



The Judicial Balancing Act: A Constitutional Analysis of Section 35(1)(f) and the Crisis of Legitimacy in South Africa's Bail Jurisprudence

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Abstract: The pre-trial release of an accused person on bail is a cornerstone of modern criminal justice systems, predicated on the fundamental principle of innocent until proven guilty. In South Africa, this is encapsulated in the legal maxim that bail may be granted if the interest of justice permits (Criminal Procedure Act 51 of 1977, s 60). This paper provides a critical analysis of the operation, effectiveness, and societal impact of the bail regime in South Africa. It argues that while the legal framework is constitutionally sound and designed to protect individual liberty, its application in a context of high crime rates, profound socio-economic inequality, and institutional challenges has led to a significant crisis of legitimacy. This crisis is exacerbated by two pervasive problems: the perceived ease with which suspects of serious crimes are granted bail and subsequently re-offend, and the ability of wealthy accused persons to manipulate the system through corruption. The system is perceived as failing to adequately balance the rights of the accused with the safety of the community and the administration of justice. This analysis will scrutinise the relevant legislation, pivotal case law, comparative perspectives, and international law standards, while integrating the distinct concerns of residents, police, prosecutors, and legislators.

Keywords: Bail Reform; Pre-trial Detention; Constitutional Rights; Interest of Justice; Socio-economic Inequality; Criminal Justice System.

Introduction

The South African bail regime is fundamentally shaped by the Constitution of the Republic of South Africa, 1996, which represents a radical break from its apartheid-era predecessor. The apartheid system frequently employed detention without trial as a tool of oppression, rendering the right to liberty precarious and contingent on racial identity. In this historical context, the entrenchment of a right to bail in the post-apartheid Constitution was a deliberate move to affirm the value of individual freedom and the presumption of innocence, core tenets of the new democratic order. Section 35(1)(f) guarantees every arrested person the right to be released from detention if the interests of justice permit, subject to reasonable conditions (Constitution of the Republic of South Africa, 1996). This provision is not an absolute right but a qualified one, immediately introducing the central tension that defines the bail discourse: the equilibrium between the liberty of the accused and the interests of the wider society and justice system.

The right to bail is intrinsically linked to the foundational rights in the Bill of Rights. As noted in *A Basic Guide to Criminal Procedure: A Rights-Based Approach Perspective*, the right to freedom and security of the person in Section 12(1) and the right to dignity in Section 10 are directly engaged when an individual is deprived of their liberty (Khangala, Mokoena & Ally, 2021, 45). The bail decision, therefore, is not a mere administrative act but a profound judicial function that must respect these constitutional cornerstones. The legal framework is designed to prevent the pre-trial process from becoming a form of punishment, ensuring that detention before conviction is the exception rather than the rule, a principle firmly established in international human rights law and embraced by the South African constitutional order (de Villiers, 2015, 17-35).

This constitutional right is operationalised primarily through the Criminal Procedure Act 51 of 1977 (CPA), a piece of apartheid-era legislation that has been significantly amended and reinterpreted through a constitutional lens to align with modern values. The CPA establishes a nuanced, two-track system that differentiates between categories of offences based on their severity, a structure that has been described as a legislative attempt to calibrate the presumption of liberty against the gravity of the alleged crime (Van der Berg, 2013, 5). For offences listed in Schedule 5 (such as culpable homicide or robbery under certain circumstances), the burden of proof rests on the State. The prosecution must adduce evidence that demonstrates that the release of the accused would not be in the interest of justice (CPA, s 60(11)(a)). This aligns with the standard principle that the state bears the burden of justifying the deprivation of liberty. However, for the most serious offences enumerated in Schedule 6 (including premeditated murder, rape, or trafficking of large quantities of drugs), the legislative intent shifts dramatically towards protecting the public and the integrity of the justice process. Consequently, the burden reverses, placing it on the accused to adduce evidence satisfying the court that "exceptional circumstances" exist which permit their release (CPA, s 60(11)(b)).

The rationale behind this two-pronged approach is rooted in the perceived danger to society posed by certain serious crimes. As Snyman (2020, 512) explains, the legislature deemed ordinary offences to be adequately governed by the standard bail provisions, while for a select group of severe crimes, it was considered necessary to create a higher threshold for release to safeguard the administration of justice. This legislative classification, however, is not without controversy. Critics argue that the schedules can be over-inclusive and may not always accurately reflect the individual risk posed by a specific accused, potentially leading to the detention of individuals who do not pose a genuine threat to society or the justice process.

