



# LAW ET JUSTITIA LAW REVIEW

## VOLUME 1 ISSUE 1

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## **“BAIL: RULE OR EXCEPTION”**

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Link to paper: <https://www.lawetjusticia.com/volume1-issue1/bail-rule-or-exception>

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### **INTRODUCTION**

People who are confronted with the criminal justice system. Civil and political rights are the fundamental rights that provide for fair and equal treatment under the law and protection against harm by the state. These rights are recognized by the international law and are also stated in the constitution of India, 1950, but are also safeguarded by other legislations such as Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872.

### **WHAT ARE HUMAN RIGHTS?**

These are those rights to which all human beings are entitled, simply because they are human. Our human rights are inalienable and they belong to us. Whatever our caste, class, race, religion, gender or belief and should not be taken away from us under any circumstances.

Human rights are universal. The international community has deemed that everyone has them, regardless of where they live, or their economic, social or political situation.

The Universal Declaration on Human Rights adopted by the United Nations in 1948 contains the basic rights of all people without any discrimination. The Indian Supreme Court has ruled that ‘the rule of customary international law which is not contrary to the municipal law shall be deemed to be incorporated in the domestic law’<sup>1</sup>

Criminal justice is all related to the delivery of justice to those who have committed crimes. Providing justice to the criminals includes bail as well.

The 21<sup>st</sup> law commission of India, in its 268<sup>th</sup> report in 2017 states that, “The existing system of bail in India is ‘inadequate’ and ‘inefficient’ to accomplish its purpose”. However in the past few years there are a lot many non- governmental initiatives which entirely focused on the prison and the bail reforms, have mushroomed.

Lord Denning stated bail jurisprudence pride of place in the pantheon of liberty issues:

*“Whenever one of the king’s judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say, ‘My Lord, I have an application which concerns the liberty of the subject’ and forthwith the judge will put all other matters aside and here it. It may be an application for the writ of habeas corpus, or an application for **bail**, but whatever form it takes, it is heard first.”*<sup>2</sup>

In the leading matter heard by the hon’ble Apex court of India headed by Justice Madan B Lokur, has highlighted “A fundamental postulate of criminal jurisprudence, that is, ***Homo enim nudus cum nuda iacebat***, which means ‘A person is assumed to be innocent until proven guilty’.<sup>3</sup> The bench further added:

*“Another facet of our criminal jurisprudence is that the grant of bail is the general rule and putting the person behind the bars or in a jail or in a prison or in a correction home is an exception. Unfortunately, some of these basic principles appear to have been lost of with the result that more and more persons are being*

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<sup>1</sup>PUCL v. Union of India (1997)1 SCC 301

<sup>2</sup> Lord Denning, Freedom under the Law, Page 3

<sup>3</sup>Dataram Singh V State of Uttar Pradesh, AIR 2018 SC 980

*incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society”.*

There must be a balanced equation between the constitutional rights granted to the accused as well as to ensure the calculative punishment to the offender through a fair trial. There are indeed several factors that determine the way to maintain the equilibrium, for example, the social, political and economic status of the accused and the grievances of the society towards the offender. Different countries take different proportions in order to maintain the balance between the two and such proportions keeps on changing time to time in order to meet the needs of the society and other reasons, Due to the vast and the ever changing weightage, it is undoubtedly makes the bail reforms tougher to implement. There is also an understandable skepticism related to the success of the bail reforms, as reflected in **Fleming et. al**, who, through their quantitative analysis, attempt to show that bail reform was neither a great success nor a total failure.<sup>4</sup>

### **DEFINITION OF BAIL**

The term ‘Bail’ originates from a Latin term ‘*Baiulare*’, which means “to bear a burden” and from ‘*Baiulus*’, which means “porter, carrier, one who bears burden (for pay)”. It also derives its roots from the French word ‘*Baillier*’, which means “to control, to guard, and deliver”.<sup>5</sup>

Bail is the money a defendant pays as a guarantee that he or she will show up in court at a later date. For most serious crimes a judge or magistrate sets bail during an arraignment, or in federal court at a detention hearing. For minor crimes bail is usually set by a schedule which will show the amount to be paid before any court appearance (arraignment). For more serious crimes, the amount of bail is set by the judge at the suspect’s first court appearance.<sup>6</sup>

<sup>4</sup> Fleming R. et. al, *The Limits of Bail Reforms: A Quasi- Experimental Analysis*, Law and Society Review, 1980 (vol. 14), p 947- 976.

