

BAIL IN CRIMINAL LAW: ANALYZING JUDICIAL DISCRETION AND ITS IMPACT ON CRIMINAL JUSTICE

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ABSTRACT

Bail in the criminal law is the release of accused on satisfying the terms and condition of bail and to appear when required before the court. It is founded on the premise that an individual is “presumed innocent until proven guilty”, hence preserving equilibrium between the rights of the accused and the fundamental tenets of justice. Bail is awarded as a matter of right in bailable charges, whereas in non-bailable ones, it is at the court's discretion. There are certain kinds of bail like “regular bail”, “interim bail” and “anticipatory bail”. Bail in the criminal justice system act as safeguard to protect the rights of individual at the same time ensuring liberty of accused and fair trial.

The paper deals with the concept of bail under criminal law and its historical background in England, America and India. It also covers the types of bail both in “bailable offences and non bailable offences”. It further focus on misuse of bail by the accused persons and it also deals with the Judicial Precedent which the cases and circumstances in which accused misuses the bail provisions of criminal law creating hurdles in the delivery of justice. It also covers the recommendations of Law Commission on the bail related issues. It further deals with role of criminal justice system in granting bail to the accused as well as that the grant of bail while exercising Judicial Discretion. It also covers the provisions of judicial discretion under Bharatiya Nagarik Suraksha Sanhita (BNSS). So, bail is very necessary and important provision under BNSS that ensures that rights of accused to be maintained while delivering the justice and judicial discretion should be exercised cautiously while granting bail in non-bailable offences.

Keywords: Bail, Judicial Discretion, Justice and Criminal Justice System

INTRODUCTION

Crime is a universal and enduring phenomenon that affects every society across the globe. While all communities grapple with crime, the nature, frequency, and impact of criminal activities differ based on time, place, and social structure. Crime stands as one of the most serious threats to human life, liberty, and property. It is not a recent development; rather, it has existed since the earliest stages of human society even before organized societies took shape. Though crime is a constant across civilizations, its manifestations are relative, shaped by unique cultural, social, and economic contexts. As a result, the challenges posed by crime vary significantly from one society to another, evolving over time in response to changes in social processes and structures.¹

The jurisprudence of bail forms an essential component of the judicial process and plays a vital role in the administration of “the criminal justice system”. It acts as a protection for both the right to life and personal liberty, guaranteeing that such liberty may only be restricted through procedure established by court² by provision.³

“The criminal justice system” is designed to uphold the principle of "justice for all," which includes protecting the innocent, convicting the guilty, and ensuring a fair and transparent legal process. A crucial component of delivering justice is the proper and impartial investigation of cases by law enforcement agencies. Under “the Indian criminal justice system, an accused person is presumed innocent until proven guilty”. However, in practice, society often labels an individual as a criminal the moment they are arrested or taken into custody. Historically, there have been instances where false cases have been filed with the intent to harass or malign someone, resulting in unjust arrests that infringe upon an individual's personal liberty and tarnish their reputation. To safeguard individuals from such misuse of the legal process, the provision of “anticipatory bail” was introduced in the Criminal Procedure Code of 1973.⁴

¹ Pradeep Kumar Singh, “Bail in Socio-Economic Crimes and Criminal Justice in India,” 6 *Athens Journal of Law (AJL)* 209–30 (2020).

² Constitution of India, art.21.

³ Rupam Lal Howlader, “Shifting Contours of Bail Jurisprudence in Cases of Caste Atrocities in India,” 6 Issue 6 *International Journal of Law Management & Humanities* 598–615 (2023).

⁴ Manali Singh, “Anticipatory Bail and the Criminal Justice System in India,” 3 *Indian Journal of Law and Legal Research* 1–8 (2021).

