

**LIBERTY AT STAKE: ASSESSING THE IMPERATIVE OF BAIL REFORMS IN  
INDIA'S CRIMINAL JUSTICE SYSTEM**

**A**

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*By*

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## DECLARATION

I, **Tarun Chhapola**, do hereby declare that this dissertation titled “***LIBERTY AT STAKE: ASSESSING THE IMPERATIVE OF BAIL REFORMS IN INDIA’S CRIMINAL JUSTICE SYSTEM***” is the outcome of bona fide research undertaken by me in partial fulfilment of the Degree of Master of Laws (LL.M.) for the academic year 2023-2024, at the National Law School of India University, (NLSIU), Bangalore, under the guidance and supervision of **Ms. Radhika Chitkara (Assistant Professor of Law)**.

I declare that this dissertation is my own original work of mine and all sources used have been properly acknowledged and cited. I further declare that I have not used any generative artificial intelligence (AI) and AI- assisted technologies in the writing process.

I also declare that this work has not been submitted either in part or in whole for any Degree or Diploma at any other university.

Date: 30<sup>th</sup> April 2024

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## CERTIFICATE

This is to certify that this dissertation titled “*LIBERTY AT STAKE: ASSESSING THE IMPERATIVE OF BAIL REFORMS IN INDIA’S CRIMINAL JUSTICE SYSTEM*”, submitted by **Tarun Chhapola, (M23091)** at the National Law School of India University, Bangalore, in partial fulfilment of the Degree of Master of Laws (LL.M.) for the academic year 2023-2024, was undertaken under my supervision.

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## CHAPTER 1 - INTRODUCTION

*“The issue of Bail or Jail 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 process.”<sup>1</sup>*

The notion of bail can be perplexing in the criminal justice system. It is like a mystery in India’s legal system sometimes it is rigid to understand whether someone will get bail or not. The rubrics about bail in the Code of Criminal Procedure are intricate and not easy to comprehend. From time to time, the Supreme Court of India pronounces that bail should be the norm, and going to jail should be exceptional, except in cases where there is a circumstance someone might run away from facing justice.<sup>2</sup> Article 21 of the Constitution of India holds immense significance<sup>3</sup> and often considered as the cornerstone of Indian constitutional values and the rule of law.<sup>4</sup> Refusing bail without valid grounds would violate the individual’s “personal liberty” safeguarded under Article 21,<sup>5</sup> resulting in a miscarriage of justice, which is only permissible through the procedure established by law,<sup>6</sup> by this means assuring to each person the fundamental right of life and personal liberty comprising an accused person. In *State of Rajasthan v. Balchand@Baliay*<sup>7</sup>, Justice V.R. Krishna Iyer held that, “*the basic rule may be concise to put bail and not jail*”, in this judgment, various rights guaranteed to the accused by the Constitution were supported, paramount consideration to Article 21. Additionally, incarceration not only deprives the accused of personal liberty but also levies significant psychological and physical sufferings which impacting not only the accused but also their innocent family members.<sup>8</sup> The jurisprudence surrounding bail has experienced noteworthy transformations influenced by the enactment of Constitution of India and the development of the Criminal Justice System. *As per the data provided in the Prison Statistics India (PSI) - 2020, a report by the National Crime Record Bureau (NCRB), India houses a total of 1,306 prisons.<sup>9</sup> Within this context, it is perceived that a major portion of*

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<sup>1</sup> Gudikanti Narasimhulu And Ors v. Public Prosecutor, High Court Of Andhra Pradesh, [1978] 2 SCR 371

<sup>2</sup> State of Rajasthan v. Balchand @Baliay, [1978] 1 SCR 535

<sup>3</sup> Constitution of India, 1950, Art 21

<sup>4</sup> I.R. Coelho v. State of T.N., [2007] AIR SC 861

<sup>5</sup> Babu Singh v. State of U.P. [1978] 2 SCR 777; Akhtari Bai v. State of M.P., [2001] AIR SC 1528, wherein the Supreme Court determined that extended delays in the disposal of trials grant the accused a legitimate right to seek bail.

<sup>6</sup> *Ibid*

<sup>7</sup> *Supra* note 2

<sup>8</sup> Moti Ram v. State of M.P [1978] 4 SCC 47

<sup>9</sup> 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>

*the prison residents comprises under-trial prisoners accounting for two-thirds of the total.*<sup>10</sup> These statistics serve as a stark replication of the administration of justice within India's criminal justice framework.

In the legal framework of India, offences are classified into two primary types: Bailable and Non-Bailable<sup>11</sup>, subject to the right of the accused to bail. In cases classified as bailable offenses, the accused possesses an inherent legal and constitutional right to bail, ensuring automatic eligibility.<sup>12</sup> On the other hand, in instances categorized as non-bailable offenses the decision to granting bail lies within the discretionary authority of court affording it the scope to decide if bail ought to be granted.<sup>13</sup> Although granting bail in non-bailable offenses, the court considers various factors including but not limited to:

- A. The gravity and severity of the crimes;
- B. The quality and strength of the evidence presented;
- C. Specific circumstances relevant to the accused;
- D. The likelihood that the accused may not appear for trial; and
- E. Concerns about potential witness tampering.<sup>14</sup>

Bail has conventionally assisted the dual purpose of guaranteeing accused appearance at trial and safeguarding the impartiality of the proceedings by mitigating the risk of the defendant absconding.<sup>15</sup> Over the years, the Supreme Court and various High Courts have issued several decisions concerning bail<sup>16</sup>, therefore contributing significantly to the evolving corpus of bail jurisprudence in the country. In India, the verdict to grant bail mainly hinges upon aspects which discussed by court many times.

Hon'ble Supreme Court, in the very celebrated case of *Satender Kumar Antil v. Central Bureau of Investigation*<sup>17</sup> present a comprehensive scrutiny of bail provisions, taking into account the principles protected in Article 21 of the Indian Constitution. Furthermore, it categorized offenses into four different classes:

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<sup>10</sup> *Ibid*

<sup>11</sup> Section 2(a) of Code of Criminal Procedure, 1973

<sup>12</sup> Section 436 of Code of Criminal Procedure, 1973

<sup>13</sup> Section 437 of Code of Criminal Procedure, 1973

<sup>14</sup> Jayendra Saraswathi Swamigal v. State of Tamil Nadu, [2005] AIR SC 716

<sup>15</sup> *Law Commission of India*, "Amendment to Criminal Procedure Code, 1973 Provisions Relating to Bail", Report No. 268 of Law Commission of India, Government of India, 1, (2017), <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081637-1.pdf>

<sup>16</sup> In Re Policy Strategy for Grant Bail SMWP (CRIMINAL) NO.4/2021

<sup>17</sup> *Satender Kumar Antil v. Central Bureau of Investigation*, Special Leave Petition (Crl.) No.5191 of 2021

- **CATEGORY (A)** – (offenses carrying a maximum imprisonment term of 7 years or less)
- **CATEGORY (B)** – (offenses carrying penalties of death, life imprisonment, or more than 7 years)
- **CATEGORY (C)** – (offenses covered by specialized laws with strict bail provisions such as PMLA (S. 45), NDPS (S.37))
- **CATEGORY (D)** – (economic offenses not addressed by specialized statutes)

Court established procedures to regulate the type of bail appropriate for each individual within these above mentioned categories. The Supreme Court has directed the introduction of a new legislation to streamline the bail process countrywide emphasizing the critical/pressing need to reform bail laws in a country where under trial prisoners suffer in jails for long periods due to delays in the justice delivering system.<sup>18</sup> This is chiefly due to the fact that these provisions have provided plenty space for analysis by the authorities which resulting not only in an erratic handling of bail applications but also impacting their timely implementation of same.<sup>19</sup>

The Supreme Court's urged for new bail legislation akin to that in force in the United Kingdom.<sup>20</sup> The 268<sup>th</sup> Law Commission report<sup>21</sup> highlights the issues affecting the bail system in India mentioning delays, inadequacies, and irregularities. The report recommended several revisions to the bail system to enhance comprehensiveness, efficiency for detainees, and procedural fairness, while also ensuring that bail is not denied except in the most exceptional circumstances outlined by courts in various verdicts.<sup>22</sup> If we examine the necessity for bail reforms in a country like India to ensure the effective working of the justice delivery system, a noteworthy occasion arises from the COVID-19 Pandemic. This state highlights the overcrowding of under trial and other prisoners in jails. In response, the Supreme Court through suo-moto cognizance, directed all states to look at the release of under trial prisoners who have served more than half of their maximum sentence or are charged with offenses carrying a punishment of up to 7 years or less, with or without a fine, and have been convicted for a shorter duration than the maximum.<sup>23</sup> This instruction was issued acknowledging that numerous pre-trial convicts are held needlessly in congested jails

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<sup>18</sup> *Ibid*

<sup>19</sup> *Ibid*

<sup>20</sup> The Bail Act, 1976

<sup>21</sup> *Supra* note 15

<sup>22</sup> Sanjay Chandra v. CBI, [2012] AIR SC 830

<sup>23</sup> IN RE: CONTAGION OF COVID 19 VIRUS IN PRISONS, SMWP (C) NO. 1/2020



posing a serious danger to their health and safety which is their basic fundamental right enshrined under constitution of India.

