

Liberty and Bail

While Myanmar law guarantees the right to life and personal freedom, these rights are under severe threat and often violated.

Only in exceptional circumstances backed by sufficient evidence may the accused be held in detention without bail. Defence lawyers must request release on bail in both bailable and non-bailable cases. The right to personal freedom can be protected by restoring correct bail practices in accordance with Myanmar's laws outlined below. The following suggested practices do not apply in areas under martial law.



Do current practices comply with Myanmar law and fair trial standards?

All accused are entitled to:

- Right to life and personal freedom,
- Right to be presumed innocent until proven guilty,
- Right to a defence.

Right to life and personal freedom

Every citizen has the right to life and personal freedom, hence it is not lightly to be interfered with and the conditions and circumstances under which the legislature allows such interference must be clearly demonstrated.

Changes after 1 February 2021 may affect the right to life and personal freedom.



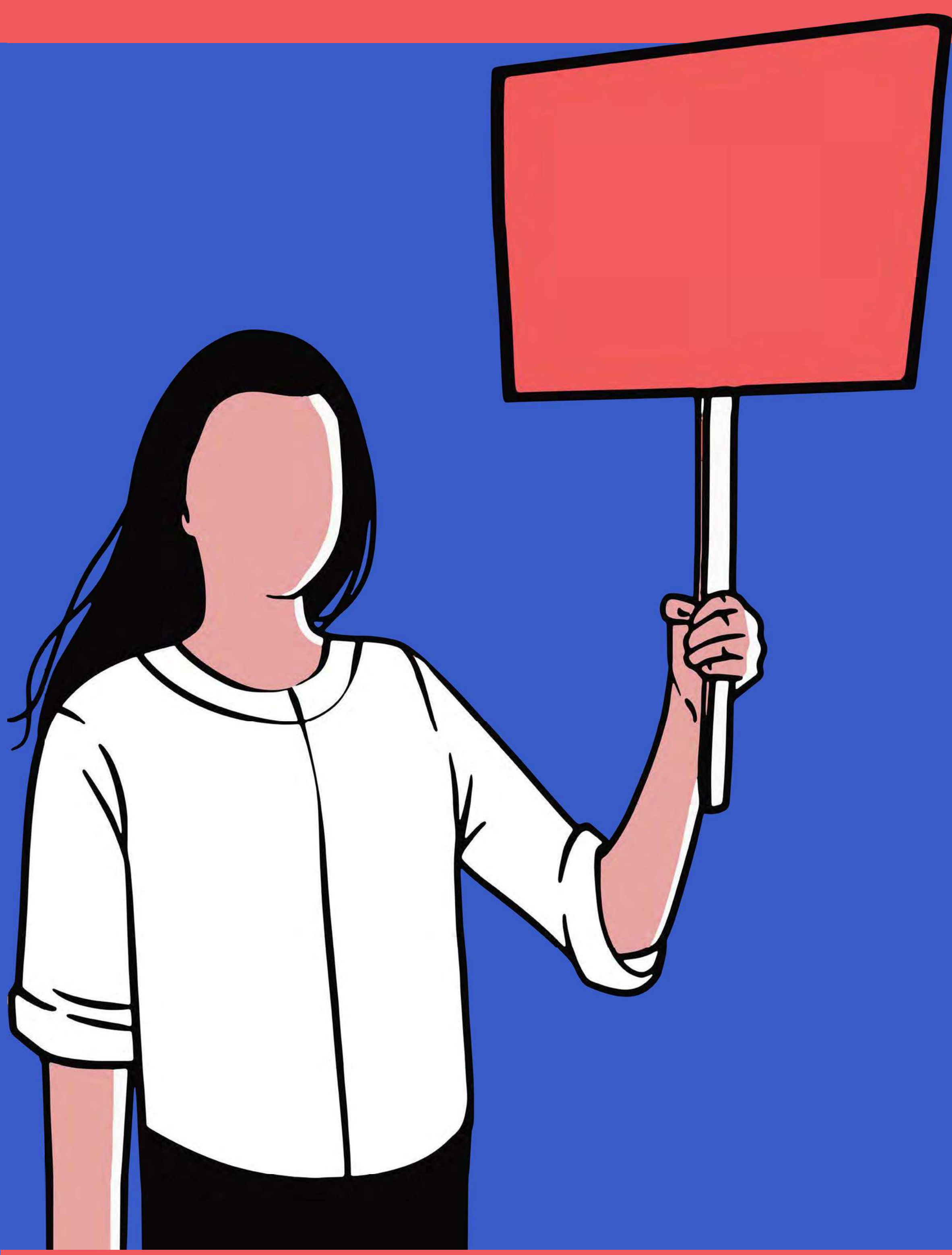
Legal Standards

- Myanmar law makes clear that bail is the rule and jail is the exception. It applies to all cases including Penal Code Section 505. Even in non-bailable cases, bail may be set except when charged with offences eligible for death penalty or life imprisonment and even then an accused person who is (1) under 18 years of age, (2) a woman, or (3) sick or infirm may be released on bail.

Current Legal Reality

- Only a small fraction of accused persons have been granted bail.
- No one charged under Penal Code Section 505 has been released on bail, although it is categorised as bailable in the law.
- Bail cannot be requested under martial law.

Right to be presumed innocent until proven guilty beyond a reasonable doubt



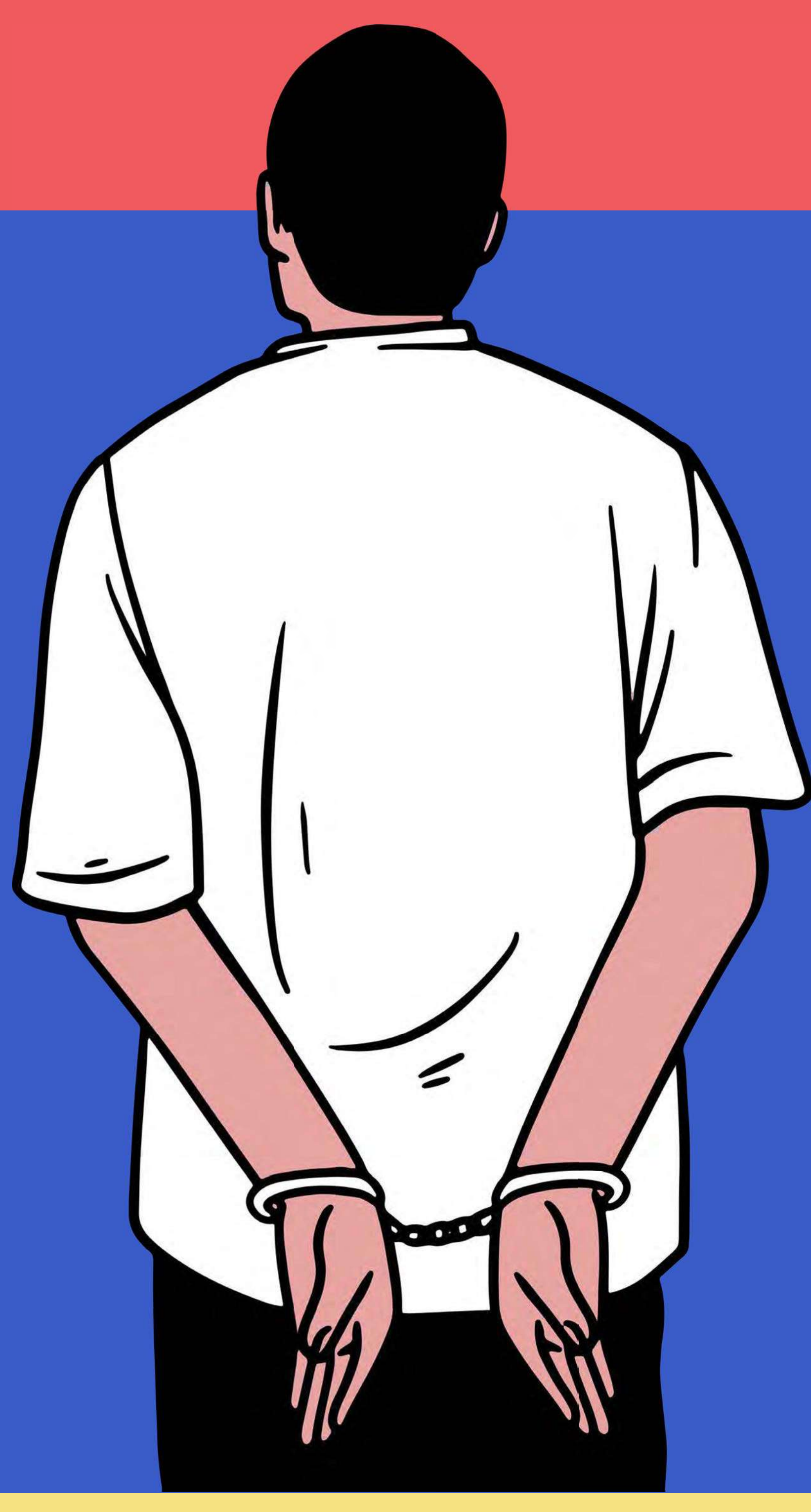
- An accused person should be treated as innocent until proven guilty at trial.
- Bail procedures which favour release pending trial serve to guard against the negative consequences of unnecessary and prolonged detention of people not yet convicted of the alleged offence.