The operative phrase throughout this framework is the "interests of justice," a deliberately broad standard defined in Section 60 of the CPA. This section provides judicial officers with a non-exhaustive list of factors to consider, creating a structured discretion. The court must evaluate the likelihood that the accused will stand trial, the risk they pose of committing further offences while on bail, their potential to intimidate witnesses or otherwise undermine the administration of justice, and whether their release would disturb public order or undermine public confidence in the justice system (CPA, s 60(4)-(9)). This multifaceted test is the legal mechanism designed to balance the competing interests, but its application is where theory often diverges from practice, leading to the profound challenges explored in this paper. The discretionary nature of this test means its outcomes are highly dependent on the individual magistrate's interpretation and the quality of evidence presented, creating a system ripe for inconsistency (Skinns, 2019, 235).

This discretionary power granted to judicial officers is a critical component of the bail system. Joubert emphasises that the court's discretion must be exercised judiciously and not capriciously, considering all relevant factors while excluding irrelevant considerations such as public emotion or the mere seriousness of the charge in isolation. The "interests of justice" standard, while flexible, requires a careful, evidence-based assessment. The court must be satisfied that there is a tangible risk linked to one of the statutory grounds, rather than acting on a generalised fear or assumption (Joubert, 2019, 178). This underscores the importance of a robust and well-presented case from both the prosecution and the defence to guide the court in making a decision that is truly in the interests of justice.

Materials and Methodology

This research is grounded in a qualitative, doctrinal legal analysis methodology, which is principally concerned with the systematic exposition and critical evaluation of legal principles derived from authoritative sources. The primary sources for this investigation comprise the foundational texts of South African law, specifically the Constitution of the Republic of South Africa (1996) and the Criminal Procedure Act 51 of 1977, which together establish the legal architecture of the bail regime. This legislative framework is further elucidated by a body of pivotal jurisprudence, including landmark judgments from the Constitutional Court and the Supreme Court of Appeal, which have authoritatively interpreted bail provisions and given concrete meaning to abstract standards such as the "interests of justice." To situate the national framework within a broader normative context, key international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR) and the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), are incorporated as benchmarks for assessment.

The methodological approach involves a critical, in-depth analysis of these primary materials to delineate the theoretical legal framework and identify its inherent tensions. This doctrinal analysis is supplemented by a comprehensive review of secondary materials, which provide critical perspective and empirical context. This includes scholarly literature from the fields of law, criminology, and sociology, as well as official reports from state institutions, such as the Judicial Inspectorate for Correctional Services, and civil society organizations like the African Policing Civilian Oversight Forum. The analytical process entails synthesizing these diverse sources to evaluate the pronounced gap between legal theory and practical application, to systematically assess the perceptions and experiences of key stakeholders, including the public, police, prosecutors, and legislators, and to

develop evidence-based recommendations for systemic reform. Furthermore, a comparative perspective is employed to contextualize South Africa's specific challenges and potential solutions within the landscape of international bail practices and reform trends.

Discussion

Pivotal Case Law Shaping the Bail Landscape

The judiciary has played a crucial role in interpreting the bail provisions, often navigating the tension between individual rights and public safety. The constitutional era demanded a new jurisprudence, and the courts have risen to this task, producing a body of case law that has fundamentally shaped how the CPA's provisions are understood and applied. These judgments have not only clarified legal principles but have also exposed the inherent difficulties in administering a fair bail system in a society grappling with deep-seated inequality and fear of crime. The courts have thus become the primary arena where the abstract "interests of justice" are given concrete meaning (Khangala, Mokoena & Ally, 2021, 67).

The interpretive journey began with the courts affirming the supremacy of the Constitution in bail matters. In *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), the Constitutional Court meticulously analysed the provisions of the CPA against the backdrop of the Bill of Rights. The court's judgment serves as a masterclass in constitutional interpretation, reading the CPA in a manner that gives effect to the spirit, purport, and objects of the Bill of Rights as required by Section 39(2) of the Constitution (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)). This approach ensured that the procedural mechanisms of the CPA would serve as a vehicle for the realisation of constitutional rights, rather than as a relic of a pre-constitutional past focused solely on crime control.

In the landmark consolidated case of *S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC), the Constitutional Court provided the foundational interpretation of the bail regime. The court unequivocally affirmed the constitutional stature of the right to bail, anchoring it firmly in the presumption of innocence and the right to liberty. It held that the purpose of bail is not to punish the accused but to secure their attendance at trial. A key holding was that while the State's concerns regarding flight risk or public safety are valid, they must be substantiated by credible evidence, not mere speculation or public emotion. This judgment served as a critical check on state power, insisting that the deprivation of liberty before conviction must be justified through a rigorous, evidence-based process, thereby firmly entrenching constitutional norms in bail proceedings. The court's reasoning underscored that the value of freedom is not diminished by the seriousness of the accusation, a principle that continues to guide lower courts (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)).

The principle established in *Dlamini* has been consistently reaffirmed, shaping the evidential landscape of bail applications. The requirement for credible evidence means that the state cannot rely on bald assertions or unsubstantiated allegations. For instance, a claim that the accused will intimidate witnesses must be supported by evidence of a specific threat or a pattern of behaviour, such as previous attempts to interfere with witnesses in the same or related cases. This evidential burden on the state is a practical manifestation of the constitutional right to liberty and ensures that the bail process remains a meaningful judicial inquiry rather than a rubber stamp for detention.

