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**BAIL A MATTER OF RIGHT: IN LIEU OF EXERCISE OF PERSONAL LIBERTY**

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**INTRODUCTION**

Bail can be considered as one of the most crucial aspects of any criminal justice system. Bail upholds the principle of personal liberty and freedom of any citizen and values of liberty and freedom are of high stature in any democratically functioning society. The term “bail” can be traced back from the old French work “Baillier”. It means to deliver or hand over.

In India’s Criminal Procedure Code, the term “bail” has not been defined anywhere in the code, however the concept of bail has been understood through the passage of time as release of any person from judicial custody. Indian courts through course of time have become sensitive in securing an individual’s freedom and liberty and be certain that these values are not compromised. The Indian constitution has also provided its citizens with a vast range of rights ensuring an individual’s freedom and liberty. Articles such as 19 and 21 provide its citizens with fundamental rights and right to life and personal liberty respectively.

In the recent past there has been a debate over refusal in grant of bail as breach of personal liberty of an individual. It has been noted that the Indian constitution has enshrined an individual’s freedom however they are subject to reasonable restriction. Bail being more than a matter of right should be considered as a norm and up to the discretion of the court of law.

It has been observed that the judges especially in the district courts are reluctant in granting bail. In context of this our present Chief Justice of India DY Chandrachud also highlighted that judges at the grassroots level that are the judges at the district level are under a fear or pressure for granting bail and upholding personal liberty of an individual. They are under constant fear of being targeted by the members of the higher judiciary. Due to this higher judiciary is flooded

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with bail application, resulting in delay in dispensing of bail application.

## **BAIL LAWS IN INDIA**

The bail laws in India govern the structure for granting bail to the individuals accused of committing crimes. In India the provisions relating to Bail are enumerated under The Code of the Criminal Procedure 1973<sup>2</sup>. The fundamental principle on which a bail is granted is that unless there are reasonable grounds to believe that the person accused will abscond, tamper with the evidence, coerce witnesses, or commit further offences, the Bail can be granted. Although bail is considered as a right but the courts gave discretionary power to grant bail, while granting bail they consider factors such as the nature of the offences, the likelihood of accused flying to another country, the nature of the evidence present against the accused, and the accused being a potential threat to public safety.

However, the requirements for granting bail may be harsher in cases involving serious offences like terrorism or organised crime which harms the society at large. In addition, the courts may impose conditions on the bail by requiring the surrender of the passport, the provision of sureties or regularly reporting to the magistrate. The primary goal of the provisions regarding to bail is to strike a balance between a balance between protecting the rights of the accused and ensuring the integrity of the judicial process.

## **OFFENCES CLASSIFIED AS BAILABLE AND NON-BAILABLE**

Under India's criminal justice system, offences are categorized as either bailable or non-bailable. Bailable offences<sup>3</sup> are those in which bail can be granted as a matter of right, which is temporary release from custody. The accused can secure their release by providing surety or security, until the trial proceedings. Generally, such crimes are not serious in nature or those where the punishment is not severe.

In contrast the non-Bailable offences are more serious crimes for which the accused does not has bail as a right. The accused must prove before the court of law that they will not misuse their freedom. or interfere with the investigation. Non-Bailable offences generally include more serious offences like murder, assault, illegal intimidation, or different offences that pose a

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<sup>2</sup> The Criminal Procedure Code, No. 02, Acts of Parliament 1973.

<sup>3</sup> The Criminal Procedure Code, Sec 2(a), 1973.

greater threat to society. The determination of whether an offense is bailable or non-bailable is usually specified in the relevant laws or sections of the Indian Penal Code (IPC)<sup>4</sup>.

## **BAIL AS A RIGHT**

The Indian Constitution enumerates the right to bail as a fundamental right. The principle of “bail not jail” is followed, which states that an accused person should not be incarcerated before their trial because under Indian Law they are presumed innocent until proven guilty.

The Code of Criminal Procedure governs the bail laws and declares that an accused person is entitled to be released on bail as a matter of right under certain circumstances. However, depending on the facts and circumstances the court may exercise its discretion to grant bail.

The right to bail is not absolute, the court takes a number of factors into consideration while deciding whether to grant bail or not. The severity of the offense, the possibility of the accused absconding, the possibility of the accused interfering with the investigation or witnesses, and the likelihood of the accused tampering with evidence are all examples of these factors<sup>5</sup>. In addition, bail may be denied if the offense is punishable with death or a life sentence, unless exceptional circumstances support the release of the accused. It is important to note that depending on the nature of the offense and the court handling the case, the specific bail provisions and procedures may differ. While granting bail, the courts are free to impose reasonable conditions to ensure the accused's attendance at the trial and prevent abuse of the freedom granted.

## **THE CONFLICT BETWEEN BAIL AND PERSONAL FREEDOM**

The conflict between individual freedom and bail is a complicated issue that involves balancing individual rights with the needs of justice and public safety. A person accused of committing a crime is granted bail when they are granted temporary release from custody until their trial or other legal proceedings. Because it ensures that individuals are not unfairly detained prior to being found guilty, it is an essential component of personal freedom.

However, there have been instances which have caused serious concerns over the granting of bail

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<sup>4</sup> The Indian Penal Code, no. 45, Acts of Parliament 1860.

<sup>5</sup> Law of Bail in India, (*Legalservices.com* 29 June 2023) [Law Of Bail In India \(legalserviceindia.com\)](https://legalserviceindia.com)

to individuals alleged to have committed serious crimes. There are those who are concerned that releasing such people could pose a threat to the society. This has sparked debate regarding whether the current bail provisions strike the appropriate balance between personal liberty and efficient criminal justice.