## 1.1 REVIEW OF LITERATURE

**Rohan Joachim Alva**<sup>24</sup>, This article gives a detailed analysis of the difficulties that poor people who are accused of crimes confront, especially with regard to bail. The author draws attention to how the poor are disproportionately affected by the bail system, which frequently calls for the posting of surety or personal bonds. The article criticizes the courts' insistence on using the "prima facie test" to determine bail, which frequently ignores the limited resources and legal counsel that impoverished defendants have access to. The author contends that when bail judgments are made based more on the seriousness of the allegations than on the presumption of innocence is compromised. The article also addresses rulings by the Supreme Court that acknowledge the unfairness that the impoverished experience when trying to secure bail, such as the *Hussainara Khatoon case*<sup>25</sup>.

**Vrinda Bhandari**<sup>26</sup>, This article focuses at India's laws governing bail and pre-trial imprisonment. *Pappu Yadav v. Central Bureau of Investigation*<sup>27</sup> and *Sanjay Chandra v. Central Bureau of Investigation* are two significant Supreme Court rulings that will be examined. The author makes the case that the presumption of innocence, a keystone of criminal law, is weakened by the court's uneven interpretation of the bail statute. While the author compares the Court's recent rulings—especially in Pappu Yadav, where the Court gave the seriousness of the allegations precedence over the presumption of innocence and resulted in unwarranted pre-trial detention with its previous "bail, not jail" approach.

**Megan Stevenson and Sandra G. Mayson**<sup>28</sup>, The article provides a thorough analysis of pre-trial reform in the US, highlighting the drawbacks of high rates of pre-trial imprisonment and monetary bail. The authors argue for a change to risk-based evaluations and criticize the existing system's dependence on wealth-based bail judgments.

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<sup>24</sup> Rohan Joachim Alva, 'Between Poverty and a Hard Place in Prison: Bail and the Suffering Indigent' (2012) 1 Nat'l LU Delhi Stud LJ 124

<sup>25</sup> Hussainara Khatoon & Ors v. Home Secretary, State Of Bihar, [1979] 3 SCR 532

<sup>26</sup> Vrinda Bhandari, 'Inconsistent and Unclear: The Supreme Court of India on Bail' (2013) 6 NUJS L Rev 549

<sup>27</sup> Rajesh Ranjan Yadav @ Pappu Yadav v. Cbi Through Its Director, [2007] 1 SCC 70

<sup>28</sup> Megan Stevenson and Sandra G. Mayson, "Bail Reform: New Directions for Pretrial Detention and Release" (2017), Penn Law, 1745.

**S.D. Balsara**<sup>29</sup>, This essay argues for a more liberal bail policy in India to decrease pre-trial detention. The Supreme Court ruled that absent certain conditions, bail should be preferred over incarceration.<sup>30</sup> The author addresses this claim. To reduce pre-trial detention and speed up trials, the Criminal Procedure Code was created in 1973. This article looks at some of its most important sections. The author highlights how critical it is to prevent pre-trial imprisonment because it infringes the accused's presumption of innocence and disproportionately affects the poor and accused.

## **1.2 RESEARCH METHODOLOGY**

A mixed-method approach will be utilized for the present research, combining quantitative and qualitative data from both governmental and non-governmental sources. Data will be gathered from mainly *primary sources* such as Acts, Judicial Precedents, report of various committees and commissions. Also, *Secondary sources* such as textbooks, Statutes reference books, journals and e-databases like, Manu Patra, JSTOR etc. The primary goal of this research is to examine India's current bail regulations, specifically the 1973 Code of Criminal Procedure. I will also look at significant decisions from India's High Courts and Supreme Court to identify any discrepancies with how bail is currently granted and to comprehend the reasoning behind bail verdicts while exercising judicial discretion.

## **1.3 RESEARCH QUESTION**

The dimension of the current research topic chosen by the researcher is extensive in nature. Hence, the present research underlines the main issue that is "what implication for judicial discretion in bail under CrPC, special and local laws". In view of the issue stated here, these questions arise for attention:

1. To what extent does the current legal framework effectively address contemporary bail provisions, and what are the prevailing criticisms of these provisions?
2. What procedural methods should the court adopt in bail cases and how is bail decisions formulated under the Code of Criminal Procedure (CRPC), special and local laws while exercising judicial discretion?

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<sup>29</sup> S.D. Balsara, "BAIL NOT JAIL-EMPTY THE PRISONS," (1980) 22 JILI 341.

<sup>30</sup> *Supra* note 2

## **1.4 HYPOTHESIS**

The primary presumption of the research is the notion that the Indian bail system possesses deficiencies that need to be fixed. To substantiate these assertions, the researcher has attempted to present systematic findings at each stage of the research. It is argued that an extensive bail statute is required, given the prevalent delays and irregularities lessening from the existing bail provisions with aiming to establish consistency in applications disposal period and impose necessary constraints on judicial discretion exercise by judges in different statutes.

## **1.5 RESEARCH OBJECTIVE**

The principal objective is to enhance understanding of the Indian bail system, with a particular focus on its statutory and procedural dimensions. Also, the goal is to identify valid problems with the bail system as it stands and offer workable solutions to these problems. Based on the issue at hand statement and existing research, the researcher noticed a knowledge gap and subsequently created the follow-up research goals: The examination comprehends the historical evolution, existing procedures, and potential implications of bail, highlighting the fundamental principles and global viewpoints. It explores into the Indian legal system's current bail procedures, identifying obstacles to enforcement and assessing judicial discretion's role. Also, it critically examines the Criminal Procedure Code's bail provisions from a human rights standpoint, stressing deficiencies and proposing reforms to enhance effectiveness and line up with equitable principles.

## **CHAPTER 2 - PRESENT LEGAL FRAMEWORK OF BAIL IN INDIA**

### **2.1 Evolutionary Development of Bail: A Historical Perspective –**

**Bail in England & America** – The theory of bail can be drawn back to ancient Rome.<sup>31</sup> Bail has a rich legal history encompassing both English and American law.<sup>32</sup> And England law and can be traced back around 1000 years ago. In medieval England, The custom emerged from the need to free inmates without a trial from filthy prisons as they expected the long-

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<sup>31</sup> Schnacke, T.R., Jones, M.R., 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.), <https://usali.org/evolution-of-pretrial-detention-law>

<sup>32</sup> Hegreness, M.J., "America's Fundamental and Vanishing Right to Bail," (2013) 55 Arizona Law Review 909 <https://arizonalawreview.org/americas-fundamental-and-vanishing-right-to-bail/>

awaited travelling justice proceedings.<sup>33</sup> The Anglo-Saxons established a legal process in which the confined accused was necessary to find a surety who would take responsibility for guaranteeing their presence at the time of trial.<sup>34</sup> In 1215, the first steps were taken to grant certain rights to people.<sup>35</sup> Though, due to prevalent corruption and abuse within the existing system, Parliament passed the *Statute of Westminster in 1275*<sup>36</sup>, which mainly limits the discretionary powers of sheriffs. In the starting of 17th century King Charles I<sup>37</sup> ordered local judges to detain five knights without charges which is contrary to the existing provisions of the Statute and Magna Carta. Parliament reacted to the King's actions by passing the Petition of Right in 1628.<sup>38</sup> In the year of 1679 the Parliament passed the Habeas Corpus Act of 1679 in reaction to procedural delays. The history of bail in the U.S. profoundly relied on the principles of English law including the *Bill of Rights*, *the Habeas Corpus Act*, and *the Petition of Rights*<sup>39</sup>. The 1960s marked the beginning of the first national bail reform movement in the U.S., leading to the path of the Bail Reform Act of 1966.<sup>40</sup>

### **Bail in India** –

The three primary codes of ancient Hindu jurisprudence are the *Arthashastra*, *Manu Smriti*, and *Yajnavalkya Smriti*. Kautilya's *Arthashastra* outlines the responsibilities of a judge (*Dharmastha*) based on Dharma.<sup>41</sup> Yajnavalkya also provides guidance on the duties of a king. Because there was no room for leniency in the matter as it involved penalties for the officials.<sup>42</sup> It was guaranteed that accused individuals were not unnecessarily detained. This truly created practical modes to both ensure the presence of an offender and to protect him from excessive restrictions on his personal freedom.<sup>43</sup> The Indian legal systems have an institution of bail with the process of release of arrested individuals upon providing a surety

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<sup>33</sup> *Supra* note 8

<sup>34</sup> Pollock, F., & Maitland, F.W., *The History of English Law* (2 edn, Cambridge University Press, London, 1898) 584, <https://historyofeconomicthought.mcmaster.ca/maitland/HistoryEnglishLaw2.pdf>

<sup>35</sup> Carpenter, D., & Prior, D., *Magna Carta and Parliament (Parliamentary Achieves Houses of Parliament, London, 2015)*, <https://www.parliament.uk/globalassets/documents/Magna-Carta-and-ParliamentBooklet.pdf>

<sup>36</sup> *Statute of Westminster, 1275* (3rd Edw. 1), also known as the statute of Westminster codified the existing law in England in 51 chapters

<sup>37</sup> Janak Raj Jai, *Bail of Law and Procedures* (6<sup>th</sup> edn, Universal Law Publishing 2015)

<sup>38</sup> The *Petition of Right* (1628) stands as a prominent constitutional document in England's history, It was crafted by Parliament in response to King Charles I's perceived overreach of authority, which many English citizens viewed as a significant violation of their civil liberties

<sup>39</sup> P.V. Ramakrishna, *Law of Bails*, (9<sup>th</sup> edn, Universal Law Publishing 2016)

<sup>40</sup> The *Bail Reform Act of 1966* mandated that Magistrates release individuals accused of violating Federal Law without imposing any financial bond, unless specific circumstances in a particular case necessitated additional conditions of release.