<sup>5</sup><https://www.etymonline.com/word/bail>, last accessed on January 3, 2020.

<sup>6</sup> P.M Mathivathani and Mrs. V Udayavani, *Bail and its Processing under CrPC- a critical stud.*

In a leading case the Supreme Court of India held that the definition of the term bail includes release of the accused with or without securities, which means either release based on the monetary assurance or on the personal bond.<sup>7</sup>

A fundamental principle of the criminal justice system is that all defendants are innocent until proven guilty, and according to this principle the granting of bail should be the rule rather than the exception<sup>8</sup>. Unnecessary pre-trial detention subjects the accused to the stigmatizing effects of detention, including inability to prepare an effective defence, without any proper justification in law.<sup>9</sup> The CrPC governs pre-trial detention through the system of bail.

‘Bail’ actually means the judicial interim release of the person so accused of an offence kept in the custody, on entering into the recognizance, with or without sureties, that the accused (a suspect of the crime) would be present in the court of law in order to answer the charges alleged on him on a later date; and it further includes the grant of the bail by any competent authority under the law, i.e., either the police or the magistrate himself.<sup>10</sup>

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## **BAIL JURISPRUDENCE IN THE CODE OF CRIMINAL PROCEDURE, 1973**

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The Code of Criminal Procedure 1973 (hereinafter referred to as “CrPC”), is a procedural law, i.e., it deals with the procedural aspect of the prevailing substantive laws. It also contains the provisions regarding the bail in India. The CrPC nowhere defines the term bail however it draws the line between the crimes which can be categorized into bailable and non-bailable offences. Like every other law the law relating to granting of bail found its roots from the England Law.

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<sup>7</sup>*Moti Ram V state of Madhya Pradesh*, 1978 AIR 1594

<sup>8</sup>*State of Rajasthan V. Balchand* 1978 SCR (1)535, 536

<sup>9</sup>*Supra* at point 7.

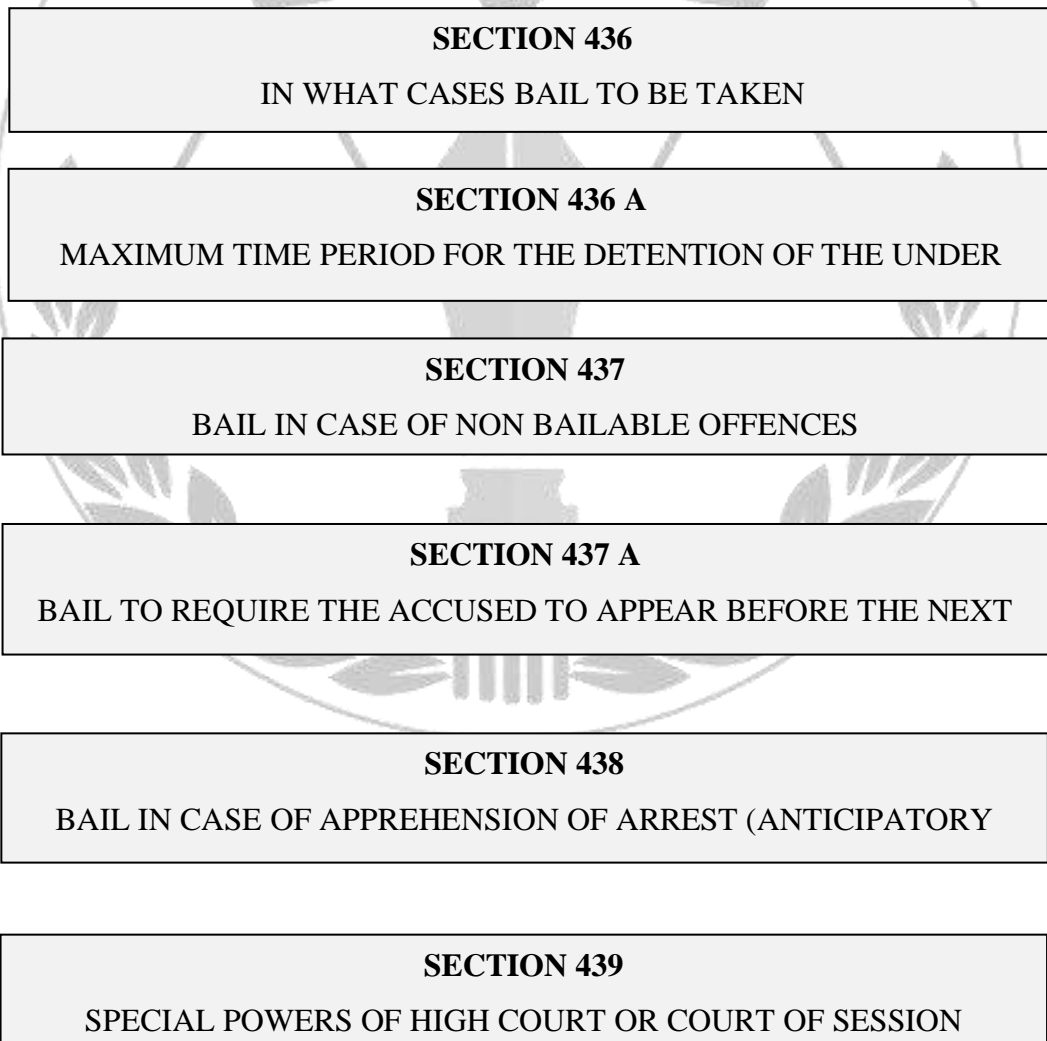
<sup>10</sup> Law Commission of India, 268<sup>th</sup> Report, *Amendment to Criminal Procedure Code, 1973- Provisions Relating to Bail* (May 2017)

