A balance of ABSOLUTE and LIMITED judicial discretion!

BAIL OR JAIL

'an absolute judicial discretion in bail matter corrupts justice absolutely'

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Introduction: Conceptual Framework of Bail

> "*Bail not Jail, A bail system where the poor cannot afford justice/freedom is unjust*."
>
> ***—Amnesty International India***

Bail is the temporary release of a person awaiting trial for an offence or crime committed. This simple decision—to detain or release a defendant—is made all over the India in courtrooms every day. It is a decision that often takes less than five minutes, does not require evidence, and usually only involves one lawyer and a judge. But what happens during those five minutes tells a significant story about criminal justice in India.

The story of bail is one that most heavily impacts underprivileged and poor individuals.

The Court has to see from material available whether a prima facie case has been made out and whether it is possible to believe that the Applicant/Petitioner must have committed an offence as alleged[4].

1.1 Meaning and Definition of Bail

Webster's Dictionary[5] defines 'Bail' as a security wherein, "Bail is a security given for due appearance of prisoner in order to obtain this release from

imprisonment; a temporary release of a prisoner upon security; one who provides bail".

Wharton's Law Lexicon defines bail in the following manner: "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, because the person arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required in order that he may be safely protected from prison to which if they have, if they fear his escape, etc, the legal power to deliver him".

Stroud's Judicial Dictionary[6] defined "bail" as "Bail is when a man is taken or arrested for felony, suspicion of felony, indicated of felony or any such case, so that he is restrained of his liberty. And being by law bailable offereth surety to those which have authority to bail him, which sureties are bound for him to the king's use in a certain sum of money, or body for body, that he shall appear before the justice of Gaole delivery at the next sessions, etc."

In ***Concise Oxford Dictionary*** and ***Chamber's 20th Century Dictionary***, the meaning of the world "bail" has been explained as a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free.

Etymologically the world "bail" has been derived from the French old verb "bail" or having meaning of "to deliver" or "to give". Another view is that the world is derived from the Latin term "Bajalure" which means, to bear "burden".

'Corpus Juris Secundum' defines bail as a means to deliver an arrested person to his sureties, on their giving security for his appearance at the time and place designated, to submit to the jurisdiction and judgment of the court.

Halsbury's Laws of England defined it—"Bail in criminal proceedings" means bail granted in or in connection with proceedings for an offence to a person accused or convicted of the offence.

The word "bail" has, nowhere, been defined in Code of Criminal Procedure. The old and the new Code have defined the expression "bailable" and "non-bailable offences" in section 4 (1)(b) and section 2 (a) respectively Bailable offence has been defined to mean an offence which is made bailable by any law for the time being in force; and the expression "non-bailable" to mean any offence other than

bailable.

Hon'ble Mr. Justice M.R. Malick, in his book "Bail" has deducted the meaning of Bail as a technique evolved for effecting a synthesis of two basic concepts of human values, namely, the right of an accused to enjoy his personal freedom and the public interest on which a person's release in conditioned on the surety to produce the accused person in court to stand the trial.

Crimes are investigated by the police and during the investigation the police interact with the Magistrates who preside over the courts at the gross root levels at the District or Sub-Division or Taluka etc. The scheme of ***the Code of Criminal Procedure, 1973*** (herein after referred as Cr.P.C.) is designed to see that during the course of investigation and before the commencement of the trial, rights of the accused are protected regarding bail. The Magistrates do not interfere with the investigation and at the same time they closely supervise the investigation and zimni reports of the investigation police officer. The Magistrate keep vigilance and supervision at all the stages of the investigation through pursuing zimni or case diary of the investigation officer, but he does not ordinarily interfere with the investigation powers of the police. Magistrate also performs the duties which ensure the fairness in the investigation and collection of the evidence by the police. Magistrate has the power to order the investigation and in certain circumstances he can order the stopping of investigation. In this dissertation of bail rights and its laws related thereto which the magistrate or superior courts empowered who undertakes before and after commencement of a trial are discussed. The role of the Magistrate in the process before and after commencement of trial of a criminal case is pivotal and the role of the magistrate and courts in safeguarding the rights of the accused relating to stages of bail, remand and custody accrued as a matter of right or discretion (absolute or relative) before, during and after completion of trial, are discussed elaborately in this dissertation.