<sup>41</sup> L.N. Rangarajan (ed.), *Kautilya - The Arthshashtra*, (Penguin Books, New Delhi 1992)

<sup>42</sup> Kautilya *Arthshastra*, IV, Ch. 9, [https://csboa.in/eBooks/Arthashastra\\_of\\_Chanakya\\_-\\_English.pdf](https://csboa.in/eBooks/Arthashastra_of_Chanakya_-_English.pdf)

<sup>43</sup> Asim Pandya, *Law of Bail Practice and Procedure*, (2<sup>nd</sup> edn, Lexis Nexis 2015)

originated in Mughal period.<sup>44</sup> When British rule was recognized over main parts of India, there was a gradual adoption of colonial common law principles. Likewise, the form and contents of the British bail system were legally transferred through the enactment of the Code of Criminal Procedure in 1861, which was subsequently re-enacted in 1872 and 1898. Nonetheless, over time the bail system of colonial time had an eternal influence on India's bail system and future endeavors.<sup>45</sup>

## 2.2 Concept of Bail:

The bail system represents a fundamental element of the criminal justice system seeking to harmonize the individual's right to liberty and society's interest in pursuit of justice. It functions as a method through which an accused individual is temporarily freed from lawful detention while awaiting trial or ongoing investigation. While the precise definition of '**bail**' lacks clear codification in the Code of Criminal Procedure, 1973,<sup>46</sup> it is commonly interpreted as the *temporary release of an individual from legal custody*, with the assurance that they will appear in court at the designated time or date assisted by their sureties.<sup>47</sup>

The etymological origins of the term 'bail' can be traced to the ancient French word "*baillier*," signifying "guard, to control or to deliver".<sup>48</sup> Another interpretation proposes its derivation from the Latin term "*baiulare*," meaning "to bear a burden". This linguistic connection emphasizes the core tenet of bail - wherein the accused is hand over to the custody of sureties who shoulder the responsibility of guaranteeing their presence in court.

In the 1978 case of *Moti Ram v. State of Madhya Pradesh*, the Supreme Court decided that individuals could be released based on their personal undertaking. And with sureties are both included in the concept of bail. By this meaning, "bail" solely refers to release that is based upon monetary assurance, such as guarantees provided by third parties or one's own assurance.<sup>49</sup> Granting bail has the effect of releasing the accused person from confinement of the law and placing him in the care of his sureties, who are obligated to bring him forward for trial at an agreed-upon date and location, as per *England's Halsbury Laws*, The sureties have

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<sup>44</sup> J.N. Sarkar, *Mughal Administration in India*, (1920)

<sup>45</sup> *Supra* note 39

<sup>46</sup> Vaman Narain Ghiya v. State of Rajasthan, [2009] 2 SCC 281

<sup>47</sup> *Supra* note 39

<sup>48</sup> <https://www.etymonline.com/search?q=BAIL> (last accessed in April, 2024).

<sup>49</sup> Abhishek Manu Singhvi, India's Bail Jurisprudence: Need for Urgent and Comprehensive Revamp in (Salman Khurshid eds), *Taking Bail seriously: The State of Bail Jurisprudence in India*, (1<sup>st</sup> ed, LexisNexis 2020)

the right to take possession of their principle at any point and can release themselves by turning him over to the authorities, who will then put him in jail.<sup>50</sup>

Bail serves as machinery through which the state entrusts the community with the duty of ensuring the accused's appearance, thereby engaging the community in the dispensation of justice.<sup>51</sup> It represents a right enabling the exercise of freedom in opposition to restrictions imposed by the state.<sup>52</sup> The principle dictates that individuals suspect of a crime are deemed innocent until proven guilty and safeguarding them from undue restraints on their freedom.<sup>53</sup>

The Code of Criminal Procedure, 1973, recognizes various types of bail, each fulfilling specific roles within the criminal justice system. These are:

1. **Regular Bail**: This bail also termed 'normal bail,' is issued to individuals under arrest. It involves an assurance by the accused to appear in court for trial as required.<sup>54</sup> The criteria for regular bail are delineated in Sections 437 and 439 of the Code of Criminal Procedure, 1973.

Section 437 authorizes courts to grant regular bail to individuals accused of non-bailable offenses under certain conditions are fulfill. These conditions include factors such as the: (a) If the accused is below sixteen years of age, female, or sick or infirm; (b) has no previous convictions punishable by death or life imprisonment; and it seems to the court that there are no reasonable surroundings to rely on that the accused has committed a non-bailable offense, but there are enough grounds for further probe into their guilt.<sup>55</sup>

On the other side, Section 439 confers special authority upon the "High Court and the Court of Session" to order the release of non-bailable offense person accused on regular bail, even if bail was initially denied by the Magistrate because this power is discretionary and can be exercised.<sup>56</sup>

2. **Interim Bail**: is a temporary form of bail granted for a limited duration. Normally, it is issued by a court pending the hearing for grant of regular or anticipatory bail. Its

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<sup>50</sup> Halsbury's Laws of England, 1998 (Vol. II)

<sup>51</sup> *Law Commission of India*, 41st Report on the Code of Criminal Procedure, (1969)

<sup>52</sup> Supra note 39

<sup>53</sup> *Ibid*

<sup>54</sup> *Ibid*

<sup>55</sup> Section 437 of Code of Criminal Procedure, 1973

<sup>56</sup> Section 439 of Code of Criminal Procedure, 1973

purpose is to prevent undue hardship or injustice to the accused person while their bail petition is awaiting before the court.

The concept of interim bail was propounded by the Supreme Court in the *Lal Kamlendra Pratap Singh v. State of U.P.*<sup>57</sup> the court established that under exceptional circumstances, interim bail may be granted to prevent irreparable harm to the accused provided that their case meets the criteria outlined in Sections 437 or 439 of the Code of Criminal Procedure and where the regular or anticipatory bail application is due.

3. **Anticipatory Bail**: as outlined in Section 438 of the Code of Criminal Procedure, offers pre-arrest bail that can be approved by a Session Court or High Court. It functions as a preemptive safeguard for individuals anticipating arrest for non-bailable offenses.<sup>58</sup>

In the landmark case of *Gurbaksh Singh Sibbia v. State of Punjab*<sup>59</sup>, the Supreme Court established the norms guiding the issuance of anticipatory bail. The court highlighted that the exceptional nature of anticipatory bail and advocating for its sparing use. It should only be approved in unexpected situations where the court is influenced that the applicant is unlikely to flee etc.

While highlighting the significance of bail in safeguarding personal liberty, the Law Commission of India stressed in its *41st Report (1969)* that *bail is a matter of right for bailable offenses, discretionary for non-bailable ones*, and generally not available for offenses carrying a punishment of death or life imprisonment.<sup>60</sup>

In *Moti Ram v. State of M.P.*, the Supreme Court elaborated on concept of bail, noting that it encompasses release on one's own bond, with or without sureties. The court put emphasis on that the power to restrict liberty should be exercised judiciously, mindful of its impact on individuals and society.<sup>61</sup>

In *Gudikanti Narasimhulu v. Public Prosecutor*, the Supreme Court emphasized the preciousness of personal liberty and the need to cautiously consider its denial. The court

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<sup>57</sup> Lal Kamlendra Pratap Singh v. State of U.P & Ors [2009] 4 SCC 437

<sup>58</sup> Section 438 of Code of Criminal Procedure, 1973

<sup>59</sup> Gurbaksh Singh Sibbia v. State of Punjab, [1980] 2 SCC 565

<sup>60</sup> *Supra* note 51

<sup>61</sup> *Supra* note 8

emphasized that denying bail is not intended as a punishment but serves the twofold goals of justice both for the individual involved and for the impacted society.<sup>62</sup>

Bail primarily ensures an accused's reappearance for trial if they are free after arrest, balancing the presumption of innocence with justice's due course. Likewise, bail acknowledges the practical challenges of the justice system preventing overcrowding in prisons while the trial in process because period between arrest and trial can be lengthy, resource strain. Bail addresses these concerns while upholding the accused's accountability to the legal process. These different types of bail serve specific roles and mandate judicial scrutiny over various aspects like, considering offense severity, flight risk and etc. Eventually, concept of bail signifies that deprivation of liberty should be exceptional rather than the rule also, ensuring every accused person has the right to a fair trial and presumption of innocence until proven guilty.<sup>63</sup>

### **2.3 Critical Study of Bail Provision:**

In India, bail regulations predominantly stem from the Code of Criminal Procedure, 1973 (CrPC), which delineates bail provisions across different offense categories covering bailable, non-bailable etc. This chapter conducts a thorough analysis of these provisions, assessing their present validity and addressing criticisms surrounding them, all with the objective of fostering a comprehensive grasp of the Indian bail mechanism.