HISTORY OF BAIL

Bail Law in England and America:

The concept of bail can be traced back to ancient Rome. The principles of bail have deep roots in both American and English legal traditions, with a history spanning approximately 1,000 years. In medieval England, the practice of bail emerged out of the need to release untried prisoners. The Anglo-Saxon legal system required that the accused find a surety who would take responsibility for ensuring their appearance at trial. After the Norman Conquest, the bail system became more complex, with sheriffs gaining the discretion to hold individuals pretrial. This led to corruption and abuse of power. In 1215, steps were taken to grant certain rights to individuals, but widespread corruption led Parliament to pass “the Statute of Westminster in 1275”, which restricted the discretionary powers of sheriffs. Early in the 17th century, “King Charles I” issued an order the imprisonment of five knights without charges, defying the provisions of the Statute and the Magna Carta. In response, Parliament passed the Petition of Right in 1628. The passage of the Habeas Corpus Act of 1679 further addressed procedural delays and reinforced the right to a fair process. In the United States, the history of bail is heavily influenced by English law, including the Bill of Rights, the Habeas Corpus Act, and the Petition of Right. The 1960s saw the first national bail reform movement in the U.S., culminating in the passage of the Bail Reform Act of 1966.⁵

Bail Law in India:

The foundations of Indian legal thought can be traced to ancient Hindu jurisprudence, particularly in texts like the *Arthashastra*, *Manu Smriti*, and *Yajnavalkya Smriti*. Kautilya’s *Arthashastra* outlines the responsibilities of the *Dharmastha* (judge) based on the principles of *Dharma*. Similarly, the *Manu Smriti* and *Yajnavalkya Smriti* prescribe the ethical conduct and duties of kings, including fair treatment of the accused. These ancient texts emphasized that individuals under arrest should not be detained unnecessarily. The concept of bail, in a more structured form, emerged during the Mughal period, where arrested persons could secure their release by furnishing a surety. With the establishment of British rule in India, colonial influences led to the gradual incorporation of common law principles. Over time, these colonial

⁵ Satwinder Singh and Palakdeep Kaur, “The Status of Bail Jurisprudence in India: Need Comprehensive Revamp,” 6 Issue 2 *International Journal of Law Management & Humanities* [i]-1401 (2023).

practices had a lasting impact on India's bail system, shaping its evolution and laying the groundwork for future legal reforms.⁶

CONCEPT OF BAIL

"The term bail is derived from the old French verb *ballier*, meaning to give or deliver." According to *Shorter Oxford English Dictionary*, the word "bail" is linked to the Latin term "*bajulare*," which means "to carry or manage." Wharton's Law Lexicon defines "bail" as the act of granting release to an individual who has been detained or jailed on submission of security

to ensure their appearance on a specified date and at a designated location. This security is referred to as "bail."⁷

The Criminal Procedure Code classifies all offences as either "bailable" or "non-bailable." According Code⁸, offences designated as such in "the First Schedule" or those made bailable by any other applicable law are referred to as "bailable offences."

In contrast, "non-bailable offences" are those not explicitly marked as bailable in the Code or the First Schedule. Generally, "offences punishable with imprisonment of three years or more are categorized as non-bailable due to their greater seriousness".⁹

In *Kamalapati Trivedi v. State of West Bengal*¹⁰, the Supreme Court emphasized the need to balance two fundamental considerations: an individual's "right to personal liberty" and broader public interest. The Court highlighted that bail decisions must ensure the accused's presence during trial while respecting their right to freedom, provided that granting bail does not compromise justice.¹¹

⁶ *Ibid.*

⁷ *Ibid.*

⁸ The Code of Criminal Procedure, 1973, s. 2(a).

⁹ Paulomi Das, "Detailed Study of Bail in India," 1 *LexForti Legal Journal* 20–30 (2019).

¹⁰ AIR 1979 SC 777.

¹¹ Paulomi Das, "Detailed Study of Bail in India," 1 *LexForti Legal Journal* 20–30 (2019).

