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The Status of Bail Jurisprudence in India: Need Comprehensive Revamp

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ABSTRACT

Criminal Justice System in India is generally gigantic and arduous bestowed with myriad goals. The concept of Bail in criminal justice system has become increasingly elusive, insurmountable, and enigmatic. Refusing to grant bail to jailed accused is a grave violation of liberty of an individual and undermines the legality as well as the legitimacy of the justice system. The code doesn't provide the exhaustive list of the conditions, rather it depends upon the judicial discretion of the court. The real challenge before the criminal justice system is the overreach of the State. Bail is germane to criminal justice system to accomplish the object of the Code of Criminal Procedure – Fair Trial and Justice. From this vantage, the paper seeks to analyse the jurisprudence of bail. The object of this paper is to give an overview of the jurisprudence of Bail including history of bail and provisions relating to the bail in the Code of Civil Procedure, but does not look at specific legislation. We then explain the golden principle followed in India – Firstly, presumption of innocence till the guilt is proved beyond reasonable doubt and Secondly, the onus of proving the offence does not shift upon the accused. We then analyse the grant of bail as rule while using the historical precedents. We also explain how unbridled discretion operates in case of bail along with the test laid down by the Apex Court for guiding discretion by courts. The authors also give an insight into challenges before the judiciary with regard to bail. Last but not least, we also analyse a possible first step to remedy this situation – Bail Law. We conclude with the observations in support of just system of bail. Just System is a system in which court provide services rather than onerous conditions and ensure that citizens are not wiped-out unconstitutional principles.

Keywords: *Jurisprudence of Bail, Accused, Criminal Justice System, Judicial Discretion, Presumption of Innocence.*

I. INTRODUCTION

“The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial

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process.”

- Justice Krishna Iyer³

The concept of Bail is very puzzling in the criminal justice system. “Bail or not to bail” belongs to the obfuscated area of India’s criminal justice system. The Code of Criminal Procedure is cryptic and arcane with regard to bail. The courts prefer to be tacit. The Supreme Court of India, intermittently insists that the basic rule is bail and committal to jail is an exception except where there are circumstances suggestive of fleeing justice.⁴ Article 21 of the Constitution of India has been held to be the very soul of the Constitution of India⁵ and represents the foundational values which form the basis of the rule of law.⁶ The refusal to grant bail without any reasonable grounds would amount to deprivation of “personal liberty” under Article 21.⁷ Deprivation of liberty under Article 21 results in miscarriage of justice and permissible only through the procedure established by law.⁸ The jailed accused wouldn’t only subject to deprivation of “personal liberty” but also subject to physiological and physical deprivations of life. The burden of detention of jailed accused falls heavily on the innocent members of his/her family.⁹ In post-independent India, the jurisprudence of bail has undergone significant change with enactment of Constitution of India and Criminal Justice System. As per Prison Statistics India (PSI) - 2020, a report released by the National Crime Record Bureau (NCRB), there are a total of 1,306 prisons in India.¹⁰ Under-trial prisoners constitute two-thirds of India’s prison population.¹¹ These stark realities reflect the supply of justice in India’s criminal justice system. The paper commences with history of bail. Its further analysis the meaning and object of bail in the criminal jurisprudence. The paper in next part examines the presumption of innocence pertaining to bail, as the presumption of innocence is the golden principle of Criminal law. The paper, further, articulate the provisions relating to bail under CrPC and subsequently attempts to examine the “grant of bail as rule”. Landmark case laws related to bail are also discussed in depth through studying their legislative provisions. The concluding part of the paper enlists some legal suggestions for action.

³ Gudikanti Narasimhulu & ors. v. Public Prosecutor, High Court of Andhra Pradesh, 1978 SCR (2) 371.

⁴ State of Rajasthan v. Balchand @Baliay, 1978 SCR (1) 535.

⁵ INDIAN CONST. art. 21.

⁶ I.R. Coelho v. State of T.N., AIR 2007 SC 861.

⁷ Babu Singh v. State of U.P., AIR 1978 SC; Akhtari Bai v. State of M.P., AIR 2001 SC 1528, wherein the Supreme Court ruled that prolonged delay in disposal of the trials conferred a right upon the accused to apply for bail.

⁸ *Ibid.*

⁹ Moti Ram v. State of M.P., (1978) 4 SCC 47.

¹⁰ National Crime Records Bureau, “Prison Statistics India (PSI)-2020” (Ministry of Home Affairs, 2020) available at: <https://ncrb.gov.in/en/prison-statistics-india-2020> (last visited on Feb. 08, 2023).

¹¹ *Id.* at 78.

II. HISTORY OF BAIL

Bail law in England and America: The concept of Bail can be traced back to ancient Rome.¹² The jurisprudence of bail has deep roots in American¹³ and England law and can be delineated back in the period of approximately 1000 years old. In medieval England, the custom grew out of the need to free untried prisoners.¹⁴ The Anglo-Saxons legal process was created in which the jailed accused was required to find a surety who accepted responsibility of assuring their appearance at trial.¹⁵ After the Norman Conquest, the system of bail became more complex. The sheriffs were vested with powers of discretions to hold persons pretrials. This led to instances of corruption and abuse. In 1215, the first step was taken in granting certain rights to peoples.¹⁶ However, the exposure of widespread corruption and abuse in this system, parliament passed the Statute of Westminster in 1275, which limited discretionary powers of sheriffs. In early 17th century, King Charles 1 ordered local judge to hold five knights with no charge in contrary to provisions of the Statute as well as Magna Carta. Parliament responded to King's action by passing the Petition of Right of 1628.¹⁷ In 1679, the parliament passed the Habeas Corpus Act of 1679 in response to the procedural delays. The history of bail in the U.S. derived heavily from the principles of English law – the Bill of Rights, the Habeas Corpus Act and the Petition of Rights.¹⁸ The 1960s ushered in the first national bail reform movement in the U.S. The led to passage of Bail Reforms Act of 1966.