Police commence investigation after registration of the First Information Report (hereinafter referred to as *the FIR*) under section 154 of the Code of Criminal Procedure, 1973 (hereinafter referred to as *the Cr.P.C.*) in case of cognizable offences (defined under 2(c) Cr.P.C.) and after receiving an order for investigation from the Magistrate having jurisdiction to try or commit the case under section 155(2) of the Cr.P.C., in case of non-cognizable offences (defined under 2(l) Cr.P.C.). After completion of the investigation, the officer in charge of

the police station (SHO, SI, ASI, HC) files a Final Report or Challan before the court under section 173(2) of the Cr.P.C., which in known as charge sheet/challan in common parlance. Though in the light of the scheme of the Cr.P.C., framing of charges or the process of discharge is considered as part of trial in practice, commencement of recording of the evidence of prosecution witnesses is considered to be the starting point of trial. If the Magistrate having jurisdiction is empowered to try the offence, he will commence the trial and if the offence is exclusively triable by the Court of Session Magistrate commits the case to the Court of Session under section 209 of the Cr.P.C., Till the commencement of the trial or commitment of the case to the Court of Session, the Magistrate acts as supervisor of the investigation. The Cr.P.C., provides for independence of the police officers in the process of the investigation of the offences and non-interference of the judiciary in the investigation process. At the same time to sustain the fairness in the investigation by the police and protect the rights of the accused, Judicial Magistrates are vested with certain powers.

Bail is an important aspect of pre-trial process of the Magistrate. All the persons who are arrested in bailable cases are to be released on bail with or without sureties as per the discretion of the court. Section 436 of the Cr.P.C., mentions that persons other than those persons accused of a non-bailable offences arrested or detained without warrant by an officer in charge of a police station or before police to surrender is brought before a jurisdictional or illaqua or territorial Magistrate and is prepared to give bail, such person shall be released on bail, either by the police officer who detained him or by the Magistrate before whom he is produced or appeared. It is important to notice that the section provides for release on bail of the persons who are arrested in cases other than non-bailable offences. Thus if a person is arrested without any offence being committed by him, then also the Magistrate can release the person with or without sureties. In such circumstances the court can release him by a special order under section 59 of the Cr.P.C. also. The court or police officer can insist security for his appearance or can release him on executing a bond. Prior to 2006, once surety is insisted by the court by an order, and the accused is not able to furnish the surety, the court had no option to review it’s order. By an amendment to Cr.P.C. in the year 2005 a provision was added to section 436 of the Cr.P.C. to save the situation. If a person who was granted bail under section 436 of the Cr.P.C. on condition of furnishing the surety fails to furnish such surety within a week from the date of arrest, he shall be considered as an indigent person and shall be

released on executing bond. This provision was added with an object that by reason of poverty, no person shall be deprived of his liberty.

Section 437 of the Cr.P.C., controls the grant of bail to the arrested persons accused of non-bailable offences, by the Magistrates. The powers of the Magistrate to release a person accused of non-bailable offence are limited by section 437 of the Cr.P.C. The Magistrate shall not order release of a person if there are reasonable grounds to believe that he has committed an offence punishable with death or imprisonment for life.

The Court before granting bail to the persons accused of non-bailable offences, offences punishable with death, imprisonment for life or imprisonment for seven years or more, has to give notice to the public prosecutor and hear his objections.

The Sessions Court or High Court can grant bail to the accused under section 439 of the Cr.P.C. A direction to grant bail immediately after arrest which is known as anticipatory bail can be given under 438 of the Cr.P.C.

Under section 167(5) Cr.P.C., if the investigation in cases triable by the Magistrate could not be completed within 60 days and investigation in cases exclusively triable by the Session Court could not be completed within 90 days the court has to release the accused on bail. This is known as Statutory or Default Bail. It is based on the policy that if enough material could not be collected by the investigating agency within the time limit, the arrested person shall not suffer. The discretion to grant or refuse bail is an important pre-trial judicial function. First Schedule annexed to the Cr.P.C. contains the information as to whether an offence is bailable or non-bailable.

The Code of Criminal Procedure, 1973 (Cr.P.C., 1973) is designed or drafted in a manner to ensure the protection of rights of the accused to the fullest possible extent, but at the same time, it has to be stringent enough to secure the ultimate goal of substantial justice. The best procedural law has checks and balances in its every step of the proceeding. Arresting a person brings humiliation, curtails freedom and casts scar forever therefore, the procedure involved in the arrest of the person should be of the nature to minimize fake arrests or based on false information. Law Commissions and the Supreme Court in a large number of Reports, Directions, Guidelines, Orders, Judgment emphasized the need to maintain a balance between individual liberty and societal order while exercising the power of arrest. Police officers make an arrest as they believe that they

possess the power to do so.