TYPES OF BAIL

BAIL IN BAILABLE OFFENCES

As per Code¹² a “bailable offence” refers to an offence that is classified as bailable in the First Schedule of the Code or is designated as bailable under any other applicable law. If an individual is accused of committing a bailable offence, they have the right to claim bail. In such cases, the police or if the accused is ready to give the required bail security, no other authority can deny bail. According to code¹³, a person accused of a bailable offence, “at any stage of the proceedings”, is “entitled to be released on bail”, even if they are arrested without a warrant.¹⁴

BAIL IN NON-BAILABLE OFFENCES

Section 437 of the Criminal Procedure Code and Section 482 of Bharatiya Nagarik Suraksha Sanhita (BNSS) defines a non-bailable offence as any offence that is not classified as bailable. In such cases, the accused does not have an automatic right to claim bail. However, “bail may be granted to an individual accused of a non-bailable offence”, provided certain conditions are met. These conditions include:

- (a) There must be “reasonable grounds to believe that the accused has committed an offence punishable by death or life imprisonment.”
- (b) The accused must “not have been previously convicted of a serious cognizable offence punishable by death, life imprisonment, or imprisonment of seven years or more.”
- (c) Exceptional circumstances, such as the accused being a minor, a woman, or suffering from an illness, may also be considered by the court when deciding whether to grant bail.¹⁵

¹² Supra note 7.

¹³ Supra note 7, s.436.

¹⁴ Madhu Rani and Rana Praveen, “Law Relating to Bail under Indian Law,” 2 Part 2 *Indian Journal of Integrated Research in Law* 1–8 (2022).

¹⁵ *Ibid.*

BAIL MISUSE BY THE ACCUSED

In *A. K. Murumu v. Prasenjit Choudury*¹⁶ The court stated “that an order granting bail can be revoked if new or aggravating circumstances arise after the release on bail, such as harassment of individual liberty by destroying evidence, malicious attacks on eyewitness accounts, or the commission of the same or comparable crime, but that the existence of any expressly or impliedly situation following the grant of anticipatory bail or bail is not the only criterion for bail cancellation.”

In the case of *Bishambhar Nath Vs. Emperor*¹⁷, “The learned counsel for the crown, Mr. Gupta expressed apprehension in the course of his arguments as to these accused tampering with the prosecution evidence. The apprehension, however, will not be sufficient ground for me to refuse bail if I otherwise think that it should be granted. So far these apprehensions are merely chimerical. But if they turn out to be real at any stage of the trial, it will be open to the learned counsel who I understand is in charge of the case for prosecution to move the trial court to cancel bail.”

In the case of *Madhukar Purshottam Mondkar and Another Vs. Talab Haji Husain and others*¹⁸, “the Bombay High Court has revoked bail in a bailable case after concluding that the accused manipulated or attempted to meddle with prosecution information. The Supreme Court agreed with this viewpoint.”

In *Ramchandra vs. State*¹⁹, Justice Kaul emphasized primary purpose of imprisonment and detention is to ensure the accused appears for trial and does not interfere with its proceedings by being absent. The court generally considers granting bail unless there is a valid concern that the accused might evade the trial. However, if the evidence presented by the prosecution is strong and compelling, the court may reasonably presume that the accused could attempt to avoid standing trial, and in such cases, may deny bail.²⁰

In *Emperor Vs. Narainji*²¹, “the Bombay high court held that very great weight must be attached to the fact that according to the allegations before the Magistrate, the complainant was

¹⁶ 1999 Cr.LJ 3460.

¹⁷ 25 CrLJ 1132.

¹⁸ AIR 1958 SC 376.

¹⁹ 1953 CrLJ 17.

²⁰ Purna Sharma, “Misuse of Bail Provisions in India,” 6 Issue 2 *International Journal of Law Management & Humanities* 1941–54 (2023).