- **Bailable Offences i.e. Section 436** –

Section 436 of the CrPC stipulates that person accused of bailable offenses must be granted bail. The entitlement to bail in such cases is considered absolute and undeniable<sup>64</sup> implying that neither court nor the police officer holds discretion in granting bail except in choosing between a personal bond or a bond with sureties.<sup>65</sup> This provision is rooted in the principle that individuals accused of bailable offenses are presumed innocent until proven guilty, and withholding bail would essentially constitute a form of pre-trial punishment to person.

Nevertheless, Section 436(2) of the CrPC authorizes the court to reject bail if the accused fails to adhere to the conditions of the bond. This provision reflects the notion that bail may be revoked if the demeanor of the accused weakens the fairness of the trial process. In *Talab*

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<sup>62</sup> *Supra* note 1

<sup>63</sup> *State of U.P. v. Naresh and Ors*, [2001] 4 SCC 324

<sup>64</sup> *Rasiklal v. Kishore s/o Khanchand Wadhvani*, [2009] AIR SC 1341

<sup>65</sup> *Supra* note 46



*Haji Hussain v. Madhukar Purshottam Mondkarand*,<sup>66</sup> the Supreme Court ruled that an individual's right to bail in bailable offenses could be forfeited if their post-release conduct is deemed prejudicial to a fair trial process.

On Contrary, the categorization of offenses into bailable and non-bailable categories has faced criticism for its lack of clear criteria which resulting in inconsistencies in the application of bail provisions.<sup>67</sup> The LCI in his 154<sup>th</sup> Report observed that while the seriousness of the offense characteristically determines its classification but this criterion is not regularly followed.<sup>68</sup> Therefore, this ambiguity can lead to differing interpretations by different courts which generating disparities in bail matters.

Also, I argue that the mandatory nature of bail in bailable offenses fails to consider exceptional circumstances justifying bail refusal.<sup>69</sup> *For illustration; instances where the accused has a history of fleeing or tampering with evidence may not be adequately addressed merely based on offense classification.* In *Ratilal Bhanji Mithani v. Asstt. Collector of Customs*, the Supreme Court recognized that the compulsory nature of bail in bailable offenses may not be appropriate for all circumstances this stressing the necessity for a more nuanced approach to deal with these aspects.

- **Non-Bailable Offences i.e. Section 437** –

The jurisdiction of courts in deciding bail for non-bailable offences is clarified in Section 437 of the CrPC. In contrary to crimes for which bail may be required, the decision to set bail in NBO is discretionary and subject to specific criteria.<sup>70</sup> If there are abundant grounds to suspect that the accused has committed a crime punishable by death or life imprisonment, the court cannot grant bail. This restriction does not apply such as when the parties Involved are women, people under the age of 16, or sick or infirm people.<sup>71</sup>

The court must take into account a range of criteria when assessing bail applications in non-bailable cases such as the seriousness of the charge, the accused's background etc.<sup>72</sup> In *Gurcharan Singh v. State*<sup>73</sup>, the Supreme Court highlighted how important it is to take these

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<sup>66</sup> Talab Haji Hussain v. Madhukar Purshottam Mondkarand, [1958] AIR SC 376

<sup>67</sup> *Law Commission of India*, 154th Report on the Code of Criminal Procedure, 1973, (1996)

<sup>68</sup> *Ibid*

<sup>69</sup> *Ratilal Bhanji Mithani v. Asstt. Collector of Customs*, [1967] AIR SC 1639

<sup>70</sup> Section 437(1) of Code of Criminal Procedure, 1973

<sup>71</sup> *Ibid*

<sup>72</sup> *State of U.P v. Amarani Tripathi*, [2005] 8 SCC 21

<sup>73</sup> *Gurcharan Singh v. State (Delhi Administration)*, [1978] AIR SC 179

things into account while determining whether to set bail for offences that are not eligible for bail. Also, in non-bailable cases, the court must give a reason for granting or refusing bail as per Section 437(4) of the CrPC. By promoting accountability and transparency in bail, this section intends to enable appellate courts to examine cases more closely.

*I have pointed* out probable drawbacks of the discretionary nature of bail in non-bailable offenses, naming distresses about inconsistencies and subjectivity in bail matters. The extensive discretion granted to courts in assessing bail applications may lead to varying interpretations and applications of the law across different judicial court. Consequently, this disparity could result in uneven outcomes for similarly situated accused individuals. Also, liberty of an individual cannot be absolute, the court cannot lose perception of the fact that the valuable right of liberty is subject to the larger interests of society. The court must take into account the possibility that the community's overall interests may prevail over every individual's right to personal freedom.<sup>74</sup> To prevent parties from losing faith in the system and engaging in private retaliation, liberty must be protected by the legal system, which is administered with consideration of the victim who feels helpless, accused interest, and the community as a whole.<sup>75</sup>

Moreover, Section 437 of the code which includes exceptions for minors, women, and those who are sick or infirm. *I argue here*, that these exceptions may not always align with the severity of the offense or the specific circumstances of the case at the hand. While these are designed to safeguard vulnerable populations and these exceptions might not always be appropriate particularly in the cases involving serious offenses or when the individual situations of the accused do not warrant special attention. Bombay High Court in ***Mahendra C. Vakharia v. State of Maharashtra***<sup>76</sup> cautioned against applying these exceptions indiscriminately and stressed the importance of judicious application in cases. Also, advising against treating them as routine matters.

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<sup>74</sup> Dipa Dube, Judicial Discretion in Grant of Bail in (Salman Khurshid eds), *Taking Bail seriously: The State of Bail Jurisprudence in India*, (1st ed, LexisNexis 2020)

<sup>75</sup> Shahzad Hasan Khan v. Ishtiaq Hasan Khan, [1987] AIR SC 1613

<sup>76</sup> Mahendra C. Vakharia v. State of Maharashtra, [1998] Cri LJ 1924 (Bom)

- **Anticipatory Bail i.e. Section 438 –**

The Supreme Court noted in the *Balchand Jain v. State of M.P.* that anticipatory bail is intended to protect an individual's right to privacy and to protect them from unjustified harassment or shame.<sup>77</sup>

In 2005, an amendment to Section 438 introduced additional safeguards to prevent the misuse of anticipatory bail provisions. This amendment stipulates that the accused must be present during the final hearing and necessitates the court to notify the Public Prosecutor before granting anticipatory bail.<sup>78</sup> Additionally, to ensure the accused's cooperation with the investigation and prevent tampering with evidence, the court may levy conditions.<sup>79</sup> Critics have pointed out that the anticipatory bail provision is lying to abuse by powerful individuals aiming to avoid arrest and dodge investigation.<sup>80</sup> The LCI, in its 203<sup>rd</sup> Report, acknowledged misuse and emphasized the necessity for stricter guidelines to curb this trend. *I also argued here* that, anticipatory bail is revolves around its discretionary nature, which can lead to disparities and arbitrary outcomes.<sup>81</sup> In *Pokar Ram v. State of Rajasthan*, the Supreme Court put emphasis on the significance of adopting a more uniform and principled approach in granting anticipatory bail. *I support* the court's reasoning because without proper guidelines or approaches the serious crimes may go unpunished which directly impacting society at large. Court has also suggested in other instances that “*no blanket order of Anticipatory bail should be passed under section 438 to prevent the accused being arrested at all in connection with the case*”.<sup>82</sup>

- **Default Bail i.e. Section 167 –**

Section 167(2) of the CrPC establishes the provision for default bail also referred to as statutory bail. If the investigation exceeds the stipulated period (60 days for offenses carrying a maximum sentence of 10 years and 90 days for offenses punishable by death, life imprisonment, or more than 10 years) the accused is eligible to default bail. The purpose is to

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<sup>77</sup> *Balchand Jain v. State of M.P.*, [1977] 2 SCR 52

<sup>78</sup> THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 2005, <https://www.mha.gov.in/sites/default/files/2022-09/TheCCP%28Amendment%29Act%2C2005%5B1%5D.pdf>

<sup>79</sup> *Sumit Mehta v. State of NCT of Delhi*, [2013] 15 SCC 570

<sup>80</sup> *Law Commission of India*, 203<sup>rd</sup> Report on Section 438 of the Code of Criminal Procedure, 1973, (2007)

<sup>81</sup> *Pokar Ram v. State of Rajasthan*, [1985] AIR SC 969

<sup>82</sup> *HDFC Bank Limited v. J.J Mannan @ J.M. John Paul & Anr*, [2010] AIR SC 618

prevent prolonged pre-trial detention and ensure expeditious investigation.<sup>83</sup> In *Natabar Parida v. State of Orissa*, the Supreme Court highlighted the significance of default bail in preserving the rights of the accused and preventing unnecessary detention. The Court observed that any delay in the investigation cannot justify denying this right to the accused.