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CrPC defines the bailable as “Bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other Law for the time being in force” and non bailable offences as “any other offence”.<sup>11</sup> The aforesaid definition covers the schedule that refers to the offences under the Indian Penal Code 1860 and further classifies them on the basis of the nature of the crime.

Any offence whose punishment is at least three (3) years or more shall be considered as the non bailable offence whereas bailable offences are contrary to it, i.e., the offences which are punishable for a period less than of three (3) years.

The CrPC specifically provides for the processes and the procedure for granting of bail under Sections 436 to 450. A brief overview of the same is shown in the flowchart below.



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<sup>11</sup> Section 2(a) CrPC



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**SECTION 440**

AMOUNT OF BOND AND ITS REDUCTION

**SECTION 441**

BOND OF ACCUSED AND SURETIES

**SECTION 444**

DISCHARGE OF SURETIES

**SECTION 445**

DEPOSIT INSTEAD OF RECOGNIZANCE

**SECTION 446**

FORFEITURE OF BOND

**SECTION 446 A**

CANCELLATION OF BOND AND BAILBOND

**SECTION 447**

PROCEDURE IN CASE OF INSOLVENCY OR DEATH OF SURETY OR

**SECTION 448**

BOND REQUIRED FROM MINOR

**SECTION 449**

APPEAL FROM ORDERS UNDER SECTION 446, I.E., AGAINST

**SECTION 450**

POWER TO DIRECT LEVY OF AMOUNT DUE ON CERTAIN

## BACKGROUND OF THE INDIAN LAW COMMISSION'S 268<sup>TH</sup> REPORT (2017)

In the year 2015, the Department of Legal Affairs and the Ministry of Law and Justice, asked the Law Commission of India to examine whether there is any need to introduce a separate and an independent law for bail in India?

The suggestion was made by the letter attached to the 268<sup>th</sup> Report of the Law Commission which was headed by Justice B S Chauhan, make the facts clear as a mirror that as per the meeting of the Advisory Council for Justice Delivery and Law Reforms held in 2016, it was decided that there is actually no need to have a separate Bail Act. However the provisions in the CrPC shall be amended as per the recommendations and suggestions in order to make the provisions regarding the bail more effective to implement.