Bail law in India: *Arthshashtra*, *Manu Smriti* and *Yajnavalkya Smriti* are the three leading codes of ancient Hindu jurisprudence. Kautilya's *Arthshashtra* lists the duties of *Dharmastha* (a judge), based on *Dharma*.¹⁹ The Code of Manu also lists the proper conducts and daily duties

¹² Timothy R. Schnacke, Michael R. Jones, *et.al.*, The History of Bail and Pretrial Release, Chapter 1 in The Evolution of Pre-Detention of law: A Comparative Study (Compiled by: Ira Belkin, Chi Yin, *et.al.*) available at: <https://usali.org/evolution-of-pretrial-detention-law> (last visited on Feb. 10, 2023)

¹³ Matthew J. Hegreness, *America's Fundamental and Vanishing Right to Bail*, 55 ARIZONA LAW REVIEW 909, 920 (2013) available at: <https://arizonalawreview.org/americas-fundamental-and-vanishing-right-to-bail/> (last visited on Feb. 09, 2023)

¹⁴ *Moti Ram & Ors v. State of M.P.*, 1978 AIR 1954.

¹⁵ F. Pollock and F. William Maitland, *The History of English Law* 584 (Cambridge University Press, London, 2nd edn., 1898) available at: <https://historyofeconomicthought.mcmaster.ca/maitland/HistoryEnglishLaw2.pdf> (last visited on Feb. 10, 2023).

¹⁶ David Carpenter and David Prior, *Magna Carta and Parliament* (Parliamentary Achieves Houses of Parliament, London, 2015) available at: <https://www.parliament.uk/globalassets/documents/Magna-Carta-and-Parliament-Booklet.pdf> (last visited on Feb. 10, 2023).

¹⁷ Charles I and the Petition of Right available at: <https://www.parliament.uk/about/living-heritage/evolution-of-parliament/parliamentary-authority/civil-war/overview/petition-of-right/> (last visited on Feb. 11, 2023).

¹⁸ MATHEW, *supra note* 11.

¹⁹ L.N. Rangarajan (ed, tr), *Kautilya – The Arthshashtra* 377-384 (Penguin Books, New Delhi, 1992), available at: <https://ncjindalps.com/pdf/HUMANITIES/The%20kautilya%20Arthashastra%20-%20Chanakya.pdf> (last visited on Feb. 12, 2023).

of the kings.²⁰ *Yajnavalkya*, also provides the duties of king.²¹ It was ensured that jailed accused was not unnecessarily detained. The Bail system came into existence during the Mughal period. An arrested person was released on furnishing a surety.²² When British rule was established over major parts of India, the period saw gradual adaptation of colonial principles of common law. Over time, however, the system of bail had long lasting impacts on the India's bail system and future efforts.

III. BAIL: MEANING AND ITS OBJECT

The word 'bail' has been derived from old French verb 'ballier', which means to 'to give or deliver.'²³ According to the Shorter Oxford English Dictionary, the word 'bail' is related to Latin word 'bajulare', signifying 'to carry or manage.'²⁴ The Wharton's Law Lexicon defines 'bail' as "to set at liberty a person arrested or imprisoned on security being taken for his appearance on a day and at a place certain, which security is called bail."²⁵ In Stroud's Judicial Dictionary 'bail' is described as follows: "Baile is when a man is taken or arrested for felony, suspicion of felony, indicted of felony, or any such case, so that he is restrained from liberty And, being by lawailable offereth

surety to those which have authority to bail him, which sureties are bound for him to king's use in a certain sum of money for body, that he shall appear before the justices of Gaole-delivery at next sessions etc."²⁶ Bail, therefore, means release of jailed accused from legal custody. It has two connotations of human values: first, it gives the right of an accused to enjoy his personal liberty and second, to release an accused person on surety in order to secure appearance in the court to stand trial.²⁷ The Hon'ble Supreme Court in its recent judgement has defined the bail as "a surety inclusive of a personal bond from the accused. It means the release of an accused person either by the orders of the court or by the police or by the investigating agency."²⁸ Thus, it is a conditional release of a prisoner on security required by the court so that he/she would

²⁰ George Buhler (tr), *The Laws of Manu - Manusmriti* (Clarendon Press, Oxford, 1886) available at: https://lakshminarayanlenasia.com/downloads/MANU_1.pdf (last visited on Feb. 13, 2023).

²¹ Srisa Chandra Vidyarnava (tr), *Yajnavalkya Smriti With the commentary of Vijnanevara called the Mitaksara and notes from the gloss of Balambhatta 392-439* (Panini Office, Allahabad, 1918) available at: <https://ia600303.us.archive.org/32/items/yajnavalkyasmrit00yj/yajnavalkyasmrit00yj.pdf> (last visited on Feb. 14, 2023).