Further refining the nature of a bail inquiry, in *S v Acheson* 1991 (2) SA 805 (Nm) a principle is articulated that remains a cornerstone of bail law: "a bail application is not a trial." The court emphasised that the magistrate is not to attempt to determine the guilt or innocence of the accused based on a preliminary assessment of the State's case (*S v Acheson* 1991 (2) SA 805 (Nm)). The purpose is far more limited: to decide the sole issue of whether the interests of justice require the accused's detention pending trial. This principle is critical to preventing pre-trial detention from becoming a form of anticipatory punishment, ensuring that the formal trial process remains the sole arena for determining culpability. However, this stricture often creates a perception gap for the public, who struggle to understand why a person accused of a heinous crime is released without the court having "decided" on their guilt. This gap between legal procedure and public expectation is a significant source of the system's legitimacy crisis.

The *Acheson* principle, while vital, creates a difficult balancing act for judicial officers. As discussed in *A Basic Guide to Criminal Procedure: A Rights-Based Approach Perspective*, the court is permitted to consider the strength of the state's case, but only insofar as it relates to the specific grounds for refusal listed in Section 60, such as the likelihood of conviction and the severity of the likely sentence as a factor influencing the incentive to flee (Khangala et al., 2021, 68). The court must therefore engage with the evidence without prejudging the ultimate

outcome of the trial. This nuanced approach requires a sophisticated understanding of the distinction between assessing evidential weight for bail purposes and determining guilt beyond a reasonable doubt.

The interpretation of the "exceptional circumstances" test for Schedule 6 offences has been a particular jurisprudential challenge. In cases like *S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA), the courts have grappled with defining this elusive concept, ultimately settling on the formulation that circumstances must be "out of the ordinary, of an unusual nature, or which deviate from the standard" (*S v Botha en 'n Ander* 2002 (1) SACR 222 (SCA)). While this sets a high bar to justify release for the most serious crimes, critics argue its application is often inconsistent and creates a systemic bias. As legal scholar Martin Schönteich has argued, for an indigent accused, demonstrating "exceptional circumstances" is a Herculean task (2010, 7). Without financial resources for strong legal representation, unable to offer substantial sureties, and lacking stable employment or community ties that a court might recognise as "exceptional," their poverty becomes the primary factor leading to prolonged pre-trial detention. This contrasts sharply with a wealthy accused, for whom financial strength and strong social capital can itself be framed as an exceptional circumstance ensuring their return to court, highlighting a fundamental socio-economic disparity at the heart of the bail process.

The challenge of "exceptional circumstances" is further compounded by its abstract nature. Snyman (2020, 515) points out that the test does not provide a definitive list of what qualifies, leaving it to judicial interpretation. This has led to outcomes where factors such as prolonged pre-trial detention due to court backlogs, the accused's health conditions, or even the novelty of a legal defence have been accepted or rejected as "exceptional" with varying degrees of consistency across different courts. This lack of a uniform standard can lead to arbitrary outcomes and undermines the principle of legal certainty, which is a key component of the rule of law.

Stakeholder Concerns: A Multifaceted Crisis of Confidence

The practical application of the bail system has generated significant concerns from key stakeholders, revealing a deep-seated lack of public trust. The theoretical balance envisioned by the Constitution and elaborated by the courts is, in practice, experienced very differently by the various actors within the criminal justice ecosystem. Their divergent, and often conflicting, perspectives reveal a system under severe strain, where the ideals of justice are frequently overshadowed by operational failures and societal pressures (Redpath, 2021, 89). This crisis of confidence threatens to unravel the social contract that underpins the criminal justice system.

The dissonance between constitutional theory and street-level practice is stark. While the Constitution guarantees a rights-based approach, the daily reality for many stakeholders is defined by fear, frustration, and a perception of systemic failure. This disconnect is not merely academic; it has real-world consequences, including the breakdown of community cooperation with law enforcement, the demoralisation of justice officials, and the erosion of the judiciary's moral authority (Redpath, 2021, 95). Understanding these stakeholder perspectives is therefore essential to diagnosing the systemic failures of the bail regime.

