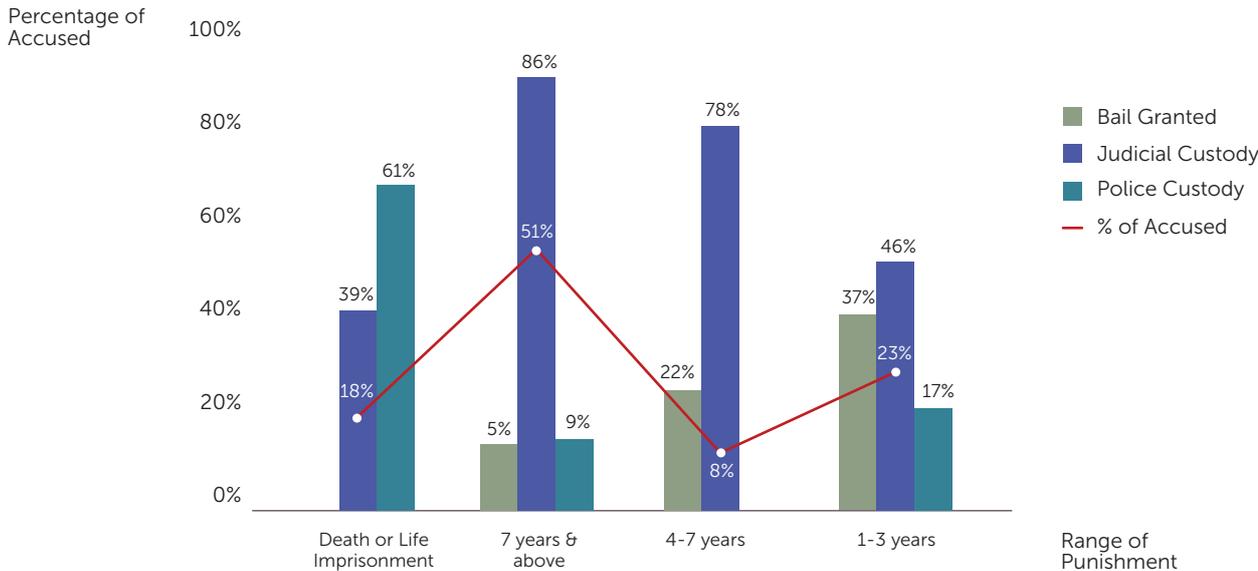


Figure ii: Range of Punishment and outcome of First Production

of offences punishable with imprisonment of 1 to 3 years. This is significant as, in general, offences punishable with imprisonment of 3 years and above are also likely to be classified as non-bailable offences under Schedule – I of the CrPC. In case of such ‘serious’ offences, courts may be more restrained in granting bail.

6.34

In our study we found that at the stage of first production, a higher sentence seemed to result in a lower chance of securing bail. No person accused of an offence punishable with death penalty or life imprisonment secured bail. Only 5% of those accused of an offence punishable with imprisonment of 7 years and above secured bail. Orders granting bail increased to 22% and 37% as the range of punishment decreased from 4 to 7 years and 1 to 3 years respectively.

6.35

Judicial custody was the most common outcome except in cases punishable with death or life imprisonment where 61% were remanded to police custody at first production (Figure jj). While the high proportion of police custody orders in cases of offences punishable with death or life imprisonment is expected, the proportion of police custody orders was high at 17% for less serious offences punishable with imprisonment between 1 to 3 years. On the other hand, no police custody orders were made for offences punishable with imprisonment of 4 to 7 years in the Court Records data set. This uneven distribution at the two ends of the ranges of punishment suggests an egregious use of police power in less serious offences.

6.36

Having examined how bail decision making is influenced by the seriousness of the offence using the range of punishment prescribed for it, now we turn to the relationship between range of punishment and bail outcomes at other stages of the criminal justice process.

6.37

Ultimately, bail was also more frequently granted at a subsequent point in the pre-trial stage to accused persons who were remanded to judicial custody at first production, irrespective of the range of punishment i.e. an outcome of remand to police custody at first production disproportionately affects the chances of securing bail in the pre-trial stage for offences punishable with death or life imprisonment and offences punishable with imprisonment of 1 to 3 years.

6.38

Bail was granted only to 45-50% of persons remanded to police custody at first production, whether they were accused of offences punishable with death or life imprisonment or of less serious crimes (Figure jj). However, 83% remanded to police custody eventually received bail where they were accused of offences punishable with imprisonment of 7 years and above.

6.39

Therefore, in this section, we observed that the findings on bail decision making from the Court Observations and Court Records data sets for Bengaluru broadly confirm each other.

Most accused receive bail at some point in the pre-trial stage, with bail rates being higher at different stages (after first production) of the criminal justice process.

As in the Court Observations study, bail decisions were noted to be influenced significantly by substantive factors such as the statutory basis and the nature of the offence as well as by the levels of effective legal representation available. In the next section, we analyse bail decision making in the pre-trial stage in Tumakuru and Dharwad and the extent of influence of these factors.

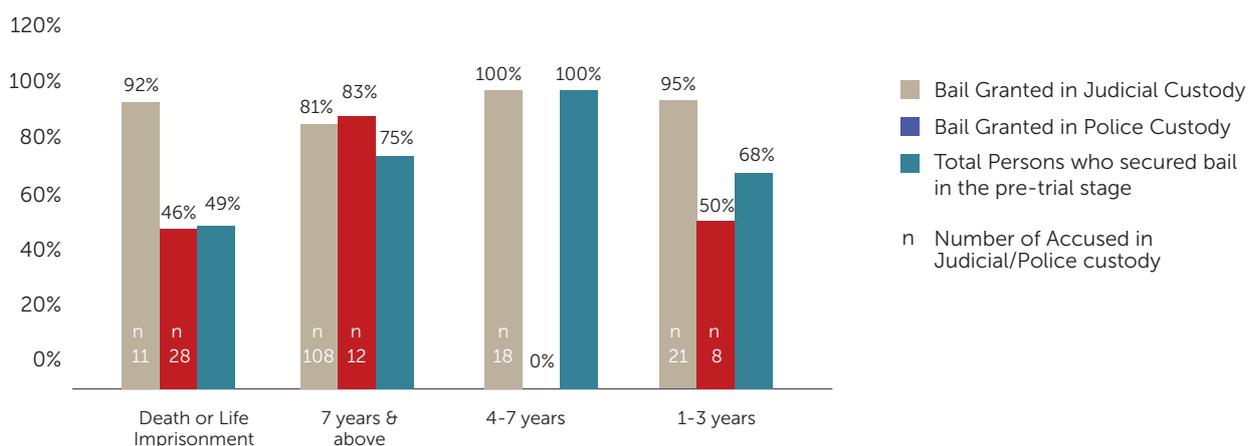


Figure jj: Relationship between range of punishment and bail in the pre-trial stage where an accused was held in judicial custody and police custody

B. Bail Decision Making in the Pre-Trial Stage: Dharwad and Tumakuru

6.40

In the previous section we analysed court records for first production cases in Bengaluru courts. However, as the court registry in Dharwad and Tumakuru did not maintain a register of first productions, we analysed a representative sample of all criminal cases in these two districts. So, the court records data from Dharwad and Tumakuru are not fully comparable with the data from Bengaluru. However, the data sets give us a fuller view of the pre-trial stage rather than just first productions and are useful to obtain a broader understanding of the criminal justice process.

6.41

As fewer arrests were made in Dharwad and Tumakuru, this resulted in fewer first productions in the Court Records data. In particular, a significant number of petty cases were registered under special statutes where no arrests were made or where order sheets were unavailable or incomplete.⁵ As this resulted in a smaller sample size, it affects the breadth of the claims made in this section. With the limited data procured, in this section, we first analyse the court records from Dharwad and Tumakuru to identify trends in arrest and police bail rates in the two districts. Next, we focus on 'first

production' to assess the influence of factors such as the statutory basis and nature of offence, on bail outcomes. Finally, we study bail decision making in the pre-trial stage where we go beyond the offences to understand the role of other substantive and procedural factors on bail decision making.

I. ARRESTS AND POLICE BAIL

6.42

Of the 111 cases in Dharwad and 98 cases in Tumakuru analysed, only about 10% and 13% of the accused were arrested in Dharwad and Tumakuru respectively (Figure kk). All persons who were arrested in the two districts were produced before the Magistrate.⁶ It may be noted here that as the Bengaluru data set did not include all court cases before the courts, we are unaware of the rate at which accused persons were arrested in Bengaluru.