²² William Irvine, *I & II Later Mughals 1707-1720* (Oriental Books Reprint Corporation, New Delhi) available at: <https://archive.org/details/in.ernet.dli.2015.280772> (last visited on Feb. 15, 2023). See also the case of Niccolao Manucci (19 April, 1638-1717).

²³ Amir Chand & Anr. v. The Crown, 1950 Cr. LJ 480.

²⁴ *Ibid.*

²⁵ Wharton John Jane Smith, *Wharton's Law Lexicon* 105 (14th edn. Stevens and Sons ltd., London, 1938).

²⁶ F. Stroud, *The Judicial Dictionary of Words and Phrases: Judicially Interpreted to which has been added Statutory Definitions* 157 (Sweet and Maxwell, London, 2nd edn. 1903).

²⁷ Kamalapati Trivedi v. State of West Bengal, 1979 AIR 777.

²⁸ Satender Kumar Antil v. C.B.I., 2022 LiveLaw (SC) 577.

appear in a court at future time. The underlying object of the bail is to secure the attendance of the accused at trial by reasonable amount of bail.²⁹ Thus, the primary purpose of bail is neither punitive nor preventive in nature, rather to relieve an accused person from imprisonment, however, at same time, he/she remains constructively in the custody of the court, to assure that whenever the court requires the presence of the accused person, he/she must be present before the court.³⁰

IV. PRESUMPTION OF INNOCENCE

The presumption of innocence is a guiding principle of India's criminal jurisprudence. In criminal justice system, the presumption is that the accused is innocent until a court declares them guilty, hence ensuring the overall fairness of trial. Blackstone tells us that, "It is better that ten guilty persons should escape than that one innocent suffers."³¹ It is, however, interesting that Article 11 of the Universal Declaration of Human Rights (UDHR)³², Article 14(2) of the International Covenant on Civil and Political Rights³³ and Article 66 of the Rome Statute of the International Criminal Court³⁴ strongly recognizes the presumption of innocence as a cardinal principle of law. The Constitutional Bench of Supreme Court in *Sahara India v. SEBI*³⁵ explicitly held that the presumption of innocence is recognised as human right under Article 21 of the Constitution of India. Another point of discussion in this context is the burden of proof. The Supreme Court in *S. L. Goswami v. State of M.P.*³⁶ held that the onus of proving all the ingredients of an offence is always upon the prosecution and at no stage does it shift to the accused. The principles elucidated by the Courts in India can be traced back to the *Woolmington v. DPP*.³⁷ Therefore, the substance of all this means that presumption of innocence is a piece of evidence and a part of the proof in favour of the accused introduced by the judicial precedents or laws in his/her behalf.

²⁹ Narendra Nath Chakrabarathi v. King Emperor, AIR 1924 Cal 476; Sanjay Chandra v. C.B.I., AIR 2012 SC 830.

³⁰ Sanjay Chandra v. C.B.I., AIR 2012 SC 830.

³¹ Sheo Raj Singh v. State of U.P., Capital Case no: - 6301 of 2007 (Allahabad High Court, July 01, 2015).

³² The Universal Declaration of Human Rights, art. 11 *available at*: <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> (last visited on Feb. 15, 2023).

³³ U.N. General Assembly, International Covenant on Civil and Political Rights, GA Res 2200A (XXI) (Dec. 16, 1966) art. 14(2) *available at*: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> (last visited on Feb. 15, 2023).

³⁴ The Rome Statute of the International Criminal Court, art. 66 *available at*: https://legal.un.org/icc/statute/99_corr/cstatute.htm (last visited on Feb. 16, 2023).

³⁵ 2013 (1) SCC 1.

³⁶ 1972 AIR 716; Himachal Pradesh Administration v. Shri Om Prakash 1972 AIR 975; Bhan Singh v. State of M.P., 1990 Cr LJ 1861 (MP).

³⁷ (1935) UKHL 1.

V. PROVISIONS OF BAIL UNDER THE CODE OF CRIMINAL PROCEDURE

The provisions relating to bail is governed by the Chapter-XXXIII from Sections 436-450 of CrPC. Offences are classified into bailable and non-bailable offences.³⁸ The code has not given any criterion to determine whether an offence is bailable or non-bailable. It all depends upon First Schedule of the Code. However, it can be generally explained that these offences are depends upon the gravity of the offences and the punishments but subject to exceptions on both sides.³⁹

Bail in Bailable Offence: In respect of bailable offence, right to seek bail is a matter of right. Section 436 provides that where a person accused charged of bailable offence is arrested or detained without any warrant by an officer in charge of police station or appears or brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such court to give bail, such person shall be released on the bail. The section is imperative in nature.⁴⁰ The right to claim bail under Sec 436 is an absolute and indefeasible right and a person cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds.⁴¹ Under this provision, the officer in charge of a police station or the court is duty bound to release the person on bail. The court has no discretion even to impose any condition except the demanding of security with sureties.⁴² The release may be ordered on executing a bond even without sureties. There is no question of discretion of court in granting bail.⁴³ However, the insistence of the personal bond and the surety is a matter of discretion and within the jurisdiction of court under Sec 436.⁴⁴ If the bail bond has already been given by an accused person, fresh undertaking is not to be asked for the same effect.⁴⁵ Section 167(2) provides that an accused person cannot be detained in the custody by the police for more than 90 days in case of an offence punishable with death, life imprisonment or sentence of more than 10 year; and where the investigation relates to any other offence, the period of detention shall not exceed 60 days. The right to seek default bail under Section 167(2) is a fundamental right and not merely a statutory right which flows from Article 21 of the Constitution of India.⁴⁶ If it is not possible to complete the investigation within the period of 60 days, then even in serious and ghastly types of crimes the jailed accused is entitled to be released on bail.⁴⁷

³⁸ The Code of Criminal Procedure, 1973, s 2(a).