Though, it's essential to recognize that the entitlement to default bail expires upon the filing of the charge sheet even if the investigation remains ongoing.<sup>84</sup> In *Rakesh Kumar Paul v. State of Assam*, the Supreme Court explained that the right of default bail dismisses upon the filing of the charge sheet and the accused cannot subsequently assert this particular right. Additionally, default bail is treated similarly to regular bail and can be revoked or cancel based on comparable grounds as like regular bail.<sup>85</sup>

Here, *I argue* that the default bail provision is that the designated time frames for investigation of offences i.e. (60 or 90 days) might not always be adequate particularly in complex cases involving multiple accused persons or wide-ranging evidence. This situation can result in investigating agencies hastily submitting charge sheets to prevent default bail for the accused even if the investigation remains unfinished. The LCI in its 154<sup>th</sup> Report acknowledged this issue and proposed a more adaptable approach to determining investigation time limits for better use of this rights and accused persons liberty is not harmed while investigation is pending.<sup>86</sup>

It is important to mention here that the termination of the right to default bail upon the submission of the charge sheet may not sufficiently address the challenge of prolonged trials.<sup>87</sup> Even after the charge sheet is placed before court the trial proceedings may endure for a considerable period which directly leading to prolonged custody for the accused. This led to violate the accused's right to a speedy trial and the presumption of innocence. Therefore, *I argue* here for a more holistic approach to address this issue of prolonged detention of accused person, including the setting time limits for trial completion.

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<sup>83</sup> *Natabar Parida Bisnu Charan Parida v. State Of Orissa*, [1975] 2 SCC 220

<sup>84</sup> *Rakesh Kumar Paul v. State of Assam*, [2017] AIR SC 3948

<sup>85</sup> *U.O.I. Thr. CBI v. Nirala Yadav@Raja Ram Yadav@Deepak*, [2014] AIR SC 3036

<sup>86</sup> *Supra* note 67

<sup>87</sup> Latika Vashist., '[Review of ARREST, DETENTION, AND CRIMINAL JUSTICE SYSTEM: A STUDY IN THE CONTEXT OF THE CONSTITUTION OF INDIA, by B. U. Devil]' (2013) 3 *Journal of the Indian Law Institute* 55 388-392

- **Bail Pending Appeal i.e. Section 389** –

Section 389 of the CrPC allows for bail during the pendency of an appeal. This authorizes the appellate court to temporarily hang up the sentence and grant bail to a convicted person while their appeal is being disposed. The court is requisite to take into account several considerations while assessing bail applications under Section 389, including the nature of offence, duration of the sentence, and possibility that appeal will be successful.<sup>88</sup> When it comes to routine bail, the power to issue bail until appeal is comparatively limited.<sup>89</sup> The right to liberty of the individual convicted must be carefully weighed against the public interest and the gravity of the offence by the appellate court.<sup>90</sup> Supreme Court noted the importance of exercising caution when granting bail until appeal in the historic case of *Kashmira Singh v. State of Punjab*, saving it for extraordinary situations in which the convict makes a convincing case. However, there is concern that the standards for granting bail during appeal could not always consider the convict's particular circumstances or the merits of the appeal.<sup>91</sup> The type of offence committed and the sentence's duration may be more important than the convict's circumstances or the merits and drawbacks of the appeal. This discrepancy may cause the court to give bail to some of the less qualified offenders while denying it to others whose grounds for appeal are less strong.<sup>92</sup>

The bail laws in the CrPC safeguard the right to personal liberty but are criticized for their discretionary nature, especially in cases of NBO, anticipatory bail, and bail pending appeal. Despite flaws, they prevent arbitrary pre-trial detention and offer a pathway for release, provided certain conditions are met. Courts must use discretion judiciously, balancing individual rights with societal interests.<sup>93</sup> Despite criticisms, these laws remain essential for upholding justice and protecting the accused's rights.

### **CHAPTER 3 - JUDICIAL APPROACH REGARDING BAIL IN INDIA**

The manner in which cases are managed before conviction can shape public opinion and attitudes toward the criminal justice system, whether negatively or positively.<sup>94</sup> In any legal

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<sup>88</sup> Rama Narang v. Ramesh Narang, [1995] 2 SCC 513

<sup>89</sup> Kashmira Singh v. State of Punjab, [1977] 4 SCC 291

<sup>90</sup> Smt. Akhtari Bi v. State of M.P., [2001] AIR SC 1528

<sup>91</sup> Supra note 29

<sup>92</sup> Bhim Singh v. Union of India, Writ Petition (Criminal) No. 310 of 2005

<sup>93</sup> Neeru Yadav v. State of UP, [2014] SCC Online SC 1009

<sup>94</sup> Neeraj Tiwari, 'Fair trial vis-à-vis Criminal Justice Administration: A Critical Study of Indian Criminal Justice System' (2010) 2 Journal of Law and Conflict Resolution 66-73.

framework, one of the most significant elements of the judiciary's duties is the ability to decide whether to issue bail to individuals who are accused of crimes.

### 3.1 JUDICIAL DISCRETION UNDER CRPC –

Bail is not an automatic prerogative for an accused individual. Determining what course of action to take with an accused person from the time of arrest until verdict present a challenging dilemma for any criminal justice system. As noted in *Superintendent and Remembrancer of Legal Affairs v. Amiya Kumar Roy Choudhury*<sup>95</sup>, “the law of bail must reconcile two dovetail conflicting demands: societal need for protection from potential harm posed by an individual accused of a crime”, and “the foundational principles of criminal justice, such as the presumption of innocence until proven guilty.” Whether to grant bail or detain an individual before trial or after conviction resides in the ambiguous realm of the criminal justice system and chiefly founded on the reasoning and judgment of the court which is termed as judicial discretion.<sup>96</sup>

This judicial discretion should align with established principles of law rather than contradicting them.<sup>97</sup> In *Gudikanti*, Justice Krishna Iyer delved into the notion of "judicial discretion" by citing germane excerpts from esteemed texts. Start with the eloquent words of *Benjamin Cardozo*: “The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure; he is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized analogy, disciplined system, and the primordial necessity order the social life. Wide enough in all conscience is the, field of discretion that remains.”<sup>98</sup> When referring to a court of justice, “discretion” implies “sound discretion guided by law.” “Not by humour. It should not be illogical or unclear but rather lawful and consistent.”<sup>99</sup>

Judges possess the power to impose bail conditions, such as requiring the accused to surrender their passport and regularly report to the police, or stay away from specific

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<sup>95</sup> Superintendent and Remembrancer of Legal Affairs v. Amiya Kumar Roy Choudhury, [1974] 1 ILR (Cal) 304

<sup>96</sup> *Supra* note 1

<sup>97</sup> Shobha Ram v. State of U.P., [1992] Cr LJ 1371

<sup>98</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale University Press, Connecticut, 1921)

<sup>99</sup> Tingley v. Dalby, 14 NW 145

people.<sup>100</sup> The discretionary use of bail by the judge is crucial to safeguarding individual rights, and preserving the public's trust in the legal system.

The following elements need to be taken into account by courts when exercising discretion in setting bail:

1. NATURE OF CRIME & ACCUSED:

Courts heavily emphasize the severity of the alleged offence by the nature of the charges and the evidence presented when considering bail for defendants. The likelihood of receiving bail diminishes for those accused of serious crimes. The offender's past criminal history is relevant especially if it suggests a propensity for further serious crimes if released on bail.<sup>101</sup> Therefore, considering a defendant's criminal record is not an irrelevant aspect of bail decisions.<sup>102</sup> In *Prahlad Singh Bhati v. NCT of Delhi*, the defendant's character and prevailing circumstances were also considered in bail guidelines. Observation mentioned by court, "*It has also to be kept se mind that for the purposes of granting the bail the Legislature has used the words reasonable grounds for believing instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not accepted at the stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt.*"<sup>103</sup>

In *Salimbhai Abdul Gaffar Sheikh v. State of Gujarat*<sup>104</sup>, the court outlined several factors typically considered when granting bail for non-bailable offences.<sup>105</sup> When reviewing a bail cancellation application under Section 439(2) of the Code, courts usually refrain from examining into the merits of the order granting bail. Typically, the pertinent factors considered in a proceeding include whether the accused is attempting to interfere with evidence post-release on bail, employing delaying tactics causing trial delays, or if the offense has sparked significant law and order issues. Interference with the bail order on its merits is warranted only in exceptional situations where the bail decision is tainted by significant flaws, and when such intervention is essential to uphold the principles of justice.