6.43

Out of the total FIRs filed 28% of the cases in Tumakuru and 34% of the cases in Dharwad were bailable.

6.44

As we noted in Chapter 4, when a person is arrested for a bailable offence, bail may be granted to an accused at the police station.

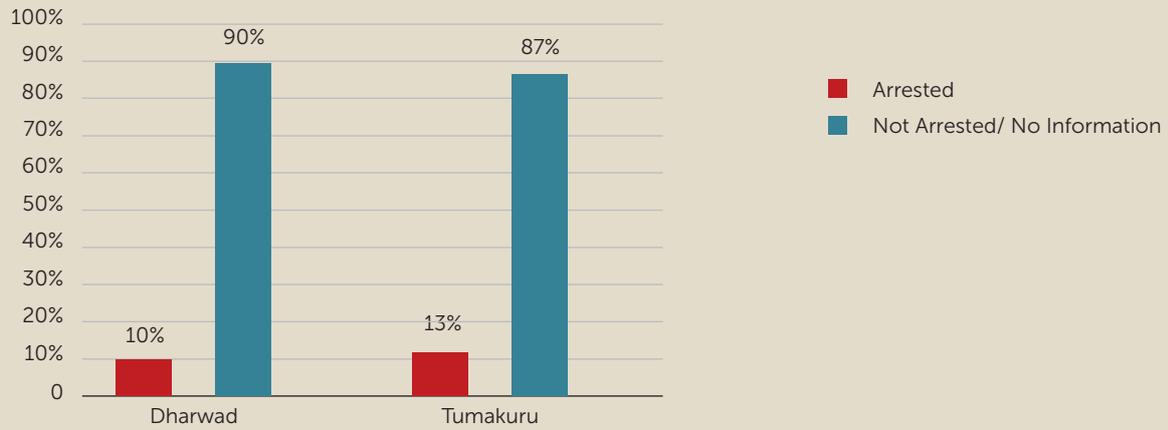


Figure kk: Total arrests made out of all FIRs filed in Dharwad and Tumakuru

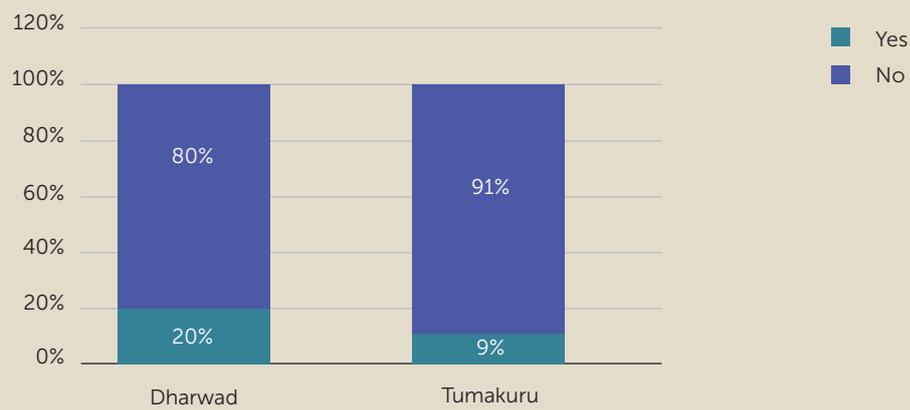


Figure ll: Cases where police bail was granted in Dharwad and Tumakuru

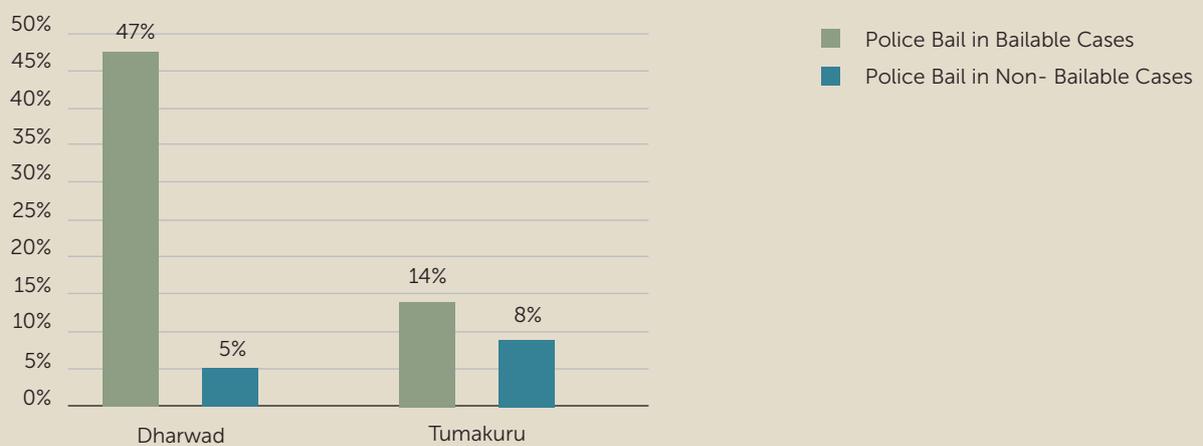


Figure mm: Police Bail in Bailable and Non-Bailable cases

Of all the 111 and 98 cases in Dharwad and Tumakuru, we noted that 20% of accused in Dharwad and only 9% of accused in Tumakuru received police bail. Police bail was granted in almost half theailable cases in Dharwad, while the rate of police bail was significantly lesser in Tumakuru (Figure mm). Police bail was also granted in 5% and 8% of the non-ailable cases in Dharwad and Tumakuru respectively.

6.45

With respect toailable offences, it appears that a Dharwad police station is three times as likely to grant police bail than a Tumakuru police station. This may be due to various factors such as the offence, the accused persons’ character or a sharp divergence in police culture. Given the small sample of cases, we are unable to explain this stark variation completely.

II. BAIL DECISION MAKING AT FIRST PRODUCTION

6.46

The date of first production and related details were available only for 11 accused in Dharwad and 15 accused in Tumakuru. Therefore, our analysis of bail outcomes at first production is limited to these cases.

6.47

Bail was granted to 18% of the accused in Dharwad and 27% of the accused in Tumakuru. The Court Records data for Dharwad shows significant variations from our previous observations in the Court Observations study, where 26% of the accused received bail at first production. In Tumakuru, however, the rate of bail observed in the Court Records study was similar to the Court Observations study (25%).

6.48

These variations in first production outcomes in the two districts may be explained by the statutory basis of offences and the type of offences before each court. Recall that in Chapter 5, we had noted that bail is more likely to be granted at first production forailable offences and IPC offences, which was also confirmed by the findings in both districts. In the Court Records study, all the first production cases in Dharwad were non-ailable, with a majority registered under SLLs, which may explain the lower rate of bail. However, in Tumakuru, the first production cases were allailable and a majority were registered under the IPC.

6.49

The composition of first production cases on the basis of statutory origin presented different results in Dharwad and Tumakuru. It is relevant to note here that as all persons who were arrested were