³⁹ Talab Haji Hussain v. Madhukar Purshottam Mondkar, AIR 1958 SC 376.

⁴⁰ Rangunandan Pershad v. The Emperor, (1904) 32 Cal 80, 83.

⁴¹ Rasiklal v. Kishore s/o Khanchand Wadhvani AIR 2009 SC 1341

⁴² Vaman Narian Ghiya v. State of Rajasthan 2008 (16) SCALE 324.

⁴³ Rasikala v. Kishore Khanchand Wadhvani AIR 2009 SC 1341.

⁴⁴ Chowriappa Constructions v. Embassy Constructions & Development Pvt. Ltd., 2002 (4) Kar LJ 532.

⁴⁵ Monit Malhotra v. State of Rajasthan, 1990 (1) WLN 632 (Raj).

⁴⁶ Abhishek v. State of NCT of Delhi, CRL. M.C. 2242/2020.

⁴⁷ Matabar Parida v. State of Orissa, (1975) 2 SCC 220.

Bail in Non-bailable offence: Section 437 gives the court or a police officer power to release an accused person on bail in non-bailable offence. In these cases, bail is a matter of discretion but the bail should not be refused as a matter of punishment.⁴⁸ Section 437(1) provides that 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 High Court or the Court of Session, he may be released on bail unless it appears reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life. The word 'may' indicate that bail is discretionary. While considering the question of bail application, the court should exercise the discretionary power guided by law and it must not be arbitrary, vague and fanciful.⁴⁹ Cases often arises where certain conditions can be attached thereto besides fixing the amount of bail. The provision mandates the court to release a person under the age of 16 years, or a woman, or a sick, or infirm person, on bail. Whenever an accused is released on bail, he/she need not be required to appear before the court until the charge-sheet is filed and the process is issued by the court.⁵⁰ The Provision also makes it mandatory for the police officer or the court to record reason in writing while any person on bail.⁵¹ If in any case triable by a magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of 60 days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate.⁵² As per Section 437(5) any court which has released a person on bail under sub-section (1) or (2) of Section 437 may direct that such person be arrested if it considers necessary. The power to cancel bail has given only to the court and the court which granted the bail can alone cancel it.⁵³ Section 438 empowers the High Court and Sessions Court to grant anticipatory bail. It is an extraordinary remedy and should be reasoned to only in special cases.⁵⁴ The object of anticipatory bail is to relive a person from unnecessary apprehension or disgrace.⁵⁵ As per this section, any person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, an application for anticipatory bail to the High Court or the Court of Session. The court while granting anticipatory bail may impose conditions as

⁴⁸ Bansi Lal v. State of Haryana, 1978 Cr LJ 472; Rao Harnarain Singh v. State, 1958 Cri LJ 563, 566; Gurcharan Singh v. State (Delhi Administration), (1978) 1 SCC (Cri) 115, 118-119.

⁴⁹ *Supra* note 1.

⁵⁰ Free Legal Aid Committee, Jamshedpur v. State of Bihar, 1982 Cr. LJ 1943 (SC); *Id* at 36 s 437(2).

⁵¹ *Supra* note 36, at s 437(4).

⁵² *Id.* s 437(6).

⁵³ Narendra K. Amin v. State of Gujarat, (2008) 13 SCC 584; Ash Mohammad v. Shiv Raj Singh, (2012) 9 SCC 446.

⁵⁴ Balchand v. State of M.P., AIR 1977 SC 366.

⁵⁵ Purna Chandra In re, 1975 Cr. LJ 1815.

mentioned in Section 438(2). Imposition of onerous condition by court while granting bail is onerous.⁵⁶ Section 439 gives an unfettered discretion to the High Court or the Court of Session to admit an accused person on bail. The court also possess the power to release an accused person on interim bail pending final disposal of the bail application. While exercising power under Section 438 and 439 of CrPC, bail application must be decided as expeditiously as possible and not to be posted in due course of time.⁵⁷

VI. GRANT OF BAIL AS A RULE

A common misnomer is jail is imperative consequence of arrest. The joint reading of section 436 and 437 of CrPC makes it clear that wisdom of the legislature is to secure “Bail as the rule and Jail as an exception”. The legal lineage of this understanding can be traced back to the verdict of the Allahabad High court in *Emperor v H.L. Hutchinson* (1932), wherein the trade unionist who were accused to have conspired against the empire were granted bail on the basis of this principle.