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<sup>100</sup>Erwin Chemerinsky, "Constitutional Law: Principles and Policies" (6<sup>th</sup> edn, Aspen Treatise Publication 2019)

<sup>101</sup> *Supra* note 74

<sup>102</sup> *Supra* note 1

<sup>103</sup> *Prahlad Singh Bhati v. NCT of Delhi & Anr*, Appeal (Crl.) 324 of 2001

<sup>104</sup> *State Of Gujarat v. Salimbhai Abdul Gaffar Shaikh & Ors*, [2003] AIR SC 3224

<sup>105</sup> *Supra* note 14

## 2. ACCUSED ABSCONDING:

One of the primary concerns expressed by the prosecution during a bail application, and a pivotal factor weighed by the court is the possibility that the accused individual might abscond etc. If the court determines that there is minimal risk of the accused failing to appear for trial bail is normally granted. However, in instances where the evidence against the accused is robust and compelling, the court may infer a likelihood of the accused fleeing from trial. Following an acquittal, the accused stands in a more favorable position compared to someone who has been convicted. Thus, if an appeal against their acquittal has been lodged granting them bail is deemed appropriate, as it is improbable that they would abscond or fail to attend the appeal proceedings.<sup>106</sup>

In occasions, where the alleged offense is not particularly grave, the court cannot refuse bail solely based on the prosecution's apprehension regarding the accused's presence at trial. Likewise, if the court is persuaded that there are significant reasons to believe that no case has been established against the applicant then bail should not be withheld any chance.<sup>107</sup>

## 3. SPEEDY DISPOSAL OF BAIL APPLICATION:

Section 436A also deals with the matter of granting bail in cases where proceedings are delayed while the individual is in custody. This section permits for bail to be granted when a person has been detained for up to half of the maximum prescribed sentence. Supreme Court in *Akhtari Bi (Smt.) v. State of M.P.*<sup>108</sup> & *Surinder Singh alias Shingara Singh v. State of Punjab*<sup>109</sup> held that bail should be granted if an appeal remains unheard for five years, discounting any delays attributable to the accused. In *Abdul Rehman Antulay and Ors. v. R.S. Nayak and Anr*<sup>110</sup> court affirming that a speedy trial is inherent to the right protected under Article 21, the court established that if this right is infringed rather than dismissing the proceedings, a superior court can instruct the conclusion of proceedings within a definite timeframe. To address the present appeals, it is proposed that the ongoing trial in the first case and the appeal in the second case be completed within six months. In a recent judgment in the *Hussain case*<sup>111</sup>, the Supreme Court drew guidelines it referenced directions provided

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<sup>106</sup> State of Kutch v. Aher Vasta Hadhu AIR 1953 Kutch 50

<sup>107</sup> Pritam Singh and Anr. v. The State Of Punjab, [1956] AIR SC 415

<sup>108</sup> *Supra* note 90

<sup>109</sup> [2005] 7 SCC 387

<sup>110</sup> [1992] 1 SCC 225

<sup>111</sup> Hussain and Anr v. Union of India, [2017] AIR SC 1362



in the *Hussainara Khatoon case*<sup>112</sup>, guideline established through various orders over time must now be the accountability of the respective High Courts supervising the subordinate courts in different states. The Court highlighted that issuing general orders for the release of under-trial prisoners without considering specific circumstances might be risky. It stressed the need for a case-by-case approach aligning with the guidelines laid down by the Court. While expressing compassion for under-trial prisoners enduring prolonged confinement due to pending cases, the Court too underlined the need to balance this with the impact of serious crimes on society. It lay emphasis on the importance of speedy disposal of cases and suggested that judge strength be handled by the concerned High Courts of state. The Court urged the Chief Justices of the High Courts to analysis such cases within their jurisdictions and issue suitable instructions for the effective execution of the guidelines.<sup>113</sup>

The Indian judicial system's approach to bail is shaped by various principles and factors established through legal precedents and legislative measures set up by court in due time. A keystone principle influencing the judicial attitude on bail is the presumption of innocence. It emphasizes that individual accused of a crime are considered innocent until proven guilty is significant consideration in bail measures. One of the relevant considerations taken by court in deciding bail applications is socio-economic background of the accused because a major number of individuals in our country particularly those facing minor charges awaiting trial find themselves in jail due to financial limitations which preventing them from taking bail. To guarantee equal access to the bail system, the Supreme Court has set specific criteria for all individuals seeking bail. The subordinate courts were instructed to consider releasing the accused on personal bonds, without the requirement for monetary sureties, mainly when the accused faces financial suffering and cannot afford bail.<sup>114</sup>

### **3.2 JUDICIAL DISCRETION UNDER SPECIAL LAWS –**

#### **1. NDPS ACT, 1985**

The Indian government enacted the Narcotics and Psychotropic Substances Act, 1985 (“NDPS Act”) to curb problems related to the illegal distribution, sale, use, and possession of illegal drugs. The Act's preamble outlines its goals, which include stricter requirements for the control and regulation of activities using psychotropic substances and narcotic drugs. The

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<sup>112</sup> *Supra* note 25

<sup>113</sup> *Ibid*

<sup>114</sup> *Supra* note 8

NDPS Act applies not only to Indian land but also to Indian people residing overseas and to passengers of aircraft and ships registered in India.<sup>115</sup> According to the Supreme Court, the NDPS Act is a specialized law and its terms need to be closely read.<sup>116</sup>

Section 37 of the 1985 Act specifies that offences under the Act are cognizable and non-bailable. The Supreme Court clarified that this section unequivocally indicates that individuals accused of offences punishable by imprisonment for five years or more are generally not eligible for bail.<sup>117</sup> To grant bail, the court must ascertain, based on the evidence presented, there are valid reasons to believe that the accused is innocent of the charges that put against them and that there is no likelihood of committing further offences. Also, in *Maktool Singh v. State of Punjab*,<sup>118</sup> court observed, “the court’s power to release an accused on bail during the period before conviction has been thus drastically curtailed by providing that if P.P opposes the bail application, no accused shall be released on bail, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.”

The NDPS Act does not meet the requirement of proving guilt beyond a reasonable doubt. Rather, all that is needed is the demonstration of "*reasonable grounds (prima facie)*" that support the notion that the accused is not guilty. Courts interpret the fairly broad term of "reasonable grounds" to indicate substantial probable cause to believe the accused is innocent.<sup>119</sup> This standard of proof is less demanding than the "beyond reasonable doubt" standard since it simply requires the facts and circumstances to be sufficiently evident to be "in keeping with reason" in order to meet the reasonable grounds criterion.<sup>120</sup>

The connection between the bail provisions outlined in Section 437 of the CrPC, 1973 and those in the NDPS Act is unparalleled. The requirements regarding bail under Section 37 of the NDPS Act override those found in the CrPC.<sup>121</sup> a non-obstante provision in Section 37 means that it supersedes other laws. Under the NDPS Act, the court must meet two rigorous standards to issue bail:

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<sup>115</sup> Section 1(2) (b) of NDPS Act, 1985

<sup>116</sup> *State of Punjab v. Baldev Singh* [1999] 6 SCC 172

<sup>117</sup> *State of M.P v. Kajad* [2001] 7 SCC 673, *also see*, Lokendra Malik & Shailendra Kumar, Personal Liberty Versus Societal Interest: The State of Bail Jurisprudence in India in (Salman Khurshid eds), *Taking Bail seriously: The State of Bail Jurisprudence in India*, (1st ed, LexisNexis 2020)

<sup>118</sup> [1999] 3 SCC 321

<sup>119</sup> *State of Kerala v. Rajesh* [2020] AIR SC 720

<sup>120</sup> *Ibid*

<sup>121</sup> *Narcotics Control Bureau v. Krishan Lal* [1991] AIR SC 558

- 1) There are justifiable reasons to rely on that the accused is not guilty.
- 2) Prosecution has not contested the bail.

Compared to the regular bail requirements under the CrPC, this is a higher standard. In addition to any other bail restrictions, the Supreme Court held that the court must first fulfil these two requirements of Section 37.<sup>122</sup> Despite the wording in Section 37, there is some uncertainty because different courts have reached different conclusions regarding whether or not all NDPS offences are exempt from bail.<sup>123</sup> Court in *Union of India v. Thamisharasi & Ors.*<sup>124</sup> Held that the CrPC bail provisions under Section 437 are subject to the limitation that bail may be denied if there are reasonable grounds to rely on the accused is guilty of the alleged crime. Though, the NDPS Act's Section 37 supersede the CrPC, forcing the court to comply with the Act's strict and particular bail requirements before releasing an accused person on bond.

The prosecution must provide sufficient proof of guilt under the CrPC to impose bail restrictions. But under Section 37, the onus is reversed; the accused must demonstrate their innocence to overcome the bail restriction. This increases the severity of the NDPS Act's bail requirements by putting the burden of proof on the suspect rather than the prosecution. The standard CrPC grounds for bail cancellation apply once Section 37 bail is granted, permitting revocation for factors like interfering with the investigation.

The Supreme Court has issued several rulings on bail under the NDPS Act, establishing strict interpretations. Even in cases wherever no drugs were originate from the accused, the Court has held that the mere absence of illegal imports possession does not justify granting bail. *In Aryan Khan Case*<sup>125</sup>, Despite Accused not having any drugs in his possession, he repeatedly sought bail, which the Court denied. Also, the division bench of apex court held that, simply lacking contraband possession is inadequate grounds for bail under the NDPS Act.<sup>126</sup> Similarly, the Court has clarified that the discovery of drugs in a vehicle does not necessarily constitute possession by the accused.<sup>127</sup> These rulings emphasize that the NDPS Act's bail provisions under Section 37(1) (b) impose a high bar, requiring more than just the lack of

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<sup>122</sup> Union of india v. Niyazuddin & Anr, [2018] 13 SCC 738

<sup>123</sup> Mohd Muslim @ Hussain v. State (NCT of Delhi) SLP (Cri.) No. 915 OF 2023

<sup>124</sup> JT 1995 (4) SC 253

<sup>125</sup> Aryan Shah Rukh Khan v. Union of India, C.B. Application No. 3624 of 2021

<sup>126</sup> Union through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan, SLP (Cri) No.1771 of 2021

<sup>127</sup> Union of India v. Rattan Mallik, [2009] 2 SCC 624

direct drug possession to fulfil the requirements for bail. The court has continuously affirmed the stringent nature of the NDPS Act's bail criteria.