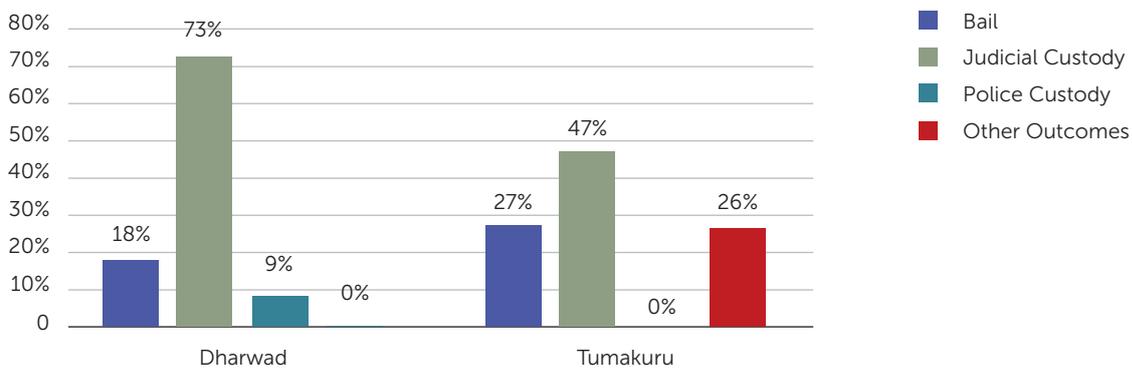


Figure nn: Bail outcomes at First Production

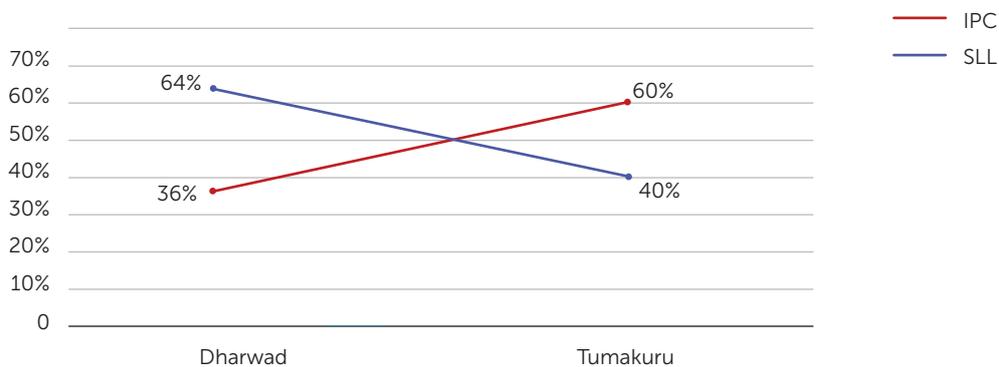


Figure oo: Statutory basis for offences in Dharwad and Tumakuru

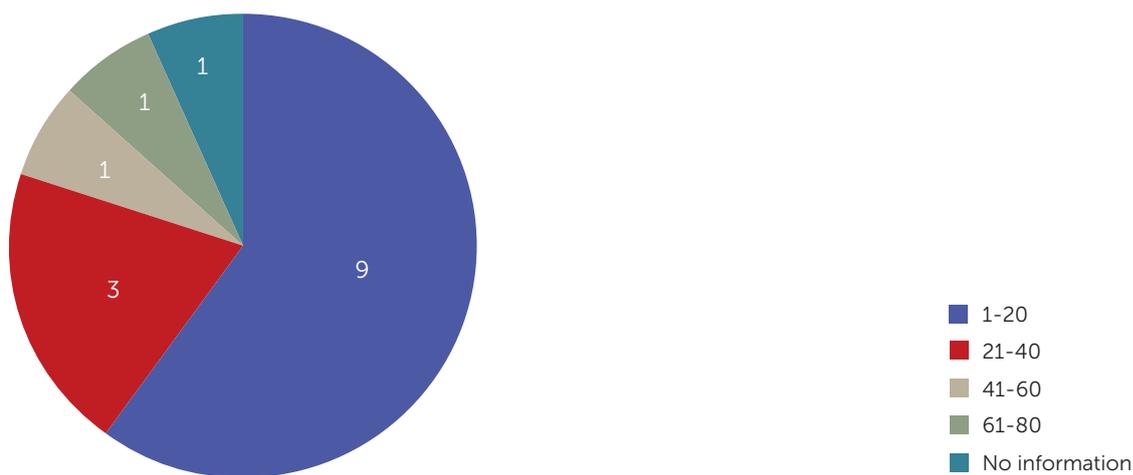


Figure pp: Number of days of judicial custody ordered at first production

produced before the Magistrate, the composition of first production cases also tells us the rate of arrest for IPC and SLL offences.

6.50

Only about 36% of the cases in Dharwad were registered under the IPC, while in Tumakuru, 60% were IPC cases. Unlike Dharwad, the composition of cases registered under IPC and SLL in Tumakuru aligned with the numbers observed in the Court Observations study in Chapter 5.

6.51

Among the three principal outcomes at first production, judicial custody remained the most likely outcome at first production. 73% accused in Dharwad and 47% in Tumakuru were remanded to judicial custody.

Significantly, almost 71% of persons in Tumakuru who were remanded to judicial custody were accused of non-bailable cases (Figure nn).

6.52

From Figure pp, we note that courts were most likely to remand an accused to less than 20 days of judicial custody at first production, similar to courts in Bengaluru. Notably, 8 of these 9 judicial custody orders were made in Dharwad. The 3 orders remanding an accused to more than 20 days of judicial custody were made in Tumakuru. This may be explained by the fact that all the 3 cases were cognizable and non-bailable offences, which as we noted in Chapter 4 are considered 'more serious' in nature under the scheme of the CrPC.

6.53

Finally, orders remanding an accused to police custody were negligible in both districts, with 9% of arrested persons in Dharwad and no arrested person in Tumakuru being remanded to police custody. This is similar to the numbers we noted in our Court Observations study, where only 2% accused in Dharwad and 10% accused in Tumakuru were remanded to police custody at first production.

6.54

In our Court Observations study, we found a negligible number of outcomes at first production apart from bail, judicial custody and police custody, across the three districts. However, in the Court Records study in Tumakuru, we found some other outcomes at first production such as where an accused took a 'guilty plea' in petty cases, punishable with fine of Rs. 100 (Figure nn). This is similar to the Court Records study in Bengaluru where about 10% of the cases resulted in other outcomes such as guilty pleas and compounding.

6.55

Having looked at bail decision making at the stage of first productions in Dharwad and Tumakuru, in the next section, we turn to bail decision making in the pre-trial stage to determine whether bail is actually most likely to be secured at first production and to gain a deeper understanding of the factors that lead to positive bail orders in the pre-trial stage.

III. BAIL DECISION MAKING IN THE PRE-TRIAL STAGE

6.56

We began this part of the Chapter analysing court records procured from Dharwad and Tumakuru. Our sample data set included 111 and 98 cases respectively. Of the accused persons named in these cases, only 10% and 13% were arrested, respectively. Of those arrested, 20% and 9% received police bail in Dharwad and Tumakuru respectively. In the section above, we analysed the bail decision making process at the stage of first production and noted that 18% in Dharwad and 27% in Tumakuru received bail at this stage.

6.57

As we discussed in Chapter 4, once a charge sheet is filed the criminal justice process enters the 'under-trial' stage. The period from arrest till filing of the charge sheet is the 'pre-trial' stage and bail may be granted at various points in this phase. Bail may be secured from the police soon after arrest, or at first production at the court of first instance. Bail may also be granted by other institutions such as the Sessions Court and the High Court at various points in the pre-trial stage. Therefore, in this section we go beyond first production and focus our attention on bail decision making across the pre-trial stage to develop a bigger picture of bail decision making.

(a) Bail in the Pre-trial Stage

6.58

In our study of the pre-trial stage, we excluded all cases where we definitively knew that no arrests had been made. The pre-trial cases include cases where police bail was granted, first production cases and cases where charge sheets were filed. However, for our study, we only considered those cases where bail was granted prior to filing of the charge sheet. Therefore, at the pre-trial stage, we analysed:

DISTRICT	NO. OF PRE-TRIAL CASES
Dharwad	109
Tumakuru	83

Table 13: Number of accused in the pre-trial stage

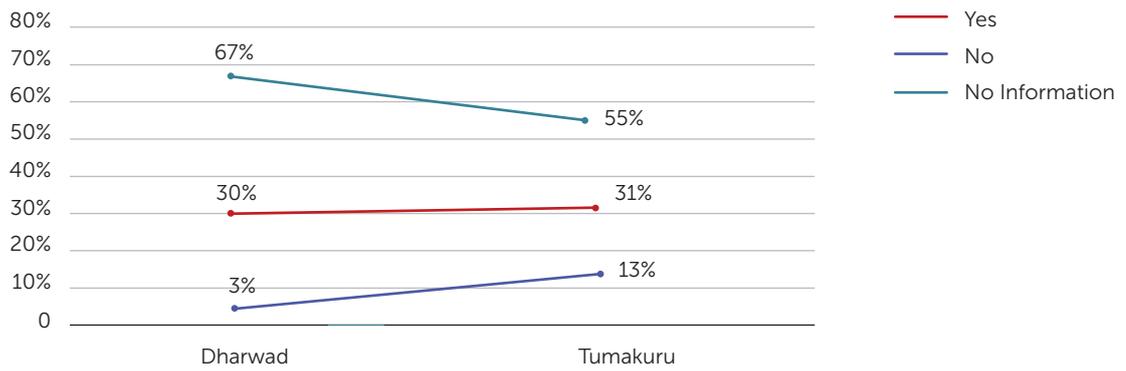


Figure qq: Bail in the pre-trial stage

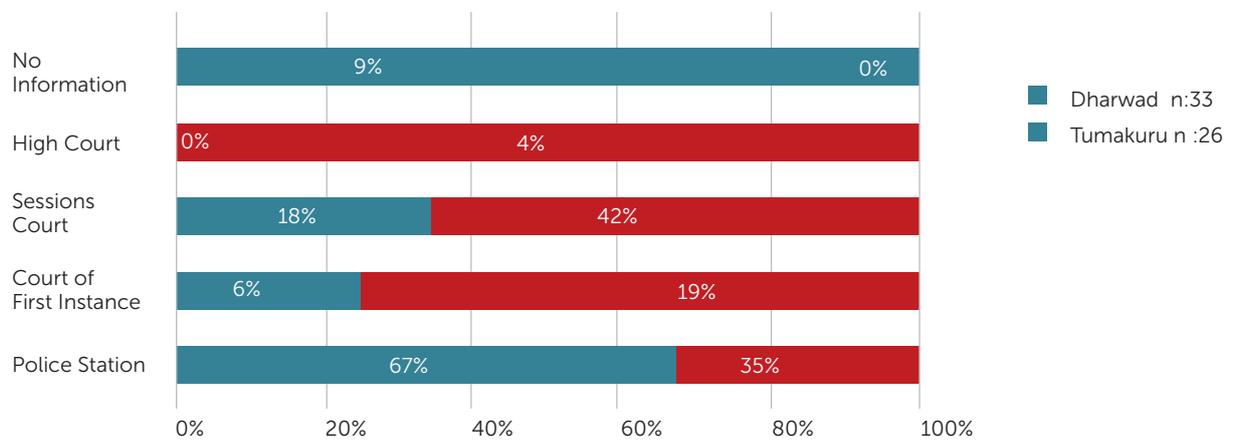


Figure rr: Institutions that granted bail

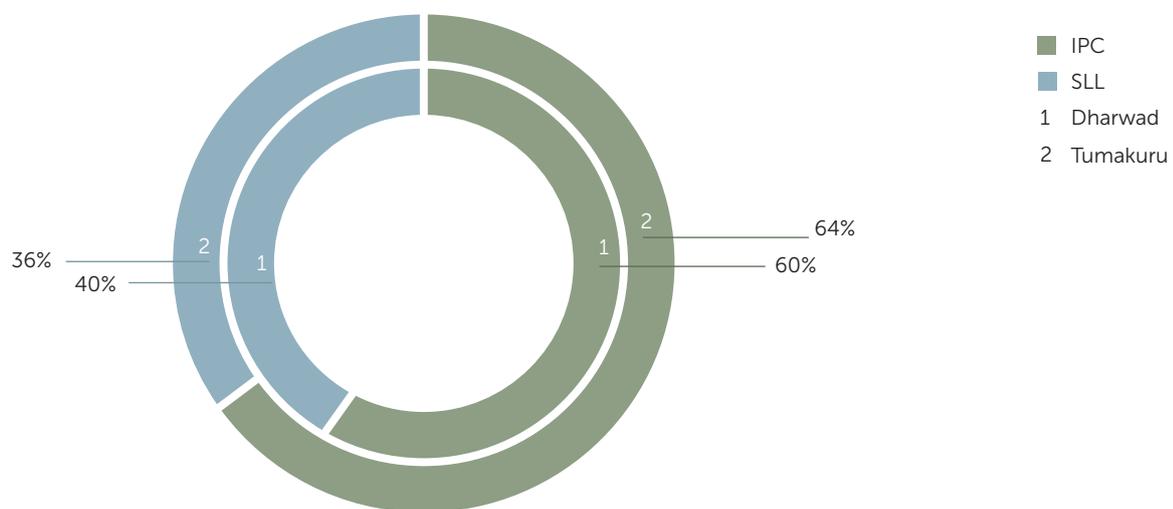


Figure ss: IPC and SLL cases in the pre-trial stage

6.59

No information was available on whether the arrested person secured bail in a significant number of these cases as the order sheets were unclear. Bail rates increased in the pre-trial stage in both districts, where 30% and 31% of arrested persons received bail in Dharwad and Tumakuru respectively.

(b) Institution Granting Bail

6.60

Given the significant rise in bail orders in the pre-trial stage, we also analysed the various institutions which granted bail to arrested persons.

6.61

Figure rr below shows us the overall picture for pre-trial bail in Dharwad and Tumakuru with respect to the institutions that granted bail. We note that in both districts, the police station and Sessions Court are the major sites of bail decision making in the criminal justice system.

Given that only 18% accused in Dharwad and 27% of accused in Tumakuru secured bail at first production, there appears to be no special reason why first production should be considered the primary site for access to justice intervention.

6.62

In Tumakuru, 19% arrested persons secured bail in the pre-trial stage at the court of first instance, while in Dharwad, only 6% arrested persons secured bail from that court.

As we noted earlier, a significant number of arrested persons secured bail from the police station, even where they were accused of committing non-bailable offences. In fact, the number of arrested persons who secured bail from the police station in Dharwad was almost double that of Tumakuru.

In addition to this, appellate courts such as the Sessions Court also granted bail to 18% and 42% of arrested persons in Dharwad and Tumakuru.

c) Statutory Basis and Nature of Offences

6.63

Unlike the first productions data set for Dharwad and Tumakuru, the composition of cases based on statutory origin of the offence were similar in the both pre-trial data sets i.e. 60% IPC cases and 40% SLL cases. Out of the IPC cases, in both districts, offences against the body were the most common, followed by offences against property.

6.64

In the Court Observations study in Chapter 5, we found that across the three districts, the rate of bail was higher for IPC offences than SLL offences. However, the most surprising result from the Court Records data set was that bail was granted more frequently for SLL offences in both districts. In Tumakuru, 27% IPC cases received bail compared to 39% of the SLL cases. In Dharwad, the difference was significant, as bail was granted in 48% of SLL cases compared to just 17% of IPC cases (Figure tt).

6.65

A substantial number of 'other offences' were observed in both districts. In Dharwad, these were a combination of offences against the body and State (30) while in Tumakuru, they were a combination of offences against the body and property (20). These 'other offences' were included in the overall numbers of offences against the body.

6.66

No clear trend was evident from the bail outcomes based on the nature of the offence. Significantly, 20% cases that were categorised as offences against the body were granted bail in Dharwad while no cases of offences against property were granted bail. As we noted in Chapter 5 in the Court Observations study of Bengaluru, bail was granted least for offences against property.

6.67

Offences against body and offences against property received bail at the same rate in Tumakuru (27%). It is pertinent to once again note that the category of 'offences against body' includes 'other offences' as well, which may explain the higher rate of bail for offences against the body in both districts. Only

The most surprising result from the Court Records data set was that bail was granted more frequently for SLL offences in both districts. In Dharwad, the difference between bail granted for IPC and SLL cases was significant. Bail was granted in 48% of SLL cases compared to just 17% of IPC cases (Figure tt).