The Public (Residents and Communities)

For many South Africans, the granting of bail is synonymous with injustice and systemic failure. High-profile cases, frequently sensationalised by the media, where accused individuals are released on bail only to commit further violent crimes, have seared into the public consciousness a perception that the system is tilted in favour of criminals at the expense of victims (*S v Vermaas* 1996 (1) SACR 528 (T)). This is not merely a perception; empirical data and media reports consistently highlight cases where individuals accused of murder, rape, or armed robbery are released on bail and are subsequently arrested for similar, serious offences. This pattern of recidivism while on bail fundamentally undermines the court's assessment of the "interest of justice" and the risk of committing further crimes, creating a tangible and justified fear within communities (Schönteich, 2010, 7). This perception is most acutely felt in communities plagued by gang violence, where residents routinely witness accused gang leaders being released and openly intimidating witnesses. This creates a vicious "circle of violence" and leads to the frequent collapse of prosecutions, as witnesses are too terrified to testify (Joubert, 2019, 185). This erosion of faith is profound; when the state is perceived as unable or unwilling to protect its citizens, it not only undermines the legitimacy of the courts but can also foster vigilante tendencies, as communities resort to extra-legal means to achieve the security, they feel the state cannot provide.

This public sentiment is often exacerbated by a sense that the legal system is overly technical and detached from the community's lived experience of crime. Snyman (2020, 516) observes that when individuals who are perceived as "clearly guilty" are released on bail, it can lead to a loss of confidence in the entire legal system. The community does not see the legal constraints of the presumption of innocence or the evidentiary burdens; they see a known criminal back on the streets. Furthermore, there is a widespread and damaging belief that the system is "for sale." Anecdotal accounts and investigations by bodies like the Judicial Inspectorate for Correctional Services often point to the possibility that wealthy and connected accused persons can exploit their resources to secure favourable bail outcomes, either by securing top-tier legal counsel who can outmanoeuvre an under-resourced prosecution,

or through more illicit means (Judicial Inspectorate for Correctional Services, 2019, 41). This can lead to a dangerous cycle where communities are less willing to report crimes or testify, further weakening the state's ability to prosecute effectively and creating a vacuum that empowers criminal elements.

The public's frustration is often compounded by a lack of understanding of the legal principles governing bail, particularly the distinction between a bail hearing and a trial. When a magistrate grants bail, the public interpretation is often that the court has "let a guilty person go," rather than understanding it as a procedural step based on a specific legal test. This disconnect is exacerbated by a lack of effective communication from the justice system, leaving a vacuum that is filled with anger and mistrust. Research on public attitudes towards the criminal justice system often finds that this "procedural justice deficit", the feeling that the process is unfair and incomprehensible – is as damaging to institutional legitimacy as the outcomes themselves (Tyler, 2006, 4). Consequently, public confidence, which is essential for the cooperation of communities with police and prosecutors, is severely damaged, creating a foundational weakness that affects the entire criminal justice process.

The South African Police Service (SAPS)

Police officials often express profound frustration, feeling that their dangerous and diligent work in apprehending high-risk suspects is nullified by what they perceive as lenient or procedurally focused bail decisions. The release of a suspect back into the very community where the crime was committed can demoralise officers and critically strain already fragile police-community relations, as citizens blame the police for a judicial outcome over which they have no control. Furthermore, the SAPS is frequently criticised, including by prosecutors and magistrates, for submitting poorly compiled bail information dockets. These dockets, which are the primary evidence upon which a prosecutor must oppose bail, often lack crucial detail, such as verified addresses, witness statements, or a coherent account of why the accused poses a specific flight risk or danger. This lack of evidentiary foundation makes it nearly impossible for the National Prosecuting Authority (NPA) to successfully oppose bail, regardless of the investigating officer's subjective belief about the accused's dangerousness (Bruce, 2015, 55).

From a police perspective, the bail court can feel like a hostile arena where legal technicalities trump operational realities. An investigating officer may have a firm, intelligence-led belief that an accused is a flight risk or a danger to the community, but without the skills or resources to translate that belief into the formal, admissible evidence required by the *Dlamini* standard, their efforts are rendered futile. This reinforces a cynical view that the justice system is not on their side, potentially impacting their zeal and methodology in future investigations.

This systemic issue points to a deeper problem of capacity and training within the SAPS. Overburdened with caseloads and often lacking advanced training in evidence gathering specifically for the purpose of bail applications, police officers may prioritise the evidence for the main trial over the distinct requirements of the bail hearing. The result is a procedural bottleneck where weak police work at the initial stage pre-emptively determines the outcome of the bail application. As noted in a report by the African Policing Civilian Oversight Forum (APCOF), the administrative burden and skill gap within the SAPS directly contribute to high bail grant rates for dangerous offenders, thereby perpetuating the cycle of crime and eroding the morale of the police service itself (APCOF, 2018, 22).

The National Prosecuting Authority (NPA)

Prosecutors bear the formal legal burden of opposing bail in Schedule 5 cases and of convincing the court that no exceptional circumstances exist in Schedule 6 cases. However, they often operate under severe constraints that hamstring their effectiveness. These include crippling heavy caseloads, chronic under-resourcing, and, most critically, a reliance on the often-incomplete investigative dockets provided by the SAPS. A prosecutor may be privy to intelligence or prior history suggesting a suspect's dangerousness or propensity to intimidate witnesses, but without concrete, admissible evidence presented to the court in the correct form, their objections will likely be overruled by a magistrate bound by the rules of evidence and the principles set out in *Dlamini* and *Acheson*.