This principle has been consistently followed by the Supreme court since then. In a landmark judgement of *State of Rajasthan v. Balchand alias Baliay*⁵⁸, the Supreme court reaffirmed this principle. The basic rule perhaps be tersely put as bail, not jail.⁵⁹ Honourable Justice Vaidyanathapuram Rama Krishna Iyer has based this rule on the rights guaranteed to the accused under the Constitution of India especially the right to life and liberty enshrined under the Article 21. Article 11(1) incorporates bail as a fundamental concept of criminal law. The right to bail is a basic right, as the state cannot deprive individuals of their life and liberty until they have been found guilty beyond a reasonable doubt.⁶⁰ Right to life and personal liberty is the most precious and cannot be violated even for a day.⁶¹

During the detention, the accused is deprived of his right to defend his freedom and liberty.⁶² Bail preserves and maintains the ideal of liberty and freedom of the accused⁶³ as while on bail, they can prepare their case for trial more adequately as compared to the ones who are

⁵⁶ Sandeep Jain v. National Capital Territory of Delhi, 2000 Cr. LJ 807(SC).

⁵⁷ Tulsi Ram Sahu v. State of Chhattisgarh, 2022 LiveLaw (SC) 764; *See also* Sanjay v. State (NCT of Delhi), 2022 LiveLaw (SC) 55 wherein the court held that posting an application for anticipatory bail after a couple of months cannot be appreciated.

⁵⁸ AIR 1977 SC 2447.

⁵⁹ Amir Chand & Anr. v The Crown 1950 CriLJ 480.

⁶⁰ Universal declaration of Human Rights, 1948 *available at*: <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> (last visited on Feb 17, 2023).

⁶¹ Arnab Manoranjan Goswami v The State of Maharashtra AIR 2020 SC 214.

⁶² Sofia Bhambri, *Concept of bail and the principle of: Bail is Rule, Jail is exception* (S Bhambri advocates) *available at*: <https://www.sbhambriadvocates.com/post/concept-of-bail-and-the-principle-of-bail-is-rule-jail-is-exception> (last visited on Feb 18, 2023).

⁶³ Gudikanti Narasimhulu And Ors v Public Prosecutor AIR 1978 SC 429.

incarcerated. Unless, there is some solid reason for the accused to flee from justice of the fear of him tampering with then evidence or inducing the witnesses, detention of the accused is against his fundamental right of liberty which is completely uncalled for.⁶⁴ Additionally, if the court has reasonable grounds to believe that the accused is prima facie guilty of a heinous crime, then his right to personal liberty can be curtailed.⁶⁵

The Supreme court has given certain guidelines which direct all the State governments to instruct police officers to first scrutinize all the facts and do the preliminary investigation before arresting the accused.⁶⁶ The Comedian Munawar Farooqui was granted bail on the basis that the guidelines mentioned in the Arnesh Kumar case were not followed.⁶⁷ These guidelines ensure that the denial of bail should not be used as a punishment as unless the person is proven guilty, there is presumption of innocence.⁶⁸ The guilt has to be proved beyond reasonable doubt.

VII. JUDICIAL DISCRETION IN GRANT OF BAIL AND ITS APPLICABILITY UNDER THE CODE OF CRIMINAL PROCEDURE, 1973

The power that judges have to make and interpret laws is referred to as a judicial discretion. The doctrine of separation of powers gives the judicial independence to the judiciary. However, the Supreme court has declared that the grant or denial of bail is regulated to a large extent by the facts and circumstances of each case. However, bail shall not be rejected merely because of the sentiments of the community against the accused.⁶⁹ The court must exercise the discretion in a judicious manner and accordance with established principles of law, having regard to the crime alleged to be committed by the accused on the one hand and ensuring the purity of the trial of the case on the other.⁷⁰

Section 360 of the Code of Criminal Procedure grants judges the authority on sentence convicts to probation. The accused has the right to bail under Section 436 of CrPC⁷¹, if the offence committed by him, is a bailable offence. The accused has no right to receive bail as a right, if the offence committed by him, is a non-bailable offence. It depends on the discretion of the

⁶⁴ Syed Mohammed Tayyab, *Bail is a matter of right, jail is an exception* (The daily guardian) available at: <https://thedailyguardian.com/bail-is-a-matter-of-right-jail-an-exception/> (last visited on Sept. 15, 2023).

⁶⁵ State of Uttar Pradesh v Amarmani Tripathi AIR 2005 SC 322.

⁶⁶ Arnesh Kumar v State of Bihar [2014] 8 SCC 273.

⁶⁷ Munawar v State of Madhya Pradesh [2021] 3 SCC 712.

⁶⁸ Krishnadas Rajagopal, *Right to seek bail implicit in Constitution: Supreme Court* (The Hindu) available at: <https://www.thehindu.com/news/national/right-to-seek-bail-implicit-in-constitution-supreme-court/article36767032.ece> (last accessed on Sept. 16, 2022).

⁶⁹ Abhilash MR, *The Jurisprudence of Bail* (The Hindu) (Chandigarh 17 August 2022).

⁷⁰ Brijmani Devi v Pappu Kumar and Anr, (2021) MANU 55223; Ms. P v. State of Madhya Pradesh, AIR 2022 SC 2183.