In order to suggest the recommendations the commission undergone various research and interactive sessions with number of police officers from various states, the Director General of Prosecution of almost all the states and had also conducted a cross- session of the judicial officers of all the possible states. After all these sessions the Law Commission of India published its 268<sup>th</sup> report titled as "*Amendments to Criminal Procedure Code 1973- Provisions relating to Bail*"<sup>12</sup>

The report consists of twelve chapters, of which the concluding two chapters, i.e., chapter XI and chapter XII deal with Recommendations and Conclusions respectively. The remains ten chapters, i.e., from first to tenth are regarding introduction, legality of bail jurisprudence and concepts and provisions of bail in the existing law.<sup>13</sup>

<sup>12</sup><http://lawcommissionofindia.nic.in/reports/Report268.pdf>, last accessed on January 4, 2020.

<sup>13</sup> Abhishek Manu Singhavi, ;*India's Bail Jurisprudence; Need for Urgent and Comprehension Revamp*, book titled Taking Bail Seriously by LexisNexis.

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## BAIL AND ARTICLE 21 OF THE INDIAN CONSTITUTION 1950.

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The important question that arises in one's mind when it comes to Article 21 of the Indian Constitution is what is the relation of Article 21 with granting of bail?<sup>14</sup>

Article 21 provides every citizen, within the territory of India, the right of life and personal liberty. This Article implicitly contains all those necessary freedom to enjoy one's life and liberty. However, on the refusal to grant bail to a person or demanding the monetary amount that an individual is not capable to pay for his own life and liberty is considered to be an infringement of Article 21 of the Constitution.

The same has been contended by Justice Krishna Iyer and further has been put with the full authority of the Supreme Court in a leading case law. It was stated as under”

*“Personal liberty is deprived when bail is refused, is too precious a value of our constitutional system, that the crucial power to negate it is a great trust exercisable not casually but judicially with lively concern for the cost for to the individual and the community.”<sup>15</sup>*

The right to bail is not expressly mentioned under the fundamental rights in the Constitution of India, but is quite implicit that it is a part and parcel of the Article 21. However, in India, the bail system has a property oriented approach. It is inaccurate to think that if an individual has money he can easily defeat and flee away from the justice system. Thus, the judicial discretion for granting of bail must be on the basis of personal liberty irrespective to the property or money the individual have. it should be in accordance with Articles 14,19 and 21 of the Indian Constitution 1950.<sup>16</sup>

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## PROVISIONS UNDER THE CODE OF CRIMINAL PROCEDURE 1973

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<sup>14</sup> Upendra Baxi, 'Epilogue: Bail, or Jail?', Taking Bail Seriously.

<sup>15</sup> Balchand Jain V State of MP, (1946) 4 SCC 572

<sup>16</sup> <https://blog.ipleaders.in/whether-getting-bail-fundamental-right-india/>, last accessed on January 7, 2020.

Chapter XXXIII of the CrPC deals with the provisions regarding bail and bond. In total it contains 19 sections, which are further discussed in detail as under:

### **IN WHAT CASES BAIL TO BE GIVEN**

It is stated under section 436 of the code. The section reads as under:

*“(1) When any person other than a person accused of a non- bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail.*

*Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.*

*Provided further that nothing in this section shall be deemed to affect the provisions of sub- section (3) of section 116 or section 446A<sup>17</sup>.*

*(2) Notwithstanding anything contained in sub- section (1), where a person has failed to comply with the conditions of the bail- bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under section 446.”<sup>17</sup>*

The present provision regarding bail can be traced back to the four CrPC Codes namely, CrPC 1861, CrPC 1872, CrPC 1882 and CrPC 1898, however the last two CrPC Codes have the provision with regards to the police bail. The aforesaid section, i.e., section 436 was copied

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<sup>17</sup> Section 436 CrPC

from the section 496 of the CrPC 1882. The sub section 2 was inserted which indeed separated the section into 436(1) and 436(2).

Section 436 contains the word '*shall*', and as per the interpretation of statutes the word shall conveys the mandatory nature of the provision. This however means that bail is the right in case of all the bailable offences and not the favor. In case of bailable offences, bail must be the rule and jail must be the exception to it. Whereas section 436(2) is a non- obstante clause the vests the power in the court to not release the accused if in case the bail conditions have been violated. Which indeed means that section 436(2) is a restriction on the liberty of the individual if they violated the law, i.e., the law respects the individual's liberty only if the individual respects the law.