The prosecutor's role is particularly challenging in Schedule 6 applications. As Joubert (2019, 185) notes, while the legal burden rests on the accused, the prosecutor must still be prepared to counter any evidence presented as "exceptional." This requires a proactive and strategic approach, yet prosecutors are often forced into a reactive position due to poor-quality dockets. They are legally and ethically bound not to mislead the court or overstate their case, which places them in an impossible situation when the evidence base from the police is weak. This can lead to a pattern where prosecutors mechanically oppose bail without a strong, evidence-based argument, a practice that can frustrate judicial officers and further undermine the NPA's credibility.

The high rate of bail grants in serious cases is a persistent point of internal contention and public criticism for the NPA. This places prosecutors in an invidious position; they are held accountable by the public for outcomes that are frequently determined by factors beyond their control at the earliest stage of the process. This can lead to a crisis of professional purpose and contributes to burnout. Moreover, the pressure to secure bail denials can

sometimes tempt prosecutors to make overzealous arguments not supported by the docket, which can in turn be criticised by the judiciary, further damaging the NPA's credibility in the eyes of both the public and the courts. This dynamic reflects a broader "systemic overload," where the NPA is tasked with delivering justice without being provided with the necessary investigative foundation (Redpath, 2021, 89).

Parliament (Legislators)

The legislature is perpetually caught between the imperative to uphold constitutional rights and the intense political pressure to respond to public demand for safety and harsher measures against crime. This tension has led to repeated legislative attempts to tighten bail provisions, reflecting a tough on crime stance. For instance, the Criminal Law Amendment Act 105 of 1997 and subsequent amendments have progressively shifted burdens of proof and expanded the lists of offences in Schedules 5 and 6, effectively making it harder for those accused of serious crimes to secure release.

This legislative response is often a direct reaction to public outcry over high-profile cases. The political appeal of being seen to be tough on crime can sometimes overshadow a more nuanced, evidence-based approach to law reform. The expansion of Schedule 5 and 6 offences, while politically popular, does not address the core institutional weaknesses, such as investigative incompetence and witness intimidation, that often undermine the bail process in the first place. This creates a cycle where legislation becomes more restrictive, yet public confidence continues to fall because the underlying operational deficits remain unaddressed.

However, legislators are constrained by the supreme Constitution. As affirmed in *S v Dlamini*, any law that effectively negates the right to bail or creates an impermissible limitation on the right to liberty would be struck down as unconstitutional. The challenge, therefore, is to design laws that are both effective in addressing legitimate public safety concerns and compliant with the Bill of Rights. This often results in legislation that is a political compromise, layering complexity onto the bail process without necessarily addressing the root causes of its dysfunction, such as investigative incompetence or witness intimidation. The legislative focus thus often remains on the letter of the law rather than on building the institutional capacity required for its just implementation, a point underscored by legal scholars who argue that reforming the criminal justice system requires investment in its human and material resources, not just its statutory rules (Redpath, 2021, 102).

Comparative and International Law Perspectives

Comparison with other jurisdictions

A comparative analysis with other jurisdictions reveals a spectrum of alternative models and highlights that South Africa's challenges, while acute, are not entirely unique. The United States, for example, has a well-developed system of commercial bail bonding, where a private bondsman posts bail for a non-refundable fee, assuming the financial risk of the accused's flight (Page, 2011, 430). While this system is argued to ensure high court appearance rates, it is highly controversial for commodifying liberty and disproportionately penalising the poor, who cannot afford the fee. Other jurisdictions, like the United Kingdom, rely more heavily on conditional release supervised by the state, employing tools like electronic monitoring, curfews, and reporting requirements to mitigate risk without resorting to detention or private profit.

The English system, for instance, places a strong emphasis on conditional bail and the use of surety. Joubert (2019, 190), in her comparative analysis, notes that English courts have a wider range of non-financial conditions at their disposal, and the breach of these conditions is treated with considerable seriousness. This approach focuses on managing risk in the community rather than relying primarily on financial disincentives or pre-trial detention. The South African system, while providing for conditions in Section 62 of the CPA, has been criticised for not utilising these alternatives as robustly or creatively as in some European jurisdictions, often defaulting to a binary choice between release on financial terms or detention.

A key lesson from comparative studies is the critical importance of robust, scientifically validated risk-assessment tools to guide judicial discretion. Many developed jurisdictions employ such instruments to provide an objective, evidence-based prediction of an accused's likelihood of flight or re-offending. South Africa's lack of a standardised, nationally implemented risk-assessment tool means decisions remain highly subjective, vulnerable to judicial idiosyncrasies and implicit biases. The Canadian approach, while sharing South Africa's principled balance between rights and public safety, functions within a less socially fractured environment, underscoring how South Africa's unique socio-economic context, characterised by extreme poverty, high inequality, and widespread violence, exponentially complicates the bail calculus and makes the importation of foreign models without adaptation problematic. As criminologist Hornberger notes, the translation of international legal models into the South African context must account for its specific historical legacies and social realities to be effective (Hornberger, 2021, 215).