⁷¹ *Supra* note 36 at s.436

court but bail must be granted after following the well-established principles, not in the cryptic or mechanical manner.⁷² The Apex Court has staunchly rejected the practice of passing an order in bail applications in very cryptic and casual manner.⁷³ If the court has reasonable grounds to believe that the accused is prima facie guilty of heinous crime, his personal liberty can be curtailed.⁷⁴ In other words, more the heinous crime, greater is the chance of rejection of bail.⁷⁵ This detention cannot be questioned as being violative of Article 21 as the same is authorized by law.⁷⁶ Section 437(3) lays down following exceptions- *"that such person shall attend following the conditions of the bond executed under this Chapter; that such person shall not commit an offense similar to the offense of which he is accused, or suspected, of the commission of which he is suspected, and that such person shall not make any inducement directly or indirectly."*⁷⁷

The court has the power to impose any such requirements as it may deem fit in the interests of justice. The Supreme court has laid down that courts should consider criteria like the accused's character, behaviour, means, position and standing, while granting the bail.⁷⁸ The judiciary has to ascertain whether the release of the accused will lead to 'breach of peace, and social or civil unrest'.⁷⁹ In addition to this, grant of bail draws an appropriate balance between public interest in the administration of justice and protection of individual liberty in a criminal case.⁸⁰ Nevertheless, the court must ensure that while granting the bail, no such condition is imposed on the accused which contradicts the premise of presumption of innocence in his favour.⁸¹ Moreover, recently the Court has observed that an interim victim compensation cannot be imposed as a condition for bail.⁸² The bail conditions imposed by the Court must not only have a nexus to the purpose that they seek to serve but must also be proportional to the purpose of imposing them.⁸³ The court while granting bail must balance the liberty of the accused and the

⁷² Jagjeet Singh v. Ashish Mishra @ Monu, 2022 LiveLaw (SC) 376.

⁷³ Kamla Devi v. State of Rajasthan, 2022 LiveLaw (SC) 272; AIR 2022 SC 1524: (2022) 6 SCC 725; Ms. Y v. State of Rajasthan AIR 2022 SC 1910.

⁷⁴ State of Uttar Pradesh v Amarmani Tripathi, (2005) SCC 124.

⁷⁵ Jameel Ahmad v. Mohammed Umair Mohammad Haroon, 2022 LiveLaw (SC) 222.

⁷⁶ Kalyan Chandra Sarkar v Rajesh Ranjan, (2005) SCC 42.

⁷⁷ *Supra* note 36 at s. 437(3)

⁷⁸ State Through CBI v Amaramani (2005) MANU 0677; See also Centrum Financial Services v. State of NCT of Delhi, 2022 LiveLaw (SC) 103; AIR 2022 SC 650; Deepak Yadav v. State of U.P., AIR 2022 SC 2514; Manno Lal Jaiswal v. State of Uttar Pradesh, 2022 LiveLaw (SC) 88.

⁷⁹ Zarina Begum v The State of Madhya Pradesh (2021) SCC 38; See also: State of Jharkhand v. Salauddin Khan, 2022 LiveLaw (SC) 755 wherein the Court held that the offer of payment of ad interim compensation to the victim could not be ground to release the accused on bail.

⁸⁰ *Supra* note at 72.

⁸¹ Aditya Mehrotra, *The Anomaly of Judicial Discretion in Grant of Bail- A Critical Analysis* (MANUPATRA) available at: <https://articles.manupatra.com/article-details/THE-ANOMALY-OF-JUDICIAL-DISCRETION-IN-GRANT-OF-BAIL-A-CRITICAL-ANALYSIS> (last visited on Feb. 21, 2023).

⁸² Talat Sanvi v. State of Jharkhand, 2023 LiveLaw (SC) 83.

⁸³ Mohammed Zubair v. State of NCT of Delhi, 2022 LiveLaw (SC) 629; AIR 2022 SC 3649

necessity of a fair trial.⁸⁴

However, the discretion in granting cannot be used arbitrarily. The discretion must be exercised judicially. In case of the Rehana Fatima, a body inequality activist, posted a video of her on YouTube, in which her daughters aged 14 and 8 were painting on her nude body. A report was filed against her POCSO⁸⁵ and IT Act⁸⁶. Her bail was rejected by the Kerala High Court stating that ‘Mother’ holds a high status in the society. This order in itself seems more of a moral preaching than providing legal service. Some of other examples of arbitrariness of courts in granting bail are-

1. The Madhya Pradesh High Court granted bail to Vikram Bagri, who was held in jail on the charges of assaulting a woman⁸⁷. He was instructed to visit the victim on Rakhi and promise to defend her. He was told to pay Rs. 11,000 to victim and Rs. 5,000 to her son as a part of Rakhsha Bandhan ceremony. This is violative of women’s autonomy.⁸⁸
2. The Supreme Court had to intervene and revoke the bail, when the Bombay High Court granted bail to a rape suspect, so that he could mediate with the victim.⁸⁹
3. The Allahabad High Court made remarks against the survivor for not speaking up about her traumatic experience of sexual assault when it granted bail to Swami Chinmayanand (2020), a former Union minister and BJP leader who was accused of sexual harassment of a female law student at his college. The practice of blaming victims should have been stopped.⁹⁰

It is evident that even after following the statute and laying down the conditions, the Indian criminal justice system remains dysfunctional. There are high chances of flawed use of this discretionary power. There is a need for a reform in the current bail regime.⁹¹ One such example statement of Supreme Court during the is grant of bail to the Alt-News co-founder, Mohammad Zubair, incarcerated recently for a 2018 tweet. The court refused to forbid him, which would violate the freedom of expression. It warned against overusing the power of arrest and condemned the practise of multiplying cases against the accused to keep him behind the bars.

⁸⁴ *Ibid.*

⁸⁵ The Protection of Children from Sexual Offences Act, 2012.