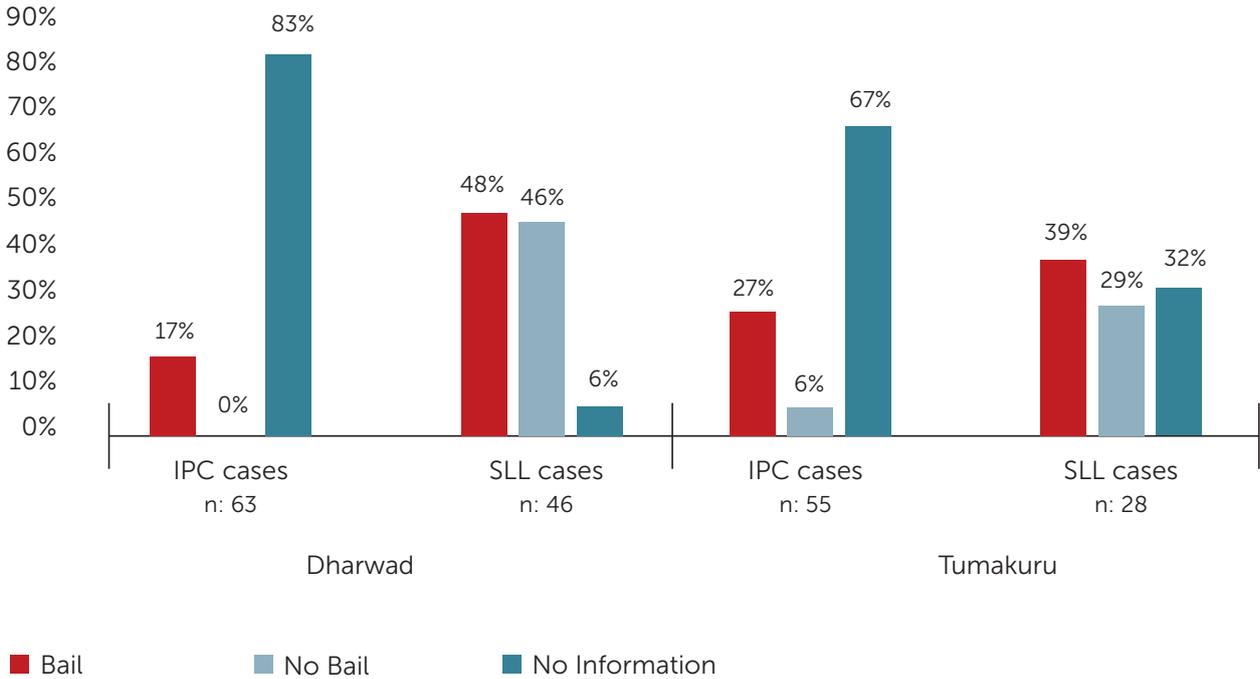


Figure tt: Pre-trial bail outcomes in IPC and SLL cases

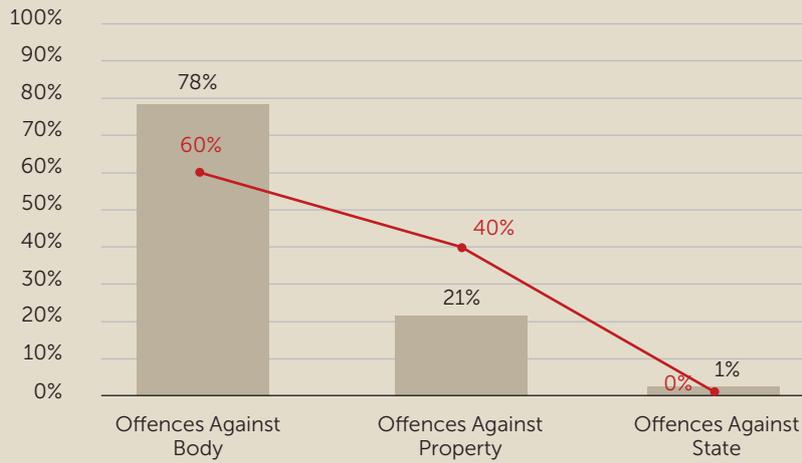


Figure uu: Nature of offences in the pre-trial stage

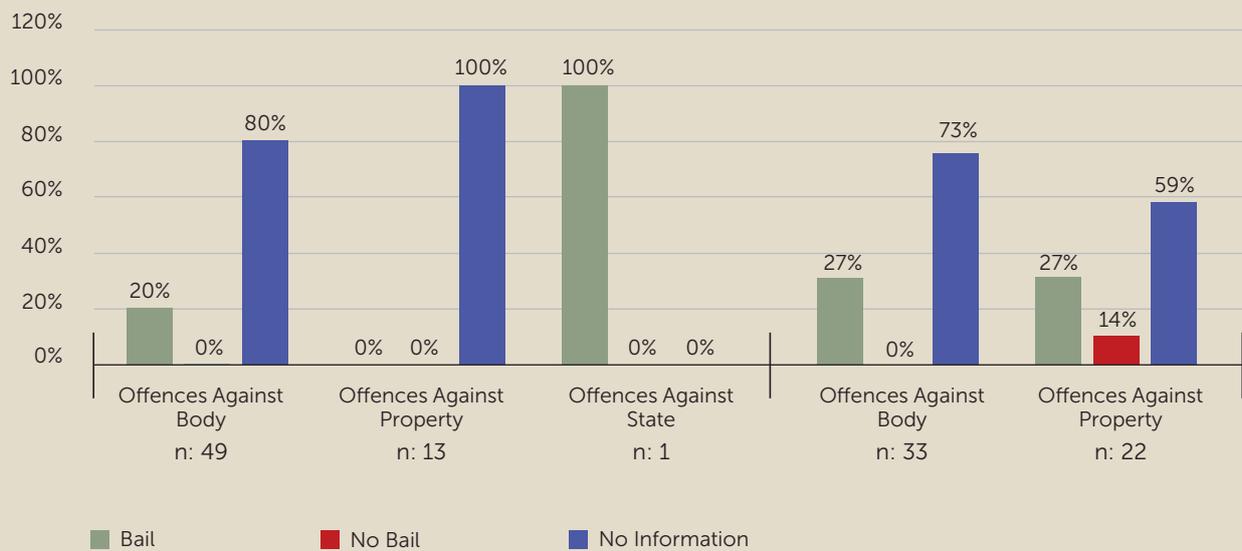


Figure vv: Pre-trial bail outcomes according to nature of offence

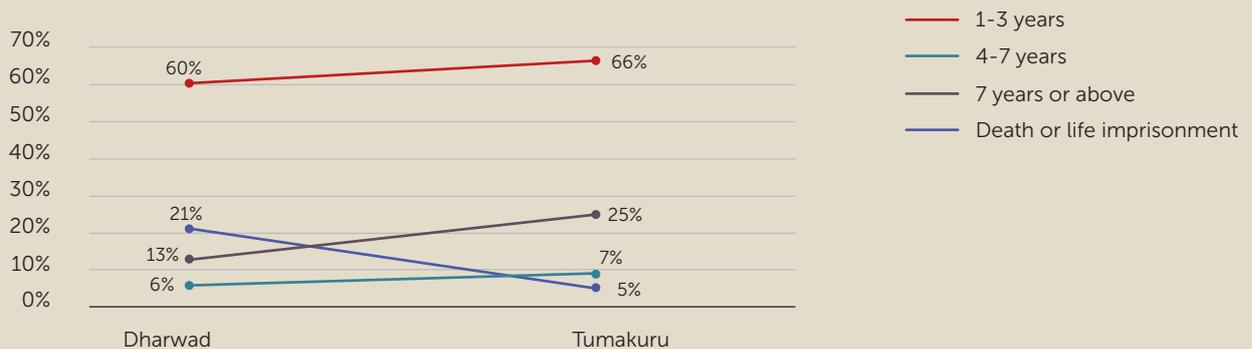


Figure ww: Pre-trial cases based on range of punishment

one offence against the State was observed in the overall data pool, which was from Dharwad, and the arrested person was granted bail (Figure uu).

(d) Range of Punishment

6.68

The final substantive factor shaping bail outcomes that we measured is the range of punishment prescribed for the offence. Over 50% of the accused in Dharwad and Tumakuru respectively were accused of offences punishable with imprisonment between 1-3 years. On other punishment parameters, there was some variation amongst the districts. In Dharwad, almost 21% were accused for offences involving death or life imprisonment. However, in Tumakuru, only 5% were accused of this category of offences while a higher 25% were accused of offences with imprisonment of 7 years and above (Figure mm).

6.69

Earlier in this Chapter, in the context of pre-trial bail decision making in Bengaluru, we showed that the range of punishment was inversely proportional to the likelihood of securing bail. We tested it in Dharwad and Tumakuru as well, and observed the variations in bail outcomes based on the range of punishment prescribed for the offence.

6.70

Overall, bail was frequently granted for offences punishable with imprisonment of 1-3 years in both districts. For offences of all types except punishable with imprisonment of 1-3 years, bail was more likely to be granted in Tumakuru than Dharwad. As expected, in both districts the rate of bail was high for offences where no more than 7 years was of punishment has been prescribed as the punishment.

6.71

Surprisingly, in Tumakuru, offences that are considered 'more serious' on account of higher ranges of punishment i.e. imprisonment of 7 years and above, life imprisonment and death penalty, received bail frequently. Those accused of the most serious offences which permitted death or life imprisonment received bail at significantly higher

rates in Tumakuru than those accused of lesser offences in Dharwad. However, as the number of accused is very small, this may be a statistical outlier to be ignored. Therefore, from this dataset, we were unable to establish any clear linear relationship between range of punishment and pre-trial bail outcomes.

6.72

While we have analysed the effect of various substantive factors on bail outcomes in the pre-trial stage in Dharwad and Tumakuru, we were unable to do so with the procedural factors. In Chapter 5, we had analysed the impact of legal representation and other due process factors on bail outcomes at first production in the three districts. We also carried out a similar, but limited analysis in the Court Records study in Bengaluru. Through this, we learnt that the presence of effective legal representation has a positive influence on bail decision making, thereby increasing the likelihood of bail.