Right to a defence

Accused has the right to be defended by a lawyer at every stage of a criminal proceeding.

Unlawfully denying bail in pre-trial detention severely restricts the accused's access to legal counsel.

Changes after 1 February 2021 may affect the right to a defence -



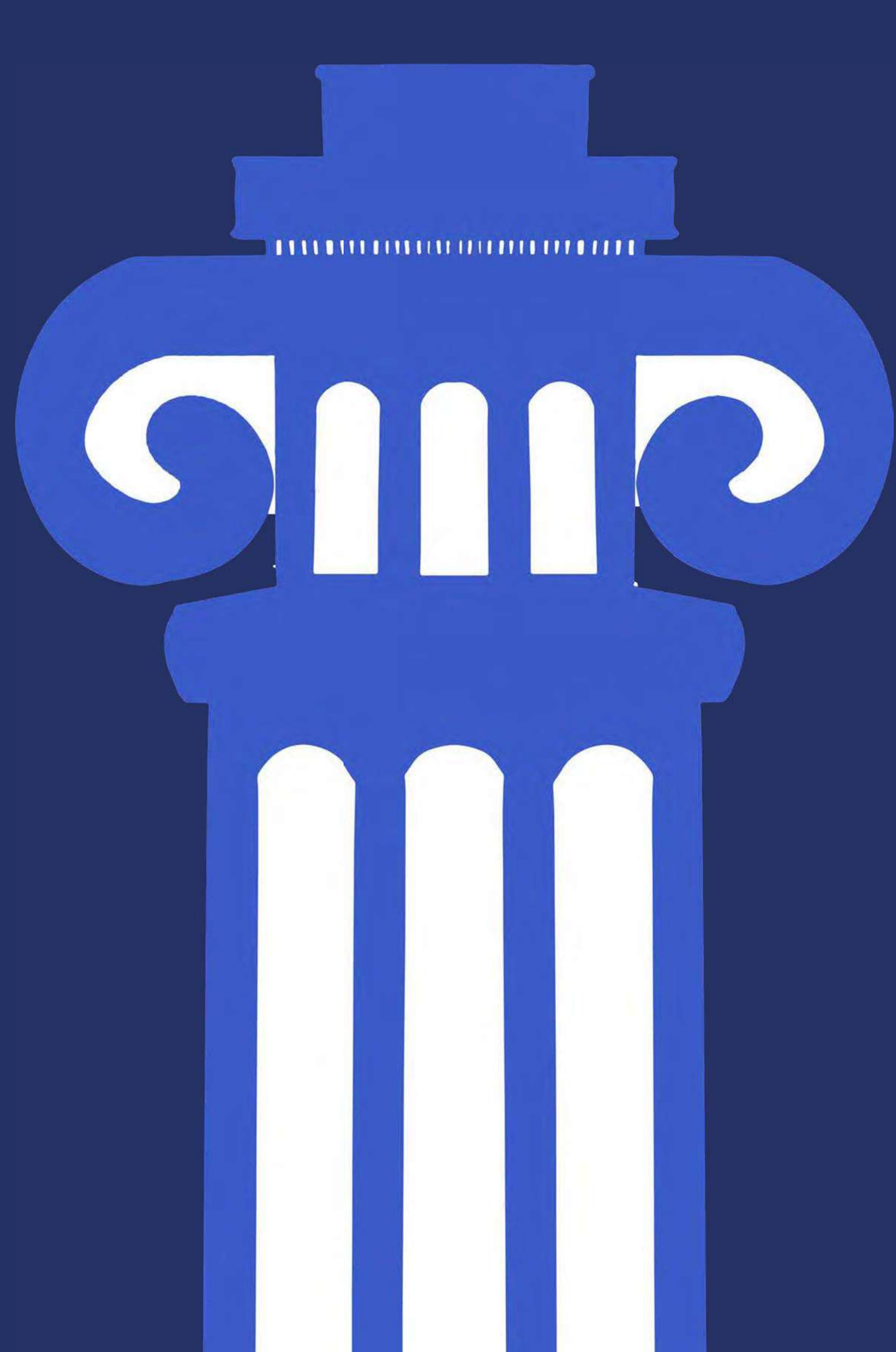
Legal Standards

- The right to a defence requires the accused to have the earliest possible access to counsel after arrest or suspected involvement in a crime, the opportunity to communicate confidentially with counsel, and adequate time and facilities to prepare the defence.

Current Legal Reality

The right to a defence has been violated in the following ways:

- Protesters are taken to prisons or military centres directly
- Lawyers often cannot access the accused
- Depending on the prison (and prison staff), sometimes there is no record of accused people
- Even if a lawyer can access the accused they will not have privacy and their time will be severely restricted
- Trials are not taking place as they normally would (trials are taking place in prison, for example)



Strategies for Protecting the Right to Life and Personal Freedom

Provide representation to detainees as early as possible

Lawyers can and should represent their clients from the time of arrest, including at the police station immediately following the arrest, at the first remand hearing (either in person or via video conference) and at subsequent remand hearings.

The earlier a lawyer is engaged following a client's arrest, the greater opportunity she will have to advocate for release and to intervene to protect the client's rights, resulting in more favourable outcomes later in the proceedings.



Request release early and often



Defence lawyers should request release on bail or surety as soon as possible after beginning representation of the accused and continuously throughout the remainder of the case.

Bailable Cases