The Supreme Court in ***Arnesh Kumar vs State of Bihar & Anr's case***[7] said that no arrest should be made only because the offense is non-bailable and cognizable and therefore, lawful for the police officers to do so, this judgment not only dealt with the cases filed under Sec. 498-A IPC, 1860 but for all cases where the offence is punishable with imprisonment which may be less than seven years or may extend to seven years and issued strict guidelines to Police and Magistrates that non-compliance will attract disciplinary and contempt proceedings against the erring officials. The existence of the power to arrest is one thing, the justification for the exercise of it is quite another. Apart from power to arrest, the police officers must be able to justify the reasons thereof. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent and wise for a police officer that no arrest is made without a reasonable satisfaction reached after some investigation as to the genuineness of the allegation. An accused arrested without warrant by the police has the constitutional right under Article 22(2) of the Constitution of India, 1950 and Section 57, Cr.P.C., to be produced before the Magistrate without unnecessary delay and in no circumstances beyond 24 hours excluding the time necessary for the journey. During the course of investigation of a case, an accused can be kept in detention beyond a period of 24 hours only when it is authorised by the Magistrate in exercise of power under Section 167 Cr.P.C.

The crucial object of granting or denying bail is to ensure appearance of an accused alleged to have committed an offence bailable or non-bailable at the time of trial and to ensure that if in case alleged accused is convicted and held guilty then convicted accused is available to receive the sentenced.

The question of the constitutionality of absolute or relative discretion has acquired new significance because of liberal judicial interpretation of fundamental rights guaranteed by article 14, 19, 21 & 22 of the constitution to ensure that if the presence of accused before the court of law could reasonably be ensured without captivating him, it would be unjust and unfair to deprive the accused of his liberty during the pendency of the criminal proceeding against him. The release on bail is very important to an accused because the consequence of only pre-trial detention are itself very critical as accused will be subjected to the psychological and physical deprivation of jail life, the accused

will lose his/her job, prevents him from effectively contributing to the preparation of his defence and most importantly the burden of detention frequently falls heavily on the innocent members of his family.

As a result of this a number of fundamental rights to have speedy trial and other human rights have been recognized. The doctrine of Deprivation of personal liberty without ensuring speedy trial is not consistent with Article 21 propounded in ***Hussain and Anr. Vs. Union of India***[8] and timely delivery of justice is a part of human rights since, denial of speedy justice is a threat to public confidence in the administration of justice therefore, consequence of only pre-trial detention are itself very critical as stated in ***Moti Ram vs. State of Madhya Pradesh***[9] accused will be subjected to the psychological and physical deprivation. Krishna Iyer, J. in ***Babu Singh vs. State of Punjab***[10] correlated bail with Article 21 of Constitution of India, 1950 while doing so hon'ble justice stated that personal liberty is deprived when bail is refused, further he added due to bail falling under the ambit of Article 21, the power to negate it must be exercised not casually but judicially with lively concern for the cost to the individual and the community. If in case a person is accused of a serious crime and is likely to be sentenced guilty for such a crime or he is likely to abscond or is likely to put obstruction in having a fair trial either by contemplating evidence or tampering prosecution witness it would be improper to release such person on bail.

But on the other hand, it would be equally unjust to deny the bail of such accused where no such reason exist, it has been exactly pointed out in the case ***Supt. & Remembrance of Legal Affairs v. Amiya Kumar Roy Choudhury***[11] that law of bail has two conflicting demands *firstly*, the requirement of the society for being shielded from the hazards of being exposed to the misadventures of a person alleged to have committed a crime, and *secondly*, the fundamental cannon of criminal jurisprudence, viz. the presumption of innocence of an accused till he is found guilty.

What is Bail?

"Bail in criminal proceedings"[12] means bail which may be granted— (a) in or in connection with proceedings for an offence, to a person charged with or convicted of the offence; (b) in connection with an offence, to a person who is

under arrest for the offence or for whose arrest a warrant (endorsed for bail) has been issued; The concept of bail denotes a form of pre-trial release or removal of restrictive and punitive consequences of pre-trial detention of an accused.

Bail, a vital aspect of every criminal justice system, is a mechanism, which should seek to strike a balance between these competing demands. While presence of an accused person for trial must be ensured and any threat to the administration of justice and just social order warded off, he should not be disabled to continue with his life activities. Custodial remands are also financially burdensome for the State, both in terms of the detention places, which have to be provided, and because the constant escorting of the accused to and fro from court eats into the resources of the prison staff. Further, detention in jail may have a deleterious effect on pretrial detainees because of the possibility of their developing delinquent tendencies.