(e) Legal Representation

6.73

However, in the Court Records study in Dharwad and Tumakuru, due to the poor record keeping practices, information on legal representation and compliance with due process factors was unavailable in more than 90% of the cases. Consequently, the relationship between legal representation and bail outcomes could not be clearly observed. Further, there was insufficient information on the presence of effective legal representation such as whether bail applications were filed on behalf of accused persons. Where information was recorded, the arrested persons were not legally represented in no more than 30% cases in both districts, which aligns with the findings from the Court Observations study in Chapter 5.

We found that substantive factors like statutory basis and nature of offences, the classification of offences into bailable and non-bailable and range of punishment are crucial to bail decision making at all stages of the criminal justice process. Therefore, the formal and informal classification of offences as 'serious' and 'non-serious' based on the above must be urgently revisited to ensure that bail is granted early on in the pre-trial stage and further, that persons accused of such offences do not form part of the flow of under-trial prisoners.

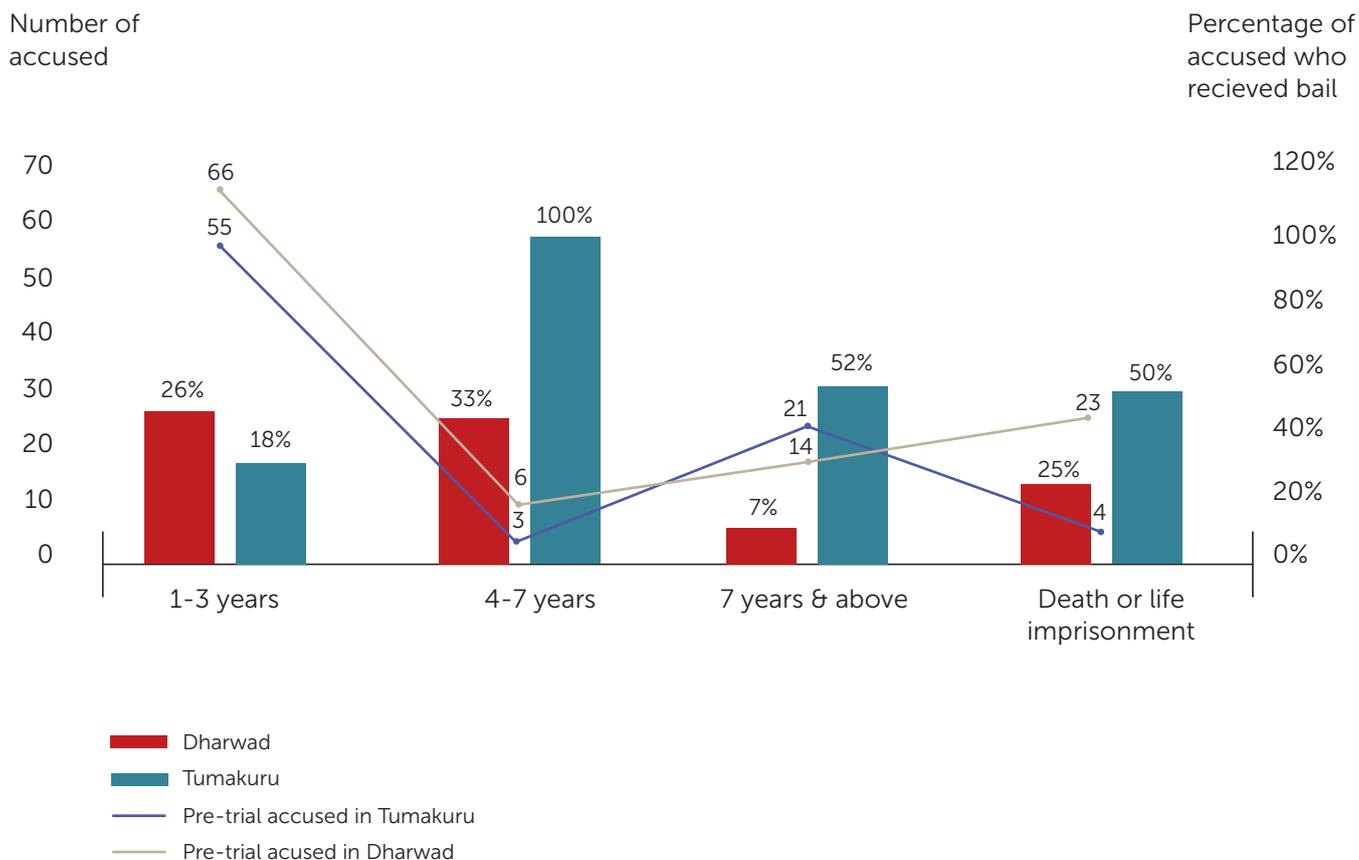


Figure xx: Pre-trial bail outcomes according to range of punishment

Conclusion

6.74

We undertook the Court Records study as a second data source to verify and validate the Court Observations data. The Court Records study in Bengaluru, Dharwad and Tumakuru largely confirm the findings of the Court Observations study. While the Bengaluru Court Observations and Court Records data sets show greater correspondence with each other, in Dharwad and Tumakuru, correspondence could not be easily established due to inadequate information in a significant number of cases. In Dharwad and Tumakuru, the difficulty in identifying trends in bail decision making and

measuring the influence of various substantive and procedural factors may be attributed to the disorganised system of maintaining court records in the Magistrate courts in Karnataka. This suggests that a protocol for recording information is required in the lower courts to ensure informed decision making that is consistent and uniform across districts.

6.75

The finding across the three districts is that while bail is secured in the pre-trial stage, it is not always

secured at first production. Further, the most commonly ordered duration of detention was between 1 to 20 days, where the court awarded judicial custody at first production. While such similarities between the three districts were observed, the differences in police, prosecutorial and judicial cultures were inescapable. For instance, unlike Bengaluru, the rate of bail for SLL offences was higher than for IPC offences in Dharwad and Tumakuru. These differences may have a bearing on the approach to arrests and bail decision making, whether at the police station or the courts.

6.76

Similar to the Court Observations study, SLL offences were numerous and common in both districts. Further, most cases involved charges which are a combination of offences against property, body and the State, also known as 'other' offences. As they dominate the cases before the court, police practices in recording cases need to be studied more carefully to explain this. Finally, in both districts, a majority of cases involved offences punishable with imprisonment of less than 3 years or 'less serious' offences, though the limited data did not permit us to arrive at any clear finding on the impact of range of punishment as a factor on bail decisions. Surprisingly, and unlike Bengaluru, bail was granted frequently for offences punishable with death and life imprisonment.

6.77

The effectiveness of legal representation in ensuring bail could be tested only from the Court Records data for Bengaluru as information for Dharwad and Tumakuru was unavailable in most of the cases. The data from Bengaluru confirmed our findings from the Court Observations study that effective legal representation undoubtedly has a positive effect on bail.

6.78

In conclusion, we found that substantive factors like statutory basis and nature of offences, the classification of offences into bailable and non-bailable and range of punishment are crucial to bail decision making at all stages of the criminal justice process. Therefore, the formal and informal classification of offences as 'serious' and 'non-serious' based on the above must be urgently revisited to ensure that bail is granted early on in the pre-trial stage and further, that persons accused of such offences do not form part of the flow of under-trial prisoners.

References

¹ In Bengaluru, we analysed 240 IPC cases and 44 SLL cases in the Court Observations data set and 202 IPC cases and 43 SLL cases in the Court Records data set.

² In Bengaluru, we analysed 23 bailable cases and 260 non-bailable cases in the Court Observations data set and 12 bailable cases and 233 non-bailable cases in the Court Records data set.

³ 21% and 28% persons in Dharwad and Tumakuru respectively were accused of offences under special statutes such as the Electricity Act, 2003, Karnataka Excise Act, 1966, Mines and Minerals (Development and Regulation) Act, 1957 read with the Karnataka Minor Mineral Concession Rules, 1994 and Karnataka Police Act, 1963.

⁴ In Dharwad and Tumakuru, court records reveal only the gender of the accused, among various other social and demographic indicators. Even gender was not recorded in over 10% of the cases in Dharwad. However, the data from both Dharwad (3.6%) and Tumakuru (6.4%) align i.e. only about 5% of the accused in the courts were women.