According to a survey report a number of persons are arrested in India not only in non bailable offence but also in bailable offences. According to the National Crime Records Bureau 2013 report, 3523577 persons were arrested under the Indian Penal Code 1860.<sup>18</sup> According to 177<sup>th</sup> report of Law Commission of India (2001) on *Law Relating to Arrest*, a large number of arrests were made in bailable offences.

According to section 436, the bail may have two meanings, they are

- Release on one's own bond (Personal Bond or no surety required)
- Release on one's own bond with sureties.

The controversy as to the meaning was observed in a leading case and the court observed the confusion as under:

*"Section 436 of the code speaks of bail but the proviso makes a contradistinction between 'bail' and 'own bond without surety'. Even here there is an ambiguity, because even the proviso comes in only if, as indicated in the substantive part, the accused in the bailable offence is prepared to give bail. Here, bail suggests for 'with or without sureties' and bail bond in section 436(2) covers own bond.....But the section 437(2) distinguishes between bail and bond without sureties."*<sup>19</sup>

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<sup>18</sup> NCRB report 2013

<sup>19</sup> *Moti Ram V State of Madhya Pradesh*, 1978 AIR 1594 at 1599, para 23.

### **CO-RELATION OF SECTION 167 AND SECTION 436.**

In case of bailable offence can the police invoke section 167 of the Code? Section 167 deals with the procedure for obtaining remand from the magistrate where investigation cannot be concluded within the period of 24 hours. In *ParvinKumar Chandrakant Vyas V State of Gujarat*<sup>20</sup> held that this section cannot be invoked by the police in case of bailable offences to obtain the remand of the arrested person.<sup>21</sup>

### **WHEN BAIL BY POLICE MAY BE REVOKED OR BAIL BOND BE FORFEITED**

Below mentioned are the parameters on the basis of which the bail by police may be revoked or bail bonds may be forfeited:

- Where any condition as to the bail is breached by the accused.
- Where the accused fails to produce the number of sureties or fails to deposit the amount for security.
- Where the sureties turn out to be insufficient or are acquired by fraud.
- Where any of the surety applies for his own discharge.
- Where any of the original surety dies or turns out to be insolvent and the accused fails to produce another to replace the former.

### **BAIL IN NON BAILABLE OFFENCE**

Section 437 talks about the discretion in grant of bail in case of non bailable offence either by police officer in charge or by the court other than the high court or Court of

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<sup>20</sup>*ParvinKumar Chandrakant Vyas V State of Gujarat* (2001)3 GLR 2755

<sup>21</sup> The Law Commission of India has also quoted the same case in its 268<sup>th</sup> Report on *Amendments to Criminal Procedure Code 1973- Provisions Relating to Bail* at 33.

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Session and section 439<sup>22</sup> gives special powers to the high court and the Court of Session for grant of bail in case of non bailable offences.<sup>23</sup>

The below tabled data shows the scenario in which the Court other than High Court and Court of Session may grant bail under section 437 of CrPC:<sup>24</sup>

S. No.	Circumstances before court other than High Court or Court of Session	Can the accused person be admitted to bail?
1	If the offence is not punishable with death or imprisonment for life.	Yes
2	In case of absence of reasonable grounds for believe that the person is guilty of an offence punishable with death or life imprisonment.	Yes
3	Where there are reasons to believe that the accused is guilty of offence punishable with death or imprisonment for life.	No

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<sup>22</sup> Special powers of High Court or Court of Session regarding bail.

(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in subsection (3) of section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub- section;

(b) that any condition imposed by a Magistrate when releasing an person on bail be set aside or modified: Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

<sup>23</sup> The court other than High Court or Court of Session is Court of Magistrate

<sup>24</sup> Charu Mathur, 'Bail or Jail: Supreme Court on Bail', Taking Bail Seriously by LexisNexis at 65

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4	If there are reasons to believe that the accused person is guilty of offence punishable with death or life imprisonment but is under the age of sixteen years of age or is a woman or is sick or infirm.	Yes
5	Absence of reasonable grounds for believing that the accused person has committed a non bailable offence but there are sufficient grounds for further inquiry into his guilt.	Yes
6	If in any case triable by a Magistrate, a trial of a person accused of a non bailable is not concluded within the period of sixty (60) days from the date fixed for taking evidence and such person has been in custody throughout.	Yes
7	If after the conclusion of the trial of the accused of a non bailable offence and before the judgment is delivered the court is in the opinion that the accused is not guilty of any such offence	Yes

On the second side, section 439 of CrPC gives extraordinary powers to the High Court and the Court of Session to enlarge an accused on bail for the offence which is punishable with death or life imprisonment. The only requisite for the aforesaid scenario is giving prior notice to the public prosecutor to oppose bail application. They also have the power to cancel the bail already granted by the Magistrate under section 437 of CrPC.