International Law

International human rights law provides a firm normative foundation for the right to liberty and the presumption of innocence, against which any bail system must be measured. Article 9 of the International Covenant on Civil and Political Rights (ICCPR), to which South Africa is a party, explicitly states that "it shall not be the general rule that persons awaiting trial shall be detained in custody" (ICCPR, 1966, Art. 9(3)). This establishes a global standard that pre-trial detention should be the exception, not the norm. Furthermore, the United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules) actively encourage the use of alternatives to pre-trial detention, advocating for measures that are proportionate and least restrictive (UN General Assembly, 1990).

The South African constitutional framework is largely congruent with these international standards. Khangala, Ally & Mokoena highlights that the Bill of Rights was deliberately crafted to incorporate South Africa's international law obligations, meaning that the right to bail in Section 35(1)(f) should be interpreted in harmony with Article 9 of the ICCPR (Khangala, Ally & Mokoena, 2021, 52). This alignment provides a strong normative basis for criticising practices that lead to the overuse of pre-trial detention, particularly for indigent accused persons, as a violation of both domestic and international law.

Therefore, South Africa's constitutional and legislative bail framework is, in principle, fully aligned with, and even progressive within, international human rights standards. The criticism from this perspective lies not in the text of the law itself, but in its application and the state's failure to meet its positive obligations. International law requires states to create conditions where rights can be realised. South Africa's failure to address the underlying socio-economic conditions, such as poverty that fuels crime and frustrates the bail system, and the critical deficiencies in witness protection, means that the state is not fully upholding its duty to create an environment where the right to bail can be exercised fairly and safely for all. The state's inability to protect witnesses, for instance, could be viewed as a failure to ensure the right to a fair trial for both the accused and the state, which is a component of the overall administration of justice, a concern raised by international human rights monitoring bodies (Human Rights Committee, 2016, para. 33).

Results

Systemic Failures and the Path Forward

The ineffectiveness and perceived illegitimacy of the South African bail system is not primarily a failure of its legal architecture, but rather a failure of the broader ecosystem in which the law operates. The meticulously crafted balance of the Constitution and the CPA is consistently undermined by systemic pathologies that distort its application. A critical analysis reveals that the system's outcomes are less a product of judicial reasoning on the "interests of justice" and more a reflection of deep-seated institutional and social dysfunctions. The system, therefore, functions as a mirror reflecting the broader inequalities and institutional weaknesses of the South African state (Redpath, 2021, 95).

A holistic critique must therefore look beyond the courtroom to the societal structures that feed into it. The bail system cannot be repaired in isolation; it requires concurrent interventions in social welfare, policing, prosecution, and court administration. The "interests of justice" are not served by a system that is theoretically sound but practically dysfunctional (Redpath, 2021, 102). The following analysis dissects the core pathologies that prevent the system from achieving its constitutional mandate.

The Inequality of Liberty is the most glaring failure. The system is inherently and profoundly biased against the poor. An accused with financial means can offer substantial sureties, afford senior legal counsel to craft persuasive arguments of "exceptional circumstances," and demonstrate stable employment or community ties. For this individual, the system works as intended. In contrast, an indigent accused, often reliant on an overworked legal aid attorney, cannot offer financial security and may lack the formal employment or fixed address that courts recognise as factors mitigating flight risk. For them, poverty itself becomes the primary factor leading to prolonged pre-trial detention, leading to the devastating consequences of lost employment, broken families, and the increased pressure to plead guilty simply to escape the hell of prolonged remand detention (Muntingh, 2017, 12). This creates a two-tiered system of justice where liberty is a commodity for sale, fundamentally undermining the constitutional promise of equality before the law.

This socio-economic bias is a direct contravention of the spirit of the Constitution. Snyman (2020, 514) argues that the bail system should not be an instrument that perpetuates class injustice. The constitutional right to equality in Section 9 is implicated when a system consistently produces outcomes that disadvantage a particular social group, in this case, the poor. The over-reliance on financial conditions and the high bar of "exceptional circumstances" effectively create a wealth-based test for freedom, which is anathema to a constitutional democracy founded on human dignity, equality, and freedom.