07

Summary and Recommendations

Existing research and suggestions for reform by State institutions, the Law Commission of India and civil society groups on under-trial detention have either focused on police excesses or have viewed the problem of granting of bail purely through the lens of prisons, prison conditions and related institutional mechanisms. However, the primary situs of a decision on detention – the lower criminal courts which decide on whether a person who is arrested and produced must be released on bail or be detained – has received lesser attention.

Existing research and suggestions for reform by State institutions, the Law Commission of India and civil society groups on under-trial detention have either focused on police excesses or have viewed the problem of granting of bail purely through the lens of prisons, prison conditions and related institutional mechanisms. However, the primary situs of a decision on detention – the lower criminal courts which decide on whether a person who is arrested and produced must be released on bail or be detained – has received lesser attention. Therefore, to understand the role of courts in bail decision making in this study we engaged with cases in lower criminal courts in three districts in Karnataka – Bengaluru, Dharwad and Tumakuru – at the stage of ‘first production’ of an accused after arrest and more generally, in the ‘pre-trial’ stage. The study was conducted in two stages of Court Observations of cases in lower criminal courts over a period of 45 days and a study of the Court Records over a period of 6 months. These records helped us confirm our findings from the Court Observations study on bail at first production but also helped gain a broader perspective on the influence of these factors on bail in the pre-trial stage.

A summary of the findings and our recommendations for reform are as follows:

A. Substantive Factors for Grant of Bail: Statutory Basis and Nature of Offences

a. *IPC v. SLL Offences:*

From our **Court Observations** study, we observed that SLL offences constitute a substantial portion of the docket in the lower criminal courts. On first production, bail was granted in only one-tenth of those cases in comparison to offences under the IPC. Thus the rate of detention and the period of detention for persons accused of SLL offences is significantly higher than IPC offences. These findings were confirmed by our **Court Records** study as well. In Bengaluru, IPC cases formed a majority of the composition of first production cases and bail was more frequently granted to

IPC offences over SLL offences. In Dharwad and Tumakuru, in the first productions data set, the proportion of IPC and SLL cases were skewed on account of the small sample.

b. *Bailable v. Non-Bailable Offences:*

Our study showed that bail was granted at a lower rate to non-bailable cases in Bengaluru and Dharwad as per our Court Observations study. In Tumakuru however bail was granted more in non-bailable cases (27%).

c. *Bail for bailable offences:*

Significantly, in all three districts, bail was not granted by the courts even in some bailable cases where bail is a matter of right, and accused were remanded to either judicial or police custody. For instance, in Tumakuru, bail was not granted for any bailable offence.

d. *Range of Punishment:*

Across the three districts, the rate of bail was high in case of offences punishable with imprisonment of 1 to 3 years. At first production in Bengaluru, a higher sentence prescribed for an offence meant a lower chance of securing bail and no person accused of an offence punishable with death or life imprisonment secured bail. However, in Dharwad and Tumakuru, a substantial number of accused persons secured bail despite being accused of offences punishable with death or life imprisonment.

Recommendations:

I. Re-thinking the classification of bailable and non-bailable offences:

Any attempt at bail reform must necessarily address the existing classification of offences under Indian criminal law so that the number of bailable offences are expanded. This re-thinking of the classification needs to take into account the level of seriousness of the offence, degree of violence, injury to the victim or property and the possibility of using alternative dispute resolution methods. This reclassification should extend to SLL offences as well, a substantial number of which are classified

as 'non-bailable' under the applicable law without adequately weighing the factors outlined earlier. SLL offences comprise almost 50% of the court docket and more research on the scope and nature of these offences is necessary.

II. Instituting Bail Protocols:

In this study, we have observed that the process of bail decision making is entirely discretionary and rests heavily in the hands of judges of lower criminal courts. This could also be a reason for the wide geographical variations in outcomes that we observed in our study. In order to limit the discretion of the court in standard matters or at least to ensure that bail is not denied in bailable offences and where the requirements for grant of bail are fulfilled, a first step to institutionalize legal reform is that a Bail Protocol be developed and instituted for all criminal courts to follow. The Bail Protocol could include a form to be filled by judges at the time of a hearing on bail to record all relevant information in relation to an accused, including but not limited to legal representation, date of arrest, the various bail decisions in the pre-trial stages and the period of remand to custody. In addition to ensuring availability of information at all points in time, it is likely to direct the mind of the judge to the considerations that must be borne in mind while making a bail decision.

B. Influence of Procedural Factors on Bail Decision Making: Legal Representation

While almost two thirds of the accused had legal representation at first production and the presence of a lawyer did have a positive impact on the likelihood of receiving bail, legal representation by itself did not result in orders granting bail as Bengaluru. Effective legal representation, including but not limited to filing bail applications, appeared to have a positive effect on bail outcomes as all three districts reported higher bail orders where bail applications were filed. Bail applications undoubtedly increased the chances of securing

bail across the three districts, with over 50% of accused who filed bail applications in Dharwad and Tumakuru receiving bail.

Recommendation:

Overhauling the existing legal aid system:

The availability of *effective* legal representation that goes beyond the mere presence of a lawyer has a positive effect on bail outcomes. This would require a complete overhaul of the existing legal aid system so that every person who is produced in court is represented by a lawyer who can effectively represent him / her by filing a bail application in a timely manner. This would also require that legal aid lawyers are properly trained and their capacity is built to provide effective legal representation. Effective legal aid will ensure that an accused is not merely represented but receives appropriate legal counsel at all levels.

C. Recognising the Distinction between Pre-trial and Under-trial Stages of the Criminal Justice Process in Law

The manner of bail decision making in India has remained largely unchanged since the enactment of the Code of Criminal Procedure, 1973, barring a few guidelines from the Supreme Court of India. As we set out on this study, we noted that the law does not make an explicit distinction between the pre-trial and under-trial stages. We argued that the failure to make this distinction will have consequences for bail decision making as bail decisions would be driven by similar factors in both stages, despite the obvious differences in the burdens of proof to be satisfied in the two stages; the considerations that guide a bail decision in the pre-trial stage, where a charge sheet has not yet been filed, ought to be different from a decision on bail at the under-trial stage where trial has officially commenced.

The category of 'under-trial' prisoners in India includes not only persons whose trial has

commenced but also includes 'pre-trial' prisoners who have been imprisoned prior to filing of the charge sheet. The distinction between pre-trial and under-trial prisoners has not been made in India in decision making at any stage in the criminal process and this has resulted in narrow approaches to solving the under-trial problem which have failed to privilege and secure pre-trial liberty.

Further, data collection on under-trial prisoners in India follows the 'census' method to determine the number of under-trial prisoners in a given year i.e. the data presented on under-trial detention only represents the total number of under-trial prisoners at the end of the calendar year. But it does not record the 'flow' of under-trial prisoners i.e. those accused persons who are arrested and released within the same year. The failure to estimate the flow of under-trial prisoners in a given year, the average period of detention and the reasons for the same will result in policy reform measures for bail decision making that are woefully inadequate and misguided.

Recommendations:

I. Creating a distinction between the pre-trial and under-trial stages:

This distinction is essential to devise appropriate strategies to control the levels of detention at each stage, as pre-trial prisoners are detained merely on a suspicion and prior to filing of a detailed charge sheet by the investigating authorities.

II. Employing the 'flow' method of data collection on under trial prisoners:

We must record data on the number of accused persons who enter and exit prisons in a given year and the time period for which they have been detained in the pre-trial stage, as opposed to following the present 'census' method which focuses only on the stock of accused persons in jail at the end of the year.

D. Reform in Case Information Management:

During the **Court Observations** phase of the study which focused on first productions, we were able to generate reliable and accurate data on court practice in these proceedings as we collected the data. However, collection of accurate data in the **Court Records** study through official court files was contingent on scrupulous data and case information management by courts, as well as their willingness to share this data with us.

Lower courts in Dharwad and Tumakuru employed inadequate and often inconsistent record keeping practices where information on a number of relevant aspects were not recorded by courts. While lower courts in Bengaluru maintained a separate record of first production cases, a similar practice was not followed in Dharwad and Tumakuru where a single register was maintained for all cases. This, compounded by the bureaucratic and operational difficulty faced in accessing this data in a reliable and timely fashion, presented limitations to the study.

Recommendation:

Designing protocols for record keeping:

In order to ensure uniformity and consistency in record keeping practices and to limit the discretion exercised by courts in bail decision making, it is imperative to reform the process of record keeping in lower courts by developing mandatory protocols for recording information. A move away from the current random and haphazard practices would assist in recording information in a standardised manner to bring consistency and order to the system.