Also section 440 of the Code empowers the High Court or the Court of Session to reduce the bail amount as specified by the Magistrate or Police. Thus the High Court and the Court of Session has the vide power or discretion for granting bail. The courts here have to maintain equilibrium between the person liberty of a person and the threat to the society.

**Bail by Police in Non Bailable Offence**



Unlike section 436, section 437 of CrPC is discretionary in nature because it contains the words, 'bail may be taken'. It can inevitably be said that this power can be exercised by the courts, but whether this discretionary power can also be exercised by the police or not?<sup>25</sup> Section 437 clause 2 and 4 prima facie makes it clear that the police officer can grant bail to the accused of non bailable offence.

Sohoni's Commentaries<sup>26</sup> on the Code of Criminal Procedure of 1931 refers to a select committee headed by Tej Bahadur Sapru. In 1922, Sapru Committee proposed its changes in the CrPC Code of the year 1898. The below stated in the intention of the committee:

*"what we have done is to allow the court and the police officer to release on bail in a non bailable offence unless there appears to be reasonable ground for believing that the accused has been guilty of an offence punishable with death or transportation and as some safeguard against this we have provided for a review by the Session Court or the High Court of any other admitting to bail in a non bailable case."*<sup>27</sup>

As quoted by the eminent constitutional expert, Durga Das Basu:

*"Who may grant bail for non bailable offence: two authorities are empowered to grant bail in non bailable cases, relating to different stages of the investigation:*

- *The police officer in charge of the police station.*
- *An inferior court."*<sup>28</sup>

### **BAIL TO REQUIRE THE ACCUSED TO APPEAR BEFORE THE NEXT APPELLATE COURT**

Section 437 A was inserted in the Code through the 2009 amendment Act.<sup>29</sup> The purpose of the introduction of this provision under the law is that till the date of order regarding the

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<sup>25</sup> Anurag Deep, 'Role of Police and The Law of Bail in Common Law Jurisdiction' (with special reference to India)

<sup>26</sup> Sohoni's Commentaries, 1063

<sup>27</sup> The amendments were made in 1923. Code of Criminal Procedure (Amendment) Act, 18 of 1923.

<sup>28</sup> Durga Das Basu, *Criminal Procedure Code*, 1973 Volume II, (New Delhi, PHI, Third Edition, 1, 1997) at 413-414.

<sup>29</sup> Section 437 A CrPC: "(1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed

acquittal of the accused is passed by the trial court attains finality, the accused is bound to be present before the appellate court. Thus, the accused though acquitted is not free. The main objective of making it mandatory for the accused to appear before the appellate court, though acquitted by the trial court, is that if after the order of the acquittal has been passed and the accused runs away, that it will be a grave failure of justice system as well as he will be successful in defeating and deflecting the course of justice. In a five judge bench in *Kalawati*<sup>30</sup> held that, “an appeal against an acquittal wherever such is provided by the procedure is in substance a continuation of the prosecution.”

### **ANTICIPATORY BAIL**

Section 438 of the Code talks about bail to be provided for the anticipation of the arrest. In other words it can be stated that the anticipatory bail when granted by the competent court means an order for immediate release of the person if arrested is passed.

The concept of anticipatory bail came into picture after recommendations of the 41<sup>st</sup> and the 48<sup>th</sup> law commission. Just like bail, anticipatory bail is also not defined under the code. In a leading case, the Apex Court of India defined anticipatory bail as, “Bail in the anticipation of arrest.”<sup>31</sup>

Section 46(1) of the code states the way the arrest is made. According to the section 46(1), while arresting a person, the police officer or any other person while making the arrest *shall actually touch or confine the body of the person to be arrested, unless the person to be arrested himself submits to the custody by words or actions.* The direction under section 438 of CrPC is to provide immunity to the person from such ‘touch’ or ‘confinement’.