⁸⁶ Information Technology Act, 2000.

⁸⁷ Faizan Mustafa, *Discretion in bail can't be used arbitrarily* (The Tribune) available at: <https://www.tribuneindia.com/news/comment/discretion-in-granting-bail-cant-be-used-arbitrarily-125345> (last visited on Sept. 22, 2023).

⁸⁸ Vikram Bagri v State of Madhya Pradesh (2019) SCC 108.

⁸⁹ Agrawal Srijana, Neha Bhardwaj and Mehak Arora, 2021 Discretionary powers of judiciary in matters of bail. *International journal on law and legal jurisprudence studies*, 7(1), pp. 50-57.

⁹⁰ Mustafa Faizan, “*Discretion in bail can't be used arbitrarily*”, The Tribune (Chandigarh 23 March 2021).

⁹¹ *Supra* note 83.

Later, he got bail in cases in July 2022.⁹²

VIII. GUIDELINES OF THE SUPREME COURT

The Supreme Court of India has laid down guidelines in the judgement of Satender Kumar Antil⁹³, on the grant of bail to an accused. The offences are divided into four different categories and has further laid down two conditions which need to be satisfied for the guidelines to become operative. These conditions are-

- a. The accused was not arrested during the investigation
- b. The accused cooperated throughout in the investigation including appearing before the investigating officer whenever called.

The categories of offences are-

- A. Offences punishable with imprisonment of 7 years or less not falling in category B & D.
- B. Offences punishable with death, imprisonment for life, or imprisonment for more than 7 years.
- C. Offences punishable under Special Acts containing stringent provisions for bail like NDPS (s.37), PMLA (s.45), UAPA (s.43D (5)), Companies Act, 212(6), etc.
- D. Economic Offences not covered by Special Acts.⁹⁴

There are different guidelines for each category.

- i. **Category A-** Since the offences involved are not very grave, the guidelines are comparatively lenient to the accused.
 - After filing of the charge sheet or the complaint taking cognizance, ordinary summons must be issued at the first instance including an appearance through lawyer.
 - If the accused does not appear despite service of summons, then a Bailable Warrant for physical appearance may be issued.
 - Again, if the accused fails to appear despite issuance of bailable warrant, a non-bailable warrant will be issued.

⁹² Richika Banka, "Mohamed Zubair gets plea in tweet case", Hindustan Times (Delhi 22 July 2022).

⁹³ *Supra* note 26.

⁹⁴ *Ibid.*

- Such non-bailable warrant may be converted by the Magistrate into a bailable warrant/summons without insisting on physical appearance of the accused, if the accused moves an application before execution of the non-bailable warrant on an undertaking to appear physically on the next date of hearing.
 - Once an appearance is made in Court, bail applications may be decided without taking such accused into custody or by granting interim bail till the bail application is decided.
- ii. **Category B and D-** The bail application will be decided on merits on appearance of the accused in Court pursuant to process being issued.
- In case of economic offences, the Supreme Court observed that to determine whether or not to grant bail, two aspects need to be considered i.e., seriousness of the charge and severity of the punishment.
 - In the context of white-collar crimes, the aforementioned factors are usually considered to decide on bail applications.
- iii. **Category C-** The guidelines are the same as Categories B and D with the additional condition of compliance with strict bail provisions under-
- Section 37 of the Narcotics Drugs and Psychotropic Substances Act, 1985
 - Section 45 of the Prevention of Money Laundering Act, 2002
 - Section 212(6) of the Companies Act, 2013
 - Section 43(d)(5) of the Unlawful Activities (Prevention) Act, 1967
 - The provisions under the Protection of Children from Sexual Offences Act, 2012.⁹⁵

IX. INADEQUACIES OF BAIL SYSTEM

The Supreme Court stressed on several cardinal principles of criminal procedure and the need for legal refers to streamline the law or order processes. There exists a lack of uniformity in magistrates' decisions owing to the lack of a law on bail. Currently, judges have complete discretion in granting bail to a person. Even the amount of the bail bond is left to the judge's

⁹⁵ Bharat Vasani, Ankoosh Mehta, Srinivas Chatti & Darshan Patankar, *Bail or Jail- The Supreme Court clarifies the law and lays down the guidelines* (Cyril Amarchand) available at: <https://corporate.cyrilamarchandblogs.com/2022/08/bail-or-jail-the-supreme-court-clarifies-the-law-and-lays-down-the-guidelines/> (last visited on Feb. 22, 2023).

discretion and since some people can't afford the amount, the judge is hesitant in granting them bail out of the fear of absconding. The chances of bail depend on the bench that is hearing the case. One judge might be more inclined towards bail, another one, not so much. Some might take a harsh approach regarding criminal law. Ultimately, it's a matter of discretion. The different treatment of persons accused with the same offence can be a grave affront to Articles 14 and 15 of the Constitution. Moreover, when a trial is delayed, and the likelihood of the trial ending soon is less, constitutional courts have the power to grant bail. However, the procedures and considerations on this aren't explained in the law.⁹⁶ The lower courts are relying on sophisticated factors in rendering release decisions.