## **2. PMLA ACT, 2002**

PMLA is an act which provides for the prevention and control of money laundering and seizure of assets acquired through money laundering.<sup>128</sup> Due to the gravity of felonies under the Prevention of Money Laundering Act, 2002, accused parties are eligible for bail or anticipatory bail under stringent conditions. Section 43<sup>129</sup> references both "Magistrate" and "Special Court." The High Court retains its distinct bail connected power under Section 439 of the Code of Criminal Procedure, 1973, including the power outlined in Section 439(1), and Section 44(2) of the PMLA does not impede such powers. Court on many instances stated that the provision of PMLA must be interpreted strictly while dealing with bail.<sup>130</sup> The court ruled that judges should refrain from routinely granting bail due to the overly punitive nature of the bail provisions in the PMLA. They stressed that while economic offenses are serious, this does not preclude the Acknowledgment of an individual's entitlement to bail.<sup>131</sup>

Section 45(1) of the PMLA, 2002 outlines two conditions for the release of individuals accused. However, in *Nikesh Tarachand Shah v. Union of India*<sup>132</sup>, the Supreme Court declared this section unlawful, citing its infringement of fundamental rights and reversal of the innocence's principle which contradicts fundamental values of law. Section 45(1) levies two requirements for bail in cases falling under Part A of the PMLA and punishable by imprisonment exceeding three years. These are:

- (1) The opportunity is provided for the Public Prosecutor to compete with such a request; and
- (2) The court needs to be persuaded by the arguments made during the proceedings that the defendant is not guilty, did not commit the alleged crime and, if released on bail is unlikely to commit another offense.

These dual requirements have been criticized as excessively severe and unjust, as they effectively preclude individuals sentenced to three years' imprisonment from being granted bail. This provision has been deemed discriminatory and unconstitutional under Articles 14

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<sup>128</sup> Prevention of Money Laundering Act, 2002 [https://fiuindia.gov.in/files/AML\\_Legislation/pmla\\_2002.html](https://fiuindia.gov.in/files/AML_Legislation/pmla_2002.html)

<sup>129</sup> Section 43 of the Act delineates the authority of the enforcement director to seize property associated with money laundering.

<sup>130</sup> Rohit Tandon v. Enforcement Directorate [2017] AIR SC 5309

<sup>131</sup> Vijay Madanlal Choudhary v. Union of India, SLP (Crl.) No. 4634 of 2014

<sup>132</sup> [2018] 11 SCC 1

and 21. The amendment to the bail provision of the PMLA in 2018 was a response to the Nikesh Shah judgment, which declared certain aspects of the provision unconstitutional. This amendment removed the specific term limit for imprisonment mentioned in the earlier version i.e. more than three years in Part A and expanded the scope to include “under this Act” itself.<sup>133</sup>

In *P. Chidambaram v. ED*<sup>134</sup>, The Supreme Court further explained additional factors must be considered when determining bail requests under the PMLA. The court emphasized that bail should generally be granted according to the norms of criminal law, and withholding bail should be an exception. The court highlighted the importance of applying the triple test when determining whether to grant bail to the accused:

1. **Previous Cooperation:** The accused has cooperated with law enforcement in prior investigations and consistently made them available to authorities and the court as required.
2. **Nature of Evidence:** When crucial evidence relevant to the case has already been secured by the investigating agency, it becomes highly improbable for the accused to tamper with it.
3. **Stable Background:** With no history of criminal involvement and possessing a stable financial status, coupled with a long-standing presence at their permanent residence, the accused shows no inclination towards fleeing.

Examining judicial discretion in bail cases under various legal frameworks shows that, in contrast to the broader power provided by the CrPC, special and local legislation frequently impose more stringent discretion. *For example*, the NDPS Act restricts the bail that can be granted for specific offences and imposes strict requirements for it.<sup>135</sup> The strict bail requirements included in statutes such as Section 21(4) of the MCOCA, which presume guilt and place the burden of proof on accused depart from traditional criminal justice standards.<sup>136</sup> *Here I argue*, this approach violates the fundamental right to personal liberty protected by Article 21 and raises the potential of extending pre-trial imprisonment. The case of *Nimeon Sangma v. Home Secretary, Govt. of Meghalaya* showed that failing to provide bail without sufficient reason is a violation of Article 21.<sup>137</sup> Important considerations for judicial

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<sup>133</sup> Government introduces Bill to amend the Prevention of Money-laundering Act, 2002 through Finance Act, 2018, <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1518768>

<sup>134</sup> [2019] AIR SC 4198

<sup>135</sup> Section 37 of NDPS Act, 1985

<sup>136</sup> State Of Maharashtra v. Vishwanath Maranna Shetty, [2013] AIR SC 158

<sup>137</sup> [1979] 3 SCR 785

discretion under special and local laws include the magnitude of the offence, the quality of evidence, the character of the offender etc. Judges may be more likely to assume guilt and refuse bail under special statutes like the MCOCA or NDPS Act than they would be under the CRPC for common IPC offences.<sup>138</sup> *If we can see*, the disparities in how bail is applied across various legal systems emphasize the necessity of a uniform strategy to guarantee equity and consistency. *I suggest* harmonizing bail procedures, it would be necessary to balance the aims of special laws with the core tenets of justice, protect the presumption of innocence and preserve individual liberty. This may involve amending the bail provisions of special laws to avoid unwarranted constraints and constitutional violations.

#### **CHAPTER 4 - EVALUATING THE NEED FOR A DISTINCT BAIL STATUTE**

The fundamental principle that states "*no person shall be deprived of their life or personal liberty except according to the procedure established by law*"<sup>139</sup> People are usually sentenced to prison after being found guilty of a crime. On the other hand, if someone is imprisoned by the state as a form of punishment they have the right to petition before the court to restore their freedom through the bail system of country. Due to a variety of circumstances, a growing percentage of inmates face delays in their release after posting bail. There are continuing discussions about whether a new bail statute needs to be enacted in India in order to address the shortcomings of the current bail system.<sup>140</sup>

One of the chief problems with the existing system is that the courts have a significant amount of discretion when determining whether to grant bail. When this discretion is abused, accused people who might not pose a flying risk or a threat to the social order could be kept in pre-trial detention for a prolonged period. In *Moti Ram v. State of Madhya Pradesh*<sup>141</sup>, the Supreme Court decided that a person is entitled to bail unless there are "*compelling reasons*" to reject it, like a strong likelihood that accused will try to dodge trial. The Court further emphasized that bail ought not to be allow based on a predetermined formula but rather on an individual basis.

The fact that interim bail is not a feasible choice under the current bail system, which should allow accused people to be released while their cases are being tried, is an additional concern.

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<sup>138</sup> *Supra* note 124

<sup>139</sup> Constitution of India, 1950, Art 21

<sup>140</sup> *Supra* note 17

<sup>141</sup> *Supra* note 8

In *Sanjay Chandra v. CBI*<sup>142</sup>, the Supreme Court decided that once an accused individual has proven a prima facie case for bail temporary bail should be given. Furthermore, Supreme Court held in *Dataram Singh v. State of Uttar Pradesh*<sup>143</sup>, Courts should not hesitate to grant bail when warranted, provided that the bail provisions in the CrPC are ample to safeguard the rights of the accused. The Court further stated that judges should exercise caution when exercising their authority and refrain from using pre-trial confinement as a kind of punishment. Referring its decision in *Siddharam Satlingappa Mhetre v. State of Maharashtra*<sup>144</sup>, The Supreme Court stressed the importance of assessing bail requests on an individual basis rather than as a matter of routine. The Court determined that the current bail procedures outlined in the CrPC effectively direct the courts and any adjustments to these regulations should be approached with attentiveness.

Furthermore, numerous recommendations existed in the 268<sup>th</sup> Report of the LCI on The Code of Criminal Procedure, 1973<sup>145</sup> to confirm that the allowing of bail is not biased or arbitrary and to enhance the efficacy of the bail provisions in the CrPC. The report suggests modifying the present bail rules in the CrPC to establish explicit criteria for granting bail, to enable electronic checking of individuals free over bond, and grant interim bail as required. The report recommended that judges go through training to ensure that bail is granted only after thorough consideration of all pertinent factors in individual cases. These recommendations imply that making specific modifications to the existing laws of bail could improve the system effectiveness and efficiency.