Law of bail is one of the important braches of the legal regime, which governs the criminal justice system of any country.

1.2 Significance of the Study

"Bail or Jail" constitutes an enigmatic question in the judicial decision-making process, of everyday occurrence and importance. The question of bail-jail alternatives needs to be answered at the stages of arrest, investigation inquiry and trail and also at the stage of appeal after conviction of the accused. The jurisprudence of bail should equilibrate the 'freedom of person' and the 'interests of social order'.

The 'golden principle' of presumption of innocence is of central importance, governing all stages of the criminal process until a verdict of guilty is reached. The law of bail has to be compatible with the principle of presumption of innocence. Any person held in custody pending trial suffers the same restrictions on his liberty as one serving a sentence of imprisonment after conviction. By keeping accused persons out of custody until tried convicted and sentenced, bail should protect against the negation or dilution of the presumption of innocence.

The quality of bail hearing by courts must improve in that full information about the accused's background should be taken into consideration, besides what the police submit. Schemes should be developed to has certain and verify the

relevant information Courts must think more deeply and give reasons while refusing an application for grant of bail for the cost of pretrial detention is very high. Greater care must be taken in dealing with matters concerning bail. Bail should be treated a basic human and not refused mechanically. If need be, conditions of hail may be stringent, but its refusal must rare. Pretrial detainees may not be punished, but pretrial detention itself, unless justified by overwhelming necessity cannot realistically be viewed as other than a form of punishment. Precious human rights of under trail prisoners should not be held hostage to inadequacies of our legal system and various kinds of delays in our criminal justice administration system. Fleeing justice has to be forbidden and escape can be considered a separate crime, but denial of bail should neither be punitive nor 'preventive detention incomplete through, it becomes difficult to rationalize the exercise of discretion one way or the other in a particular case.

Personal liberty is deprived when bail is refused, is too precious a value of our Constitutional system recognized under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental one, suffering lawful eclipse which is possible only, in terms of "procedure established by law." So deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations, relevant to welfare objectives of society, specified in the Constitution. Reasonableness postulates intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for bifocal interests of justice to the individual involved and society affected.

History of Bail System in India

It all dates back to 399 BC, to the days of great Socrates and Plato. Those where the times when Plato tried to create bond with the church, to release the accused Socrates, to the time of history of Great Britain where due to circuit courts structural system accused has to wait for months for their trial in unhygienic and unhealthy conditions. Due to which different disease were also creating havoc in the country resulting which government was compelled to release the accused persons by securing surety which was forfeited in case of non-availability.

In ancient period and that too in uncivilized society one can hardly conceive the system of bail while in the civilized society it has become the rule and the criminal justice was so quick and crime rate was so low that the criminal trial got concluded in a day or two. That is why the provision of bail was unknown to the society. With the passage of time the criminal trials got delayed day by day and a basic principle of law developed that one cannot be convicted unless the guilt of person is not proved. On the basis of the principle it was deemed unjust to keep a person behind the bar on the basis of an assumption that his guilt is likely to be proved after the conclusion of a trial. The concept of bail emerged to save a person from the police custody which may be for a longer period because the justice delayed has become the normal phenomenon of our criminal justice.

1.3 Aims and Objectives of the Study of Bail Laws

The main object of bail is to remove the restrictive and punitive consequences of pretrial detention of the accused which is made by delivering the accused to the custody of a third party(s) i.e. surety by way of furnishing of surety bonds or to one's own self by ray of execution of personal bond only.

The institution of bail has been made to keep the accused available to answer the charge and in order to perform this function, the institution of bail has been made to deliver the accused to safe custody in aforesaid manner, but in all cases accused is assured of beneficial enjoyment of freedom in regulated manner.

Like any other Constitution of a civilized country, Article 21 of our Constitution provides:-

> *"No person shall be deprived of his life or personal liberty except according to procedure established by law"*. So what if in millions of cases, people are routinely being deprived of their personal liberty with *"no bail but jail"* in the absence of expedited trials and years after KRISHNA IYER, J., having raised the questions of *"Bail or Jail?"* in his oft-quoted words!

Article of 22 of Constitution of India provides[13]:-

1. *"No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall be denied the right to consult, and to be defended by, a legal*

practitioner of his choice.