X. SUPREME COURT RECOMMENDS A SEPARATE BAIL ACT

The Court has made a specific observation regarding bail, in the form of an obiter that the Government of India may consider the introduction of a separate enactment, in the nature of a Bail Act, so as to streamline the grant of bails.⁹⁷ In this regard, the Court referred to the Bail Act in the United Kingdom.⁹⁸ The Act recognises a “general right” of bail. It aims to reduce the number of inmates in jails. It says an accused should be granted bail except as provided in Schedule 1 of the Act.⁹⁹

The court issued certain directions on this matter-

- i. The government of India may consider the introduction of separate enactment in the nature of a bail act so as to streamline the grant of bails.
- ii. The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in Arnesh Kumar Case. Any dereliction on their part has to be brought to the notice of the higher authorities by the court.
- iii. The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.
- iv. All the State Governments and the Union Territories are directed to facilitate

⁹⁶ Nidhi Jacob, *The Supreme Court said there's a "pressing need" to reform bail norms owing to hasty arrests and overcrowded prisons* (Factchecker) available at: <https://www.factchecker.in/explained/explained-why-supreme-court-calls-for-a-separate-bail-law-826657> (last visited on Feb. 23, 2023).

⁹⁷ Sohini Chowdhury, *Supreme Court Recommends Union Govt To Introduce Separate Act To Streamline Grant Of Bail; Sets Timeline For Disposal Of Bail Pleas; sets Timeline for disposal of bail pleas* (Live law) available at: <https://www.livelaw.in/top-stories/supreme-court-recommends-union-govt-to-introduce-separate-act-to-streamline-grant-of-bail-sets-timeline-for-disposal-of-bail-pleas-203426> (last accessed on Feb. 24, 2023).

⁹⁸ GS Bajpai, Anubhav Kumar, *'The latest guidelines on arrest and bail orders'* The Hindu (Chandigarh 19 August 2022).

⁹⁹ Bail Act, 1956 s. 4(1).

standing orders for the procedure to be followed under Section 41 and 41A of the Code.

- v. There need not be any insistence of a bail application while considering the application under Section 88, 170, 204 and 209 of the Code.
- vi. There needs to be a strict compliance of the mandate laid down in the case of *Siddharth v. State of U.P.*¹⁰⁰
- vii. The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to constitution of special courts. The High Court in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.
- viii. The High Courts are directed to undertake the exercise of finding out the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.
- ix. While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.
- x. An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code both at the district judiciary level and the High Court as earlier directed by the Court in case of *Bhim Singh v. Union of India*.¹⁰¹
- xi. Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application. Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.
- xii. All State Governments, Union Territories and High Courts are directed to file affidavits/status reports within a period of four months.¹⁰²

Therefore, the provisions in the Code are not sufficient to achieve the objectives of Criminal Justice System. In this regard various agencies of the State must perform their act effectively such as proper functioning of the police power, availability of legal aid and speedy trial.¹⁰³ The

¹⁰⁰ 2021 SCC Online SC 615.

¹⁰¹ (2015) 13 SCC 605.

¹⁰² *Supra* note 26.

¹⁰³ Dr. Janak Raj Rai, *Bail-Law & Procedure (With Tips to Avoid Police Harassment)* (Universal Law Publishing

bail law must reflect the philosophy and utility for grant and refusal of bail.¹⁰⁴ In addition to this, the reformation of bail law must eliminate lacunas, unambiguous and uncertainty by coherence. The present law is uncertain about how the bail process does affect the presumption of innocence.

XI. CONCLUSION

Currently, there is no straightjacket formula for bail.¹⁰⁵ Sometime law of bail takes different forms and depends on each individual case.¹⁰⁶ Law of bail should balance between two conflicting demands of the society as a whole. Shielding the society from misadventures of the persons allegedly involved in crime and presumption of innocence of the accused till he is found guilty.¹⁰⁷ The main objective of bail is to protect the fundamental right of the accused provided under Article 21 of the Indian Constitution. The courts have tried to intervene time and again and have laid certain guidelines but nothing has been done about it. The complete bail system needs to be reviewed while considering the socio-economic condition of the majority of our population, which was also suggested by the law commission in 2017.

The theory of 'innocent unless found guilty' governs bail. When proposing bail reforms, keep in mind that the victim is still facing charges and has not been charged. The seriousness of the crime does not sway the courts; instead, they should value the facts and apply their minds in a rational manner. A standardized checklist should be used to direct the courts in issuing bail. The test should compel courts to refuse bail only where there is a flight risk, a lack of compliance on the part of the convicted, or the likelihood of evidence tampering.

The discretion of the courts to grant bail in non-bailable offences should be exercised justly, reasonably, fairly and objectively. The rights of the accused and victim should be balanced, which in turn can make getting bail on reasonable grounds an easier task.

Co. 2015).

¹⁰⁴ R. Sharma, *Human Rights and Bail* (A.P.H. Publishing Corporation, New Delhi 2022).

¹⁰⁵ Dr. Abhishek Atrey, 'No set formula for Bail' India Legal (Mar 10, 2023) available at: <https://www.indialegallive.com/article/bail-supreme-court-manish-sisodia-delhi-excise-policy/304563> (last visited on Mar 12, 2023)

¹⁰⁶ Dr. Swati Jindal Garg, 'Bail in the Court' India Legal (Mar 02, 2023) available at: <https://www.indialegallive.com/magazine/jitendra-narian-rape-case-andaman-nicobar-calcutta-high-court/> (last visited on Mar 12, 2023).

¹⁰⁷ Ramesh v state of Haryana, 1997 Cri LJ 2848.