Institutional Weaknesses form a chain of failure that runs through the entire criminal justice process. The chain is only as strong as its weakest link, which is often the initial police investigation. Police investigative incompetence, under-resourcing, and poor docket management create a situation where bail decisions are made on imperfect, incomplete, or unreliable information. A weak State case at the bail stage, due to poor evidence gathering, often judicially compels a grant of bail, regardless of the accused's actual risk profile. This is then compounded by prosecutorial under-resourcing and massive court backlogs, which prolong the period an accused spends on bail, increasing opportunities for witness intimidation or re-offending. These institutional failures effectively transfer the risk of state incapacity from the government onto the shoulders of the public. As Redpath's work on case backlogs illustrates, these systemic delays have a corrosive effect on every stage of the justice process, including the assessment of risk at the bail stage (Redpath, 2021, 95).

The problem of institutional weakness is cyclical. As noted by Khangala, Ally & Mokoena, delays in the finalisation of trials can, perversely, become a ground for granting bail as the period of pre-trial detention lengthens (Khangala, Ally & Mokoena, 2021, 71). This means that the state's failure to run an efficient trial process can directly lead to the release of an accused who may have been legitimately denied bail at the outset. This creates a perverse incentive and demonstrates how failures in one part of the system can directly undermine the objectives of another.

The Challenge of Re-offending and Illicit Influence represents a critical failure in the system's risk-assessment function and its integrity. The fact that individuals accused of serious Schedule 5 and 6 offences are sometimes granted bail and proceed to commit further violent crimes points to a fundamental flaw in how the risk of re-offending is evaluated. Judicial officers, constrained by incomplete dockets and a lack of verified criminal history or intelligence, may be forced to make decisions based on an incomplete picture of the accused's dangerousness (Schönteich, 2010, 7). This problem is compounded when wealthy accused persons actively work to corrupt the process. The potential for undue influence, whereby the accused, through their financial resources, cultivate relationships with or offer inducements to police officers to lose evidence, to prosecutors to present a weak case, or even to presiding officers to exercise their discretion favourably, represents a cancer within the justice system. While difficult to prove empirically, the perception of such corruption is pervasive and devastating to public trust (Judicial Inspectorate for Correctional Services, 2019, 41). It creates a two-tiered system not only based on wealth but also on impunity, where the powerful can effectively purchase their freedom regardless of the evidence against them (Bruce, 2015, p. 55).

The Deficiencies in Addressing Recidivism and Corruption highlight the need for more than just procedural reforms. To combat re-offending on bail, the system requires integrated, real-time intelligence sharing between law enforcement agencies and the courts, allowing magistrates to make informed decisions based on an accused's known associations and previous patterns of behaviour (Redpath, 2021, 95). To counter the threat of corruption, robust anti-corruption mechanisms within the SAPS and NPA are non-negotiable. This includes dedicated, independent units to investigate allegations of corruption in bail proceedings, the protection of whistle-blowers within the justice system, and stringent lifestyle audits for officials in positions vulnerable to undue influence. The failure to address this corrosive element not only leads to injustice in individual cases but also delegitimizes the entire administration of justice, fostering a culture of cynicism and impunity (Judicial Inspectorate for Correctional Services, 2019, 41).

The Witness Intimidation Crisis is perhaps the single greatest practical obstacle to denying bail in cases where it is truly warranted. The constitutional framework requires the state to prove a likelihood that the accused will undermine the justice system. However, without a functional, credible, and responsive witness protection program, this criterion becomes almost impossible to prove prospectively with the requisite degree of certainty. The result is devastating, as witnesses are threatened or killed, cases collapse, and communities lose all trust in the state's ability to protect them. This failure not only cripples individual prosecutions but also fosters a culture of impunity, empowering criminals to operate with the confidence that they can manipulate the system. The judiciary's hands are tied without evidence of a specific threat, and the state's inability to provide protection is the linchpin of this systemic breakdown. The deficiencies in the Witness Protection Programme have been widely documented, revealing a programme plagued by bureaucratic inefficiency and a lack of resources, leaving witnesses dangerously exposed (D. O. Institute, 2019, 41).

Conclusion and Recommendations

The pre-trial release system in South Africa is ensnared in a profound paradox, caught between its constitutional mandate and its operational reality. As a right enshrined in Section 35(1)(f) of the Constitution, bail is fundamental to a democratic society founded on the values of human dignity and freedom (Constitution of the Republic of South Africa, 1996). However, its application within a context characterised by extreme violence, stark socio-economic inequality, and systemic institutional incapacity frequently transforms it into a source of injustice and insecurity for the very public it is designed to serve (Schönteich, 2010, 5). The system's dual failure to reliably

detain genuinely high-risk accused persons while remaining vulnerable to manipulation by wealthy, connected individuals creates a perfect storm of public alienation and distrust (Redpath, 2021, 95). Consequently, the statutory phrase "if the interest of justice permits," as outlined in the Criminal Procedure Act, has become a battleground where lofty constitutional principles clash with the grim reality of a fractured society (CPA 51 of 1977, s 60). This leaves judicial officers to make Solomon-like decisions with inadequate information and tools, resulting in a deep-seated crisis of legitimacy that undermines the social contract and fuels a pervasive sense of public grievance (Tyler, 2006, 4).