²¹ 1928 SCC OnLine Bom 110.

under police prosecution and hardly left in a taxi, when he was surrounded by several persons and struck with knives and sticks. This is a crime of a very determined nature and any of his assailants might, if released on bail, renew the attack, and try to kill this man, so that his evidence may not be availed of against them”

In *Balchand v. State of M.P.*²², The Court determined that it is illegal and liable to revocation when a magistrate issues bail without properly applying the judicial mind to Rule 184's provisions. The Court also referred to Section 482 of the Criminal Procedure Code, emphasizing its role in preventing abuse of the judicial process and ensuring that justice is served.²³

Similarly, in the *Rukmani Mahato* case²⁴, the Hon'ble Supreme Court addressed the abuse of bail provisions and criticized the approach taken by subordinate courts. The Court noted that even when a higher court rejects an anticipatory bail application after a thorough examination, the regular bail previously granted by a lower court may still remain in effect. This, the Court observed, undermines the authority of the superior court and renders its decision ineffective.²⁵

COMMITTEE REPORTS

1. Law commission of India 41st report

The subject of bail was also thoroughly examined the Report²⁶. Key observations from the report include:

- In the case of bailable offences, bail is considered a matter of right, in accordance with the general principles laid down in the Code.²⁷
- For non-bailable offences, “the decision to grant bail rests at the discretion of the court.”
- “If the offence is punishable with death or life imprisonment, the magistrate may grant bail only” under specific circumstances particularly if the accused is a minor, a woman, or is suffering from illness or infirmity.

²² AIR 1977 SC 366.

²³ Prerna Sharma, “Misuse of Bail Provisions in India,” 6 Issue 2 *International Journal of Law Management & Humanities* 1941–54 (2023).

²⁴ (2017) 15 SCC 574.

²⁵ *Ibid.*

²⁶ The Law Commission, “41st Report on the Code of Criminal Procedure, 1898, (1969)”.

²⁷ The Code of Criminal Procedure, 1973.

- Sessions Courts and High Courts are vested with broader discretionary powers and may grant bail even in cases involving “life imprisonment or the death penalty.”
- An individual who breaches the conditions of a bail bond will not be entitled to bail again.²⁸

2. Law commission of India 268th report

According to report²⁹, meaningful reforms are essential to increase the credibility of “the criminal justice system”, particularly in how arrested individuals are treated. The report underscores a well-known reality: influential and wealthy individuals often receive favourable treatment, while the underprivileged face undue hardships. Despite clear legal definitions and numerous judicial decisions on bail, its application remains highly inconsistent and dependent on the specific facts and circumstances of each case. Currently, approximately 67% of incarcerated individuals in India are undertrial prisoners, awaiting their day in court. This disparity in the bail system significantly contributes to prison overcrowding and places additional strain on the state and its correctional facilities. The common practice of granting bail swiftly to the powerful, while the poor remain incarcerated due to their inability to afford bail or secure legal assistance, highlights a systemic flaw.³⁰

JUDICIAL DISCRETION IN BAIL

In *Gudikanti Narasimhulu v. Public Prosecutor*³¹, Justice Krishna Iyer remarked that bail lies within a “grey area of the criminal justice system” and often rely on the intuition of the presiding judge commonly referred to as judicial discretion.

In *Hussainara Khatoon and Others v. Home Secretary, State of Bihar*³², the Court held that the right to a fair trial under Article 21 is violated when procedural law fails to ensure a speedy trial for the accused. This includes denying pre-trial release on a personal bond to an indigent person, especially when there is no significant risk of the accused absconding.

²⁸ Madhav Saxena, “Critical Analysis of Bail Trends Prevalent in India in Comparison to Other Jurisdictions,” 6 Issue 3 *International Journal of Law Management & Humanities* 1422–54 (2023).

²⁹ The Law Commission, “268th Report on Amendments to Criminal Procedure Code, 1973- Provisions relating to bail, 2017”.

³⁰ *Ibid.*

³¹ AIR 1978 SC 429.

³² AIR 1979 SC 1360.

In *Moti Ram and Others v. State of Madhya Pradesh*³³, Justice Krishna Iyer strongly criticized a magistrate's decision to impose a surety of ₹10,000 on the petitioner, a poor mason, despite the Supreme Court having granted him bail with the condition that it be to "the satisfaction of the Chief Judicial Magistrate". Recognizing petitioner's financial hardship, "the Court directed the magistrate to release him on his own bond of ₹1,000", highlighting the need for a more compassionate and realistic approach in granting bail to indigent individuals.