E. Reducing Reliance on Money Bail:

The provisions on bail in Chapter 33 of the CrPC apply irrespective of the stage of the criminal justice process and is primarily a money-based bail system i.e. bail is linked to the paying capacity of the accused where bail amounts are set by judges without any instructive guidelines. However, there is overwhelming evidence to show that curtailing pre-trial liberty in fact results in heavy costs for the accused and society and a reliance on money-bail disadvantages individuals from socio-economically disadvantaged backgrounds who find it difficult to post bail amounts set by courts. Therefore, our final set of recommendations relate to the structure of bail in India.

Efforts at bail reform around the world have attempted to move from relying solely on a system of money bail which has the consequence of detaining poor defendants posing little risk to the community while also releasing dangerous individuals with the capacity to bail themselves out. Policy reform in recent years in the United States has led to the replacement of the ad hoc money bail system with bail schedules that were designed to lay down the amount of bail to be set against each offence with a view to bring greater certainty and predictability in the system. However, as bail schedules have been subject to the similar criticisms as the money bail system,¹ pre-trial services frameworks that monitor those who are released on recognisance or an unsecured bond have been proposed as alternatives to the traditional money bail system.

Recommendation:

Instituting a pre-trial services system:

One approach to moving away from a purely money based bail system is to institute a robust pre-trial services framework which encourages pre-trial liberty. A pre-trial services framework would rely on non-custodial measures to monitor accused persons who are released on an unsecured bond, such as by issuing regular reminders of court hearing dates, providing mental health services, ensuring that accused receive the assistance of lawyers, and conducting regular supervision checks to ensure presence for trial and compliance with the conditions of release to ensure their presence in court for trial.

References

¹The money bail system gave rise to a new stakeholder in the process i.e. bail bond agents, who step to make payment towards the bail bond for and to secure the release of those who cannot make payment. However, the bail bond practice has been criticised strongly, as agents often refuse to post bail for defendants with low money bail amounts because they are not lucrative clients and often employ physically and economically coercive practices to recover their dues. See The National Association of Pretrial Services Agencies, *The Truth About Commercial Bail Bonding in America*, August 2009. Available at <https://www.pretrial.org/download/pji-reports/>

APPENDIX A

Questionnaire for Court Observation

COURT CODE	DATE
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Surveyor's Name				
Code: e.g. District/Court Number/Date/Questionnaire Number	Dharwad	XJMFC-I	20th March	1

Court Details

Court Name & Number	
Name of Judge	
Number of Cases listed as per Daily Causelist (enclose Causelist) ²	
Time of Production (11 am or 3.00 pm)	

Accused Details

1. Name of the accused: _____
2. Age: _____
3. Sex:

Male

Female

Other

Case Details

4. C.C. No./ P.C.R. No./Crime No.
(Cross out whichever inapplicable):

5. Police Station from which produced:

6. Nature of offence (mention the relevant sections):

Observation Details

7. Whether accused produced in handcuffs:

Yes	No	Before & after
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8. Whether lawyer for Accused present:

Yes	No
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a. Kind of Lawyer:

Private	Legal Aid
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b. Whether accused informed by court of right to free legal aid:

Yes	No	No Information
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9. Interaction with the Court

a. Whether accused allowed to address the Court/Magistrate:

Yes	No
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10. Whether Bail application filed:

Yes	No
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11. What was the outcome from first production (tick appropriate box and mention number of days):

- a. Bail granted
- b. Remanded to Judicial Custody: No. of Days: _____
- c. Remanded to Police Custody:
- d. Adjourned:
- e. Other (please specify): _____

12. Whether Remand Order handed over and signed by accused:

Yes	No	No Information
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13. Approximate time spent by the Magistrate on the case (tick):

- a. Less than 5 minutes
- b. 5-10 minutes
- c. 10-20 minutes
- d. More than 20 minutes

14. Any other observation:

APPENDIX B

Draft Questionnaire for Court Records Review

Court Details

Court Name & Number	
Name of Judge	
Case Number (CC No.)	

Accused Details

1. Name of the accused:
2. Age:
3. Sex (M/F/Other):
4. Whether Accused is entitled to free legal aid (as per Section 12 of the Legal Services Authority Act), if available:

 SC ST Woman Disabled Person Annual Income < Rupees 1 lakh

Case Details

5. Whether FIR available:

 Yes No

6. FIR Number:
7. Name of Police Station:
8. Nature of offence:

Statute (use separate columns if more than 1 statute)	Section(s)

- a. Range of Punishment (please tick)¹ :

1-3 years	3-5 years	5-7 years	10 years- life

- b. Bailable (tick): Non-bailable (tick):

- c. Cognizable (tick): Non-cognizable (tick):

9. Steps/action taken by police towards preliminary investigation:

 Arrest of accused Search and/or seizure No Information

10. Whether any delays in registration of FIR and forwarding to the Magistrate recorded (as per FIR and signed receipt of Magistrate):

a. Yes No

b. Reasons for delay recorded:

Preliminary investigation conducted Magistrate/ DutyMagistrate not available Any other

11. Whether Arrest Memo prepared:

Yes No No Information

12. Whether Arrest Memo contains the following Details (if available):

a. Date, Time, and Place of arrest:

Yes No No Information Partial Information

b. Details of suspected offence (including specific sections):

Yes No No Information Partial Information

c. Reasons for arrest detailed (same options as above)

d. Signed by accused, arresting officer, and 1 witness (same options as above)

e. Nearest relative informed of the arrest (same options as above)

f. Mode of conveying information of arrest, and the time taken: (please specify)

g. Whether any prior injury/medical condition recorded (whether Inspection Memo available) (same options as above)

h. Whether record of any valuables from person of accused:

Yes No

13. Even if Arrest memo not submitted, whether the family of accused was informed: (Yes/No/No information)

a. Mode of conveying such information:

Telephonically Personally Through LSA/other police station (family outside jurisdiction)
 By Electronic Means Any Other

b. Time taken: (please specify) _____

14. Whether accused was taken for medical examination during period of detention:

Yes	No	No Information
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a. Whether medical examination report enclosed:

Yes	No
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b. In case the accused was in detention for more than 48 hrs., whether medical examination conducted every 48 hrs.:

Yes	No	No Information
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15. Any other document enclosed with Arrest Memo: (please specify)

During First Production:

16. Mode of first production:

Physical Court appearance	Through video conference
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17. Legal representation on behalf of accused:

a. Record of lawyer's vakalatnama filed on behalf of the accused:

Yes	No
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Legal Aid	Private lawyer
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c. If not, whether court informed the accused of his/her right to legal aid:

Yes	No	No Information
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18. Whether bail application filed:

Yes, by Lawyer	Yes, by Accused	No, cannot secure surety (non-bailable)
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19. What was the outcome after first production (please tick):

- d. Judicial custody awarded (specify duration): _____
- e. Bail granted (based on an anticipatory bail order)
- f. Bail granted, with surety (bailable offence)
- g. Bail granted, with surety (non-bailable offence)
- h. Bail granted, without surety (bailable offence)
- i. Other (please specify): _____

20. In case bail is granted, conditions prescribed in the order (please tick):

- a. That the accused shall attend the hearing in accordance with the conditions of the bond executed
- b. That the accused shall not, either directly or indirectly, offer any threats, inducement, or promise to prejudicially affect the investigation in any manner; or tamper with the evidence
- c. Any other (please specify): _____

21. Reasoning recorded by the Magistrate (please tick):

- j. There are sufficient grounds for custodial interrogation and further police investigation
- k. Anticipatory bail order from higher court, based on which bail is granted with conditions
- l. Bail granted with surety, as it constitutes a bailable offence
- m. Bail granted without surety, as it constitutes a bailable offence
- n. Bail granted with surety in non-bailable offence, as facts of the case show that the accused is unlikely to abscond or unduly influence police investigation
- o. Not sufficient grounds for further police investigation, hence charges dismissed

Outcome of the Case (prior to Trial):

22. Current Status of accused:

In judicial custody	On Bail	No arrest	Accused absconding
Accused Deceased	Matter Compounded		

23. Whether extension of judicial custody granted: Yes/No

- a. If yes, number of times: _____
- b. Total Number of days of extended custody: _____

24. Any other information as may be recorded in case files: _____



RE-IMAGINING BAIL DECISION MAKING

REPORT

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