Addressing this crisis necessitates a fundamental paradigm shift from a narrow, legislative-centric focus to a holistic commitment to building a capable and resilient criminal justice ecosystem. As argued by Redpath (2021, 102), merely tinkering with the schedules of the Criminal Procedure Act or adjusting the burdens of proof will yield diminishing returns if the foundational pillars of the system, including competent investigation, effective prosecution, witness safety, and adequate judicial resources, remain critically weakened. The solution, therefore, does not lie in abandoning the constitutional right to bail, but in creating the necessary conditions where this right can be exercised responsibly and where the state can justifiably limit it based on solid, admissible evidence rather than on its own systemic weaknesses (*S v Dlamini*; *S v Dladla and Others*; *S v Joubert*; *S v Schietekat* 1999 (4) SA 623 (CC), 1999 (7) BCLR 771 (CC)).

To restore both the effectiveness and the perceived legitimacy of the bail system, a multi-pronged, systemic approach is essential. First, strengthening institutional capacity is a non-negotiable prerequisite. This requires targeted investment in specialised training for the South African Police Service (SAPS) to compile comprehensive, evidence-led bail information dockets, and in the National Prosecuting Authority (NPA) to develop dedicated units capable of effectively opposing bail in complex, high-risk cases (Bruce, 2015, 55; APCOF, 2018, 22). Second, the development and implementation of scientifically validated, evidence-based risk-assessment tools are crucial. As Muntingh (2017, 12) advocates, such instruments would assist magistrates in making more objective, consistent, and defensible decisions regarding flight risk and dangerousness, moving judicial discretion beyond subjective impressions and mitigating implicit biases linked to poverty or social status.

Third, a radical overhaul of the witness protection programme is imperative. Without a functional, credible, and responsive system, the statutory criterion of "undermining the justice system" through witness intimidation becomes a hollow legal standard, impossible for the state to prove prospectively (D. O. Institute, 2019, 41). Fourth, the system must aggressively expand the use of non-financial release conditions. Promoting robust alternatives such as electronic monitoring, house arrest, and regular reporting to a police station can effectively mitigate risk for indigent accused persons without resorting to wealth-based detention, thereby alleviating the inequality of liberty (Joubert, 2019, 190). Fifth, combatting corruption and undue influence requires the establishment of independent and powerful oversight mechanisms to investigate allegations of misconduct within the bail process, ensuring that wealth and connections cannot subvert the course of justice. Finally, a sustained public legal education campaign is vital to manage expectations and foster a public understanding of the distinct purpose and legal principles governing bail proceedings, thereby bridging the chasm between legal procedure and public perception.

Ultimately, the bail crisis in South Africa functions as a microcosm of the nation's broader governance challenges. A truly effective and just bail system cannot be cultivated in isolation; it is entirely contingent upon a functional, well-resourced, and trustworthy criminal justice system from the moment of arrest to the final verdict (Khangala, Mokoena & Ally, 2021, 45). The scales of justice cannot be balanced by the judiciary alone; they require the concerted effort of a capable state committed to upholding both liberty and security for all its citizens. The path forward, therefore, lies not in abandoning the right to bail, but in the arduous task of forging a state capable of honouring it.

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Appendices

No appendices were used in this paper.

Table

Table 1: Summary of Key Stakeholder Concerns in the South African Bail System

Stakeholder Group	Primary Concerns	Impact on the Bail System and Justice Administration
The Public/Communities	- Perception of injustice and systemic failure. - Fear of recidivism by accused on bail. - Witness intimidation leading to collapsed cases. - Belief that the system is corruptible by wealth.	- Erosion of public trust and legitimacy. - Breakdown of community cooperation (reports, testimony). - Potential for vigilante action.
South African Police Service (SAPS)	- Frustration that arrests are nullified by bail grants. - Poorly compiled bail dockets due to capacity/training issues.	- Weak evidence presented in court, leading to easier bail grants. - Demoralisation of officers.

Stakeholder Group	Primary Concerns	Impact on the Bail System and Justice Administration
	- Strained police-community relations.	- Procedural bottleneck at the initial stage.
National Prosecuting Authority (NPA)	- Heavy caseloads and under-resourcing. - Reliance on weak SAPS dockets. - Public criticism for high bail grant rates.	- Inability to effectively oppose bail, even for serious crimes. - Prosecutorial burnout and credibility damage. - "Systemic overload" where justice cannot be delivered.
Parliament (Legislators)	- Tension between constitutional rights and public pressure for safety. - Constitutional constraints on making laws too restrictive.	- Legislative amendments that add complexity without fixing root causes (e.g., institutional capacity). - A cycle of reactive law-making that fails to restore public confidence.

Figures

No figures were used in this paper.

Data availability

The data used in this article is available with the author and can be made available as and when required.