The Supreme Court's judgment in *Rudal Shah v. State of Bihar*³⁴ stands as a stark example of the failure of the state executive in safeguarding the rights of the poor. Rudal Shah, despite being "acquitted of all charges by a competent court on 3 June 1968", remained unlawfully imprisoned for an additional 14 years and was released only on 16 October 1982. This case highlights a grave miscarriage of justice and the systemic neglect faced by marginalized individuals.

In the case of bailable offences, there is no room for discretion when granting bail³⁵. However, for non-bailable offences, bail is considered a privilege granted to the accused, and it is expected not to be abused. It is the court's responsibility to make sure that an individual's liberty is not violated merely based on an allegation against them. "The general principle is to grant bail rather than deny it, as a person is presumed innocent until proven guilty beyond a reasonable doubt".³⁶ The decision to grant bail is not left entirely to the magistrate's discretion. Instead, it requires a judicial assessment based on all facts and circumstances presented before the court. While the law must protect society's interests from those accused of a crime, it must also uphold the principle of criminal jurisprudence, namely, the presumption of innocence. Refusing bail can have severe consequences for an innocent person. During pre-trial detention, the accused may face physical and mental suffering in jail, and their reputation in society is tarnished. The accused may lose their job and struggle to mount an effective Défense against the charges, while their family may also suffer the social and financial consequences.³⁷

Therefore, it can be concluded that, when exercising judicial discretion in bail matters, courts must carefully consider the purpose of restricting an individual's liberty while awaiting trial.

³³ AIR 1978 SC 1594.

³⁴ AIR 1983 SC 1086.

³⁵ The Code of Criminal Procedure, 1973, s.436.

³⁶ Anudatt Dubey, "An Analysis of the Law Relating to Bail in India," 4 Issue 2 *Indian Journal of Law and Legal Research* 1–9 (2022).

³⁷ *Ibid.*

Bail should only be denied if there are compelling reasons to believe that the accused will violate the terms of bail or obstruct the investigation and fair trial. The denial of bail should not be seen as a form of punishment, but rather as a measure to ensure the accused's presence during the trial.³⁸

In *Rukhmani Mahato v. State of Jharkhand*³⁹ (2017), “the Supreme Court addressed the misuse of bail provisions” and took steps to curb such unethical practices. The Court emphasized the need to prevent situations where, despite a superior court rejecting a plea for anticipatory bail after thorough consideration, the regular bail granted by a lower court remains in force. This undermines the authority and purpose of the higher court's decision, effectively rendering its order meaningless. In light of such circumstances, the Court stressed the importance of putting an end to such practices to uphold the integrity of the judicial process.

In *Harnairain Singh v. The State*⁴⁰ (1958), the Supreme Court emphasized that “the discretion to grant bail must be exercised judicially”, in accordance with the provisions laid out under the Code⁴¹. The Court highlighted several factors that must be considered, including the “seriousness of the offence, the nature of the allegations, the severity of the potential punishment, the likelihood of the accused absconding if released, the risk of evidence being tampered with, and the accused's health, age, and gender, among others”. The Court further stated that if deemed necessary, it may impose appropriate conditions on the grant of bail in the interest of justice.

In the landmark judgement of *Gurbaksh Singh Sibbia and Others v. The State of Punjab*⁴² (1980), “the Supreme Court laid down important principles regarding anticipatory bail”:

- a) The Court clarified that the Criminal Procedure Code (CrPC) does not impose any time limitations on the grant of anticipatory bail.
- b) It further held that the concerned court has the discretion to impose appropriate conditions while granting anticipatory bail, which may include setting a limited duration of protection or addressing any special circumstances relevant to the case.

³⁸ *Ibid.*

³⁹ (2017) 15 SCC 574

⁴⁰ AIR 1958 P&H 123.

⁴¹ *Supra* note 7, s.437.

⁴² AIR 1980 SC 1632.