The present situation of under trial prisoners in India is major concerns for the country, the prolonged detention of prisoners awaiting trial who are unable to obtain bail is worrisome because it goes against the principle of "innocent until proven guilty" and infringes upon personal freedom. Sadly, numerous undertrial prisoners go through years in prison before their trial because of elements like inadequate legal representation, delays in the legal process, and being not able to meet bail conditions<sup>6</sup>.

However, it is essential to keep in mind that influential or wealthy individuals have utilized bail improperly in order to evade justice or intimidate witnesses. This has prompted discussions about the stricter bail conditions and safeguards to prevent such abuse.

To address these concerns, the government had to bring in changes to the Indian legal system. In 2005, the Code of Criminal Procedure<sup>7</sup> was amended to include guidelines for granting bail that take into account the nature of the offense, the likelihood that the accused will abscond, and the possibility of tampering with evidence. In addition, a number of judgments have emphasized the importance of expediting the processing of bail applications and easing the burden on prisoners awaiting trial.

## **BAIL VS PERSONAL LIBERTY**

The Indian justice system works in a manner that a preliminary investigation and filing of charges is done by the police and on prima facie charges and evidences an arrest is done. After this the trial of charges is done by the court and arguments from both the sides (Prosecution and defense) are presented and then a statement of acquittal or conviction is made by the court of law. However due to Indian judiciary been overburdened with nearly 6.72 lakh cases pending in

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<sup>6</sup>MadhurimaDhanuka, Undertrial Prisoners And The Criminal Justice System, <https://www.humanrightsinitiative.org/download/1457162682Undertrial%20Prisoners%20and%20the%20Criminal%20Justice%20System.pdf>>accessed 29 June 2023

<sup>7</sup> The Criminal Procedure Code (Amendment) Act, No. 25, Acts of Parliament 2005.



various district and subordinate courts the trial stage takes over years to conclude.<sup>8</sup> During the pendency of trial, the personal liberty of an individual is compromised since the arrested person is still an accused and not a convicted individual.

There are various aspects of granting bail. The court of law should reasonably have no doubt that the person who is granted bail will hamper the proceeding of the court, tamper evidences or abscond and should make sure that the social order and personal liberty of other individuals are not compromised with.

❖ Supreme Court on matters of bail

Supreme Courts recently stated “Bail orders should not be too long or too late as both violate personal liberty”. The Supreme court asked the center to implement a new legislation to simplify and streamline the bail application, the Supreme court underscored that the investigating agencies have been lately exhibiting a mindset which leans more towards curtailment of personal liberty and in a democracy such a perception is unacceptable.

A bench comprising of SK Kaul and MM Sundresh also observed that jails in India are flooded with undertrial prisoners while conviction rates remain at abysmal low. The bench further added that social circumstances of such undertrial prisoners is of illiterate and poor often alien to their right of personal liberty.

Referring to the bail laws in countries the bench emphasized that there is a pressing need for the center to enact a law pointing out that the court of criminal procedure exists today is a continuation of pre-independence legislations with some modifications underlining that bail is the rule and jail is an exception. The bench also asked courts to calm down heavily on police officers affecting arrest without due compliance of Section 41 and 41A of CrPc.

The court noted that despite its directions in 2014 judgement of **Arnesh Kumar Vs State of Bihar (2014)** no concrete steps have been taken to compel with the mandate of Section 41 of CrPc and according to the order the State governments and the Union Territories to facilitate the

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<sup>8</sup> “National Judicial Data Grid (NJDG)”[https://economictimes.indiatimes.com/news/india/nearly-6-721-cases-pending-in-district-subordinate-courts-for-over-20-years-kiren-rijju/articleshow/97583641.cms?utm\\_source=contentofinterest&utm\\_medium=text&utm\\_campaign=cppst](https://economictimes.indiatimes.com/news/india/nearly-6-721-cases-pending-in-district-subordinate-courts-for-over-20-years-kiren-rijju/articleshow/97583641.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

standing order for the procedure to be followed under section 41 and 41A of CrPc. The courts underscored that **Section 41 and 41A of CrPc are facets of personal liberty** under Article 21 of the Constitution and that any non-compliance with these provisions would entitle the accused for grant to bail.

The Supreme court also said that a separate bail application need not be insisted upon while considering the application under Section 88, 170, 204, 209 of CrPc.

- ❖ Section 88- deals with the power to take bond for appearance
- ❖ Section 170- deals with the cases to be sent to magistrate when evidence is sufficient
- ❖ Section 204, 209 – deals with issue of process and commitment of case to court of session when offence is tribal exclusively by it.

The Supreme court in its judgement ordered the bail application ought to be disposed of within a period of 2 weeks and anticipatory bail application are expected to be disposed of within a period of 6 weeks.<sup>9</sup> Therefore, it is seen that grant of bail of highly depends upon the magnitude of the case and nature of offence and most importantly upon the discretion of the court of law.

## CONCLUSION

Article 21 of the Indian Constitution enshrined the fundamental right to personal liberty, denying bail without adequate grounds can confine this established constitutional right. In *Satender Kumar Antil Vs Central Bureau of Investigation (CBI), 2022* it was held by the Supreme Court that bail is granted as a norm while rejection is an exception<sup>10</sup>. Bail should be the norm, and denial of bail should only be used in exceptional circumstances to achieve a legitimate goal, such as preventing the accused from tampering with evidence, coercing the witnesses or fleeing from justice. In order to prevent excessive restrictions on individual liberty, it is essential for the courts to strike a balance between the needs of society and the interests of the accused. The protection of individuals' fundamental rights and the integrity of the criminal justice system can both be maintained by adhering to the principles established by the courts

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<sup>9</sup> In *Siddharth Vs State of Uttar Pradesh*

<sup>10</sup> *Satendra Kumar Antil Vs Central Bureau of Investigation (CBI) SCC 773*

over the time.



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