- The defence lawyer should advocate for release at every opportunity by using Section 496 of the Code of Criminal Procedure, which mandates release on bail in all bailable cases as a matter of right.

Request release early and often

Non-Bailable Cases

When the accused has been arrested for a non-bailable offence, the defence lawyer should request release of the accused on the following grounds:

- **Nature of penalty**

The alleged offence, though classified as “non-bailable”, does not carry a possible punishment of death or life imprisonment, and therefore the accused may be released on bail or surety in accordance with Section 497(1) of the Code of Criminal Procedure.



- **Insufficient evidence of guilt**

Although the alleged offence does carry a possible punishment of death or life imprisonment, the evidence is insufficient to provide reasonable grounds for believing the accused is guilty of that offence, and therefore release is permitted pursuant to Sections 169 and 497(1) of the Code of Criminal Procedure.

- **Vulnerability**

Where the alleged offence is punishable by death or life imprisonment and the judge believes there is sufficient evidence of the accused’s guilt to continue detention, release may still be requested on the basis that the accused is a woman, a child, sick or infirm.

- **Community ties and low risk.**

Defence lawyers arguing for bail should also emphasise reasons why the accused can be trusted to appear for his trial, including evidence of good character or behaviour, lack of prior criminal convictions, no history of absconding in previous cases, as well as strong community and family ties.

- **Appeal to higher court.**

Bail may be granted by a High Court or District Court in any case at any time, regardless of the strength of the evidence against the accused.

Cash or a bail bond with sureties can be required by the judge, although it is not required under the law. Bail does not have to be cash but can instead be a promise from a surety to pay if the accused absconds.