### ***Need for Significant Reforms in the Bail System:***

1. **Pendency of Cases:** The researcher has observed a pattern in which judges are using their discretionary powers to arbitrarily impose unjust requirements. Courts have the power to put circumstances that are thought to be required for the "interests of justice," but they must follow established norms of law. In *Dilip Vishvakarma (2020)* case, similarly, the High Court imposed a requirement for the accused, a petty shopkeeper, to pay ₹ 10,000 to PM Cares and volunteer for a minimum of three hours per week as conditions for bail. This was due to the accused opening his shop during the lockdown without ensuring adequate social

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<sup>142</sup> *Supra* note 22

<sup>143</sup> [2018] 3 SCC 22

<sup>144</sup> [2011] AIR SC 312

<sup>145</sup> *Law Commission of India*, 268<sup>th</sup> Report on the Code of Criminal Procedure, 1973 (2017)

distancing. It is noted that there was little attention paid to the larger crowds gathering at liquor shops.<sup>146</sup>

**2. Socio-economic Bias:** In India, the bail system disproportionately helps those who are wealthy and powerful at the expense of the impoverished and marginalized. People who are unable to afford bail or are unable to satisfy the strict conditions of the bail requirements remain in jail for a lengthy time, which exposes systemic injustice. In a nutshell, the only factor that determines who stays behind bars and who goes out is money.<sup>147</sup> The Supreme Court in *Rudal Sah v. State of Bihar*, which highlights a grave instance of state triviality toward underprivileged individuals, provides a clear picture of this. Rudal Sah spent 14 years in prison before being released on October 16, 1982, despite being found not guilty on June 3, 1968, by a competent court. He remained in custody because he couldn't afford the bail bond mandated by the court for his release.<sup>148</sup>

**3. Number of under trial:** overcrowding prison and the large number of inmates awaiting trial. There were 4, 78,600 detainees in Indian prisons as of December 2019, with 69.05% of them being under trial suspects, according to the (NCRB).<sup>149</sup> In India, prisoners awaiting trial comprise 67% of the prison population, according to the LCI's 268<sup>th</sup> report. The absence of consistency in the bail process may be a factor in the nation's prison overpopulation, which would present more difficulties for the administration of prisons.

The points mentioned above represent several challenges faced by the existing bail system. Further, the Court recommended in 2022, that the legislature enact specific bail legislation to efficiently deal with the developing backlog of bail applications, observed in *Satendar Kumar Antil v. Central Bureau of Investigation*<sup>150</sup> held that, there are "abysmally low" conviction rate. While discussed about bail found that the arrest is a "*Draconian measure that should be used sparingly*" It affirmed that bail remains the norm and detention the exception, highlighting that arrests made without proper justification contravene Sections 41 and 41A of the CrPC.

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<sup>146</sup> Faizan Mustafa, "Discretion in granting bail can't be used arbitrarily." \*Tribune India\*, <https://www.tribuneindia.com/news/comment/discretion-in-granting-bail-cant-be-usedarbitrarily-125345>. *See also, Supra* note 26, highlighting the importance of processing bail applications quickly.

<sup>147</sup> *Supra* note 8

<sup>148</sup> [1983] 4 SCC 141

<sup>149</sup> Crime in India 2020: Volume-III, <https://ruralindiaonline.org/en/library/resource/crime-in-india-2020-volume-iii/> (last accessed in April, 2024)

<sup>150</sup> *Supra* note 17



## GUIDELINES UNDER SATENDAR KUMAR CASE –

- “Bail applications must be resolved within a fortnight, unless specific provisions dictate otherwise.
- Decisions on anticipatory bail requests should be made within six weeks.
- The Court emphasized that bail petitions need not be prioritized over pleas in sections 88, 170, 204, and 209 of the Code of Criminal Procedure.
- Instead of detaining individuals in custody when they are present in court and required to appear later, a bond should suffice.
- Bail could be approved if one has been produced by a police officer<sup>151</sup> or the court issues a summons to appear in response to the complaint, issues a warrant following the police’s filing of a charge sheet<sup>152</sup>, or if a magistrate brings a matter before a Sessions Court for trial.<sup>153</sup>
- It is ruled that the accused will be eligible to bail if they violated sections 41 and 41A at the time of their arrest.
- High Courts were instructed by the Court to identify under trials, which are unable to adhere to bail requirements and take appropriate action to enable their release.
- In certain circumstances, the court may decide to grant bail to the accused based only on these rules.”

This decision which is significant for Indian bail law emphasizes the need to preserve individual liberty and the presumption of innocence. However, it is crucial to acknowledge bail is a vital portion of justice structures. Unfortunately, a significant portion of pre-trial prisoners commit suicide as a result of deplorable conditions in jail that violate their rights to health and dignity.

Here, *I support* the view taken by the Supreme Court regarding a distinct bail act because there is a pressing requisite to streamline the country’s bail system. Despite numerous judgments and Law Commission reports, slight change has been observed evident in the persistent issue of overcrowded prison populations. The absence of a means to track whether prisoners granted bail pending trial were released creates another challenge. Since the court has not informed to the facilities where prisoners are confined, prison staff may not be aware of an inmate’s bail status. Consequently, these inmates remain in prison despite being

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<sup>151</sup> Section 170 of Code of Criminal Procedure, 1973

<sup>152</sup> Section 204 of Code of Criminal Procedure, 1973

<sup>153</sup> Section 209 of Code of Criminal Procedure, 1973

technically released on bail. To eradicate gaps, ambiguities and address all of these issues, we need a separate bail act or major amendments to the country's bail laws. After evaluating the necessity for the Bail Act, here I address a key question: *What specific functions does a separate bail statute fulfil that the Code of Criminal Procedure (CrPC) does not?* *Firstly*, consolidated bail laws would promote rationalizes judicial discretion and minimizes inconsistencies among general, special and local laws. This could reduce arbitrariness and ensure uniform rules for bails in diverse legal domains. *Secondly*, unifying bail rules into a single law may improve clarity; it is likely to limit the ability of judges to tailor bail decisions to the variations of various specific laws. Creating a single bail system will balance the need for case-specific discretion with consistency. *Thirdly*, a specific bail statute might address the lack of a systematic review in the CrPC, avoid prolonged pre-trial imprisonment without cause<sup>154</sup> and establish procedures for current scrutiny and oversight of bail determinations through prison superintendent and judicial officers. *Fourthly*, a separate bail law can help reduce jail overcrowding by accelerating the bail hearings and guaranteeing speedy application processing which CrPC does not provide adequate measure to decrease under trials.<sup>155</sup> It can also provide automatic bail for certain offences, improving efficiency and speeding up the administration of justice. *Lastly*, a separate bail law can incorporate modern technology and cutting-edge approaches, like data-driven evaluations and electronic monitoring, to maximize bail administration which is currently underutilized in the CrPC and enhance the overall effectiveness and efficiency of the bail procedure.<sup>156</sup>

## CHAPTER 5 - SUGGESTIONS AND WAY FORWARD

In the past, numerous attempts have been made to rectify the problem of bail in India. Particularly, to facilitate bail in wider variety of offences and accelerate pre-trial proceedings, the "*Expert Committee on Legal Aid*", presided over by Justice Krishna Iyer, proposed in 1973<sup>157</sup> redefining offences in the Cr.P.C. as eitherailable or non-ailable. Comparably, in 2003 a committee setup known as the "*Malimath Committee*"<sup>158</sup> on Criminal Justice System Reforms suggested an revision to the Cr.P.C's Schedule I, considering elements like the kind of crime, amount of violence, possible sentence, social impact, and accessibility to ADR procedures. However, the Indian bail system is plagued by long-standing issues like backlogs

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<sup>154</sup> *Supra* note 29

<sup>155</sup> *Supra* note 24

<sup>156</sup> *Supra* note 145

<sup>157</sup> Government of India, Report of the Expert Committee on Legal Aid: Processual Justice to People, 1973.

<sup>158</sup> Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs Report, Volume I, Justice V.S. Malimath Committee, March 2003.

in cases, arbitrary court discretion, etc.<sup>159</sup> Therefore, systemic changes to India's bail system are required to address these issues and concerns. The following are a few potential suggestions:-

1. Increasing accused individual's access to legal representation and aid, particularly for those from impoverished and marginalized backgrounds.
2. Provide judges and court staff training and awareness campaigns about the values and considerations that influence bail decisions to promote a more knowledgeable and fair system.
3. Promoting the use of community-based monitoring and supervision as an alternative to pre-trial imprisonment to ease jail overcrowding and lessen the strain on the criminal justice system.
4. Modifying the terms of anticipatory bail to stop abuse and guarantee that it is granted only in extraordinary circumstances when there is a real fear of harassment or false accusations.

## **CHAPTER 6 - CONCLUSION**

Reforming the bail system in India will require an integrated approach that involves unified bail laws, freeing up prison space, prioritizing bail hearings, utilizing technology, educating the public, and advocating for change. These adjustments may be beneficial to ensuring that India's bail system is administered uniformly and constantly and that individuals accused of crimes are not denied their liberty without a legitimate explanation. A new legislation on bail will put an end to arbitrary arrests and lessen the backlog of bail requests in diverse court systems. More clarity will help magistrates by minimizing the possibility of bias and allowing more effective case processing. This study pointed out how numerous legislative measures and plenty of court decisions continue to muddy the waters surrounding the Cr.P.C bail laws. Both are plagued with vagueness. This suggests that the law is not comprehensively understood or implemented. The discrepancies in the bail's laws would continue to exist in the absence of an organized framework of laws based on doctrines and principles. As an outcome, the reform requires that all efforts be made. Government and state agencies that are concerned about it cannot overlook it for a very long time; although systematization and analytical work must be finished before any reforms are undertaken. These are crucial

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<sup>159</sup> Sudesh Kumar Sharma, "Dimensions of Judicial Discretion in Bail Matters" (1980) 22 Journal of the Indian Law Institute 351-370

requirements that must be satisfied before attempting to draft a code. Thus, even if it means diminishing the "rule of law," as currently protected by the current laws, an in-depth discussion will need to take hold before the proposed legislation is codified.

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