THE DISCRETION IN GRANTING BAIL CANNOT BE APPLIED ARBITRARILY

In *Govind Prasad*, “the Supreme Court emphasized that the grant of bail constitutes a judicial function, not a ministerial one”, and must therefore be exercised with due care and not arbitrarily. Reinforcing this principle, the Court in *Harnairain Singh* held that judicial discretion in bail matters must be guided by the provisions Code⁴³. In doing so, the court must consider several factors such as “the gravity of the offence, the nature of the allegations, the severity of the punishment upon conviction, the risk of the accused fleeing if granted bail, and the likelihood of tampering with evidence”. Other personal considerations such as the accused’s age, health, and gender may also be relevant. Furthermore, the court is empowered to impose appropriate conditions on the grant of bail, as deemed necessary, in the interest of justice.⁴⁴

While “granting bail to Swami Chinmayanand, a former Union Minister and BJP leader accused of sexually harassing a female law student at his college, the Allahabad High Court made remarks critical of the survivor for not disclosing her ordeal sooner”. Such comments reflect a troubling tendency to place blame on victims an approach that should have been abandoned long ago.⁴⁵

JUDICIAL DISCRETION FOR GRANTING BAIL

“Judicial discretion refers to the authority granted to judges to interpret and apply laws within the bounds of justice. The courts have the power to release offenders on probation, reflecting the broad scope of judicial authority”⁴⁶. Bail, as a legal safeguard, functions as “a guarantee ensuring the accused will appear before the court when required”. The procedures related to bail in India are governed by code⁴⁷. The courts are afforded considerable discretion in determining the conditions and quantum of bail. Specifically, Section 437 of CrPC outlines exceptions “under which bail may be granted in non-bailable offences”. In such cases, “bail is

⁴³ Supra note 39.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ the Code of Criminal Procedure, 1973, s.360

⁴⁷ Supra mote 7, s.436-450.

not an inherent right” but is subject to the “court's discretion, based on the circumstances and the eligibility of the petitioner”. Trials in criminal cases can often span several years, and without the provision of bail, an accused may be subjected to prolonged incarceration before conviction. The delays in trial thus become a critical factor influencing the court’s decision on bail.⁴⁸

Judicial discretion, while broad, must be exercised within the bounds of reasonableness and legality. The demand for swift justice necessitates prompt, constitutionally sound decisions. However, the penal code does not offer a comprehensive list of conditions for granting bail, placing significant responsibility on the judiciary to balance the individual’s liberty with public and societal interests. Ultimately, bail is a matter of judicial discretion, requiring careful consideration to ensure both justice and timely trial.⁴⁹

CONCLUSION

Bail is rooted in “the fundamental principle of innocent until proven guilty, and the burden of establishing guilt lies in proving it beyond a reasonable doubt”. “Denial of bail” can infringe upon “right to a fair trial”, as it restricts the accused’s access to legal counsel, often limiting communication to a controlled and constrained environment. Judges must not be swayed solely by the gravity of the alleged offence; instead, they should assess the available evidence with reasoned objectivity. A uniform set of criteria should guide judicial decisions on granting bail. Bail ought to be denied only in specific circumstances such as when the accused poses a flight risk, refuses to cooperate with the investigation, or is likely to tamper with evidence.

Bail conditions must also take into account the socioeconomic background of the accused and should not be excessively burdensome. The monetary surety requirement has made bail inaccessible to many vulnerable individuals. In such cases, alternative conditions—designed to ensure the accused’s presence at trial should be considered. Imposing unrelated or disproportionately demanding conditions serves to exclude and disadvantage the

⁴⁸ Dakshq Baweja, “Judicial Discretion in Grant of Bail,” 5 Issue 1 *Indian Journal of Law and Legal Research* 1–7 (2023).

⁴⁹ *Ibid.*

socioeconomically weaker sections of society. In essence, existing bail laws often fail to reflect the ground realities and social fabric of the country.

The court's discretion in granting bail for non-bailable offences must be exercised in a manner that is just, reasonable, fair, and impartial. A careful balance should be maintained between the "rights of the accused and those of the victim", thereby ensuring that bail is granted on reasonable grounds when appropriate.