2. *Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.*
3. *Nothing in clauses (1) and (2) shall apply:-*
   - *(a) To any person who for the time being is an enemy alien or*
   - *(b) To any person who is arrested or detained under any law providing for preventive detention."*

To concept of bail in England may be traced back to the system of frank pledges adopted in England following Norman Conquest where the community as a whole was required to pledge its property as a security for the appearance of the accused at the trial. The concept of community's liability was later on replaced by the system of third person responsibility and there still remained the capacity of the accused to remain free till the conclusion of trial by furnishing security.

Thus, under the Common Law of England, the system of interim release pending trial was prevalent, and the sureties had to be bound to produce the accused to face the trial on his failure to appear or to face the trial in his place. It was subsequently replaced by the issue of forfeiture of bond and surety and imposition of penalty upon the surety for failure to bring the accused to trial on the appointed date.

With the advent of **British Rule in India**, the common Law Rule of Bail was introduced in India as well and got statute recognition in Codes of Criminal Procedure, 1861, 1872 and 1898.

The system of bail was also in use to some extent in the ancient period in India and to avoid pre-trial detention, Kautilva's Arthasastra also advocated speedy criminal trial. The bail system was also prevalent in the form of **Muchalaka** i.e. personal bond and **Zamanat** i.e. bail in Mugal period.

After independence, the **Law Commission of India** in its **41st Report** on Code of Criminal Procedure, 1973 also recommended the system of bail in the light of personal liberty guaranteed in the Constitution and recognized the bail as a

matter of right if the offence is bailable and matter of discretion if the offence is non-bailable, denial of power to Magistrate to grant bail if the offence is punishable with life imprisonment, death and conferring wide discretionary power on High Court and Sessions Judge to grant in such cases.

1.4 Absolute Discretion on BAIL or JAIL: An Oppressive Tool in the hands of Courts

The directions, guidelines in the form of judicial orders issued by the Hon'ble Supreme Court in matters of Bails related rights *have not been yet ensured and delivered on ground level* in Bailable as well as Non-Bailable Offences providing Real Freedom to the accused, *there is need to revisit* the guidelines and directions *to ensure* better freedom *with respect to* fundamental rights enshrined in the Constitution of India, 1950 under Art.14, 19, 21, 22 *which pay a way to bring a Law in the form of an Act of the Parliament* to deal exclusively with the ***clouding circumstances related to the rights and interest of the people who are arraigned as an accused in legitimate as well as illegitimate criminal offences wherein*** *at the hands of Police* when Police with or without conducting preliminary enquiry or investigation against the persons *who become victim of a criminal offence when* they are arraigned as an accused party and remain in Police or Judicial Custody for time till **either** *investigation is completed and Final Report U/s-173(2) Cr.P.C., 1973 is submitted in the Court* **or till** *the 15 days of base time of custody enshrined U/s-309(2) Cr.P.C., 1973 is completed* **as a matter of formal procedure being followed in Trial Courts today before granting Bail even in legitimate cases** just to **rule out certain obligations or favour** which **may or may not be a matter of Judicial Discretion.**

An Oppressive Act or Provision of Law Persecute and Harass Absolutely

In history, "The Anarchical and Revolutionary Crimes Act of 1919", popularly known as **the Rowlatt Act or Black Act**, was a legislative act passed by the Imperial Legislative Council in Delhi on 10 March 1919, indefinitely extending the emergency measures of preventive indefinite detention, incarceration without trial and judicial review enacted in the Defence of India Act 1915 during the First World War. It was enacted in light of a perceived threat from revolutionary nationalists to organisations of re-engaging in similar conspiracies as during the

war which the Government felt the lapse of the DIRA regulations would enable. Passed on the recommendations of the Rowlatt Committee and named after its president, British judge Sir Sidney Rowlatt, this act effectively authorized the government to imprison any person suspected of terrorism living in British India for up to two years without a trial, and gave the imperial authorities power to deal with all revolutionary activities. The unpopular legislation provided for stricter control of the press, arrests without warrant, indefinite detention without trial, and juryless in camera trials for proscribed political acts. The accused were denied the right to know the accusers and the evidence used in the trial.

This black act effective from March, 1919 led to the infamous **"Jallianwala Bagh Massacre of 13.04.1919".**

Accepting the report of the Repressive Laws Committee, the Government of India **repealed** the Rowlatt Act, the Press Act, and twenty-two other laws in March 1922.

The purpose of this empirical research to find our ABSOLUTE OR LIMITED DISCRETION in matters related to BAIL is to study different statutes, books, cases, articles, reports, web, orders of courts etc. and uncover different studies and development in this field **which address** discretion as an ***absolute or relative or limited*** domain of Judiciary.