Supreme Court in *Gurbaksh Singh Sibbia V State of Punjab*<sup>32</sup>, had discussed the ambit and scope of the concept of anticipatory bail. It was held that section 438 of the Code is an extraordinary provision where the accused that has the apprehension of being arrest of accusation of having committed a non bailable offence can be granted bail in anticipation of arrest. The relevant observations of the bench are mentioned as under:

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*against the judgment of the respective Court and such bail bonds shall be in force for six months.(2) If such accused fails to appear, the bond stand forfeited and the procedure under section 446 shall apply.”*

<sup>30</sup>Smt Kalawati V State of Himachal Pradesh AIR 1953 SC 131

<sup>31</sup>Balchand Jain V State of MP, (1946) 4 SCC 572

<sup>32</sup>Gurbaksh Singh Sibbia V State of Punjab, (1980) 2 SCC 565

*“21... A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail.”*

The Supreme Court in *Siddharam Satlingappa Mhetre*<sup>33</sup>, has laid down following factors and parameters to be taken into consideration while dealing with the anticipatory bail:

- “(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
- (iii) The possibility of the applicant to flee from justice;*
- (iv) The possibility of the accused is likelihood to repeat similar or other offences;*
- (v) Where the accusation have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of the section 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because over implication in the case is a matter of common knowledge and concern;*

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<sup>33</sup>*Siddharam Satlingappa Mhetre V State of Maharashtra*, (2011) 1 SCC 694

(viii) while considering the prayer for grant of anticipatory bail, a balance has to be struck between two factor, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tempering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”<sup>34</sup>

### **Duration of anticipatory bail**

Anticipatory bail is granted to the person when he has the apprehension of getting arrested, however the question arises here is when can a person approach the court for an anticipatory bail and what is the time duration for the anticipatory bail, i.e., till when the protection lasts?

The answer to this question has not been discussed anywhere in the entire Code. As it is an mandatory question to be answered, in a leading case the Apex Court made it clear that *there is no specific time period for the validity of the anticipatory bail but it is entirely the discretion of the competent court based on the facts and the circumstances of the case.*<sup>35</sup>

### **Anticipatory bail: Uttar Pradesh and Uttarakhand**

As Criminal Procedural Code is a subject of the State List under schedule 7 of the Constitution of India, 1950, every state have the power to amend the procedure as per their own needs and requirements. Accordingly, in the year 1978, the State of Uttar Pradesh has specifically omitted section 438 and the same amendment has been followed by the state of Uttarakhand as well. Moreover, in the absence of this provision and to provide justice to the accused, the litigants are permitted to invoke Article 226 of the Constitution in order to seek stay of arrest in a pending investigation. In the case *Hema Mishra V State of Uttar Pradesh*<sup>36</sup>, the Apex Court has approved and accepted that the person can invoke Article 226 in order to avail the benefits

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Supra* 33

<sup>36</sup> (2014) 4 SCC 453

of anticipatory bail<sup>37</sup>. However the aforesaid provision was re- instated in the year 2019<sup>38</sup> by Uttar Pradesh.

The Gauhati High Court in *Sri Kwmta Brahma V State of Assam*<sup>39</sup> stated the law with regards to both section 438 and 439 CrPC:

*“17... It is, therefore, necessary that normally a person/ accused should file an anticipatory bail application under section 438 of the CrPC or a bail application under section 439 of the CrPC before the Session Court and thereafter he can approach the High Court. However it is not an inviolable rule. In exceptional circumstances a person/ accused can directly approach the High Court....”*

This judgment has been challenged in the Supreme Court and is still pending consideration.<sup>40</sup>

### **OTHER PROVISIONS RELATING TO BAIL BOND (SECTION 440 TO 450 OF CRPC)**

According to Section 440 of the Code, the amount required for the release of a person on bail shall be fixed by the competent court or the Police officer according to the facts and circumstances of the case. Thus, the amount so fixed must be reasonable and justified. Moreover, this provision also empowers the High Court or the Court of Session to reduce the amount, if needed.<sup>41</sup>

Once the accused has executed the bond and as a result of the same he is released on the bail, he will be bond with the conditions as stated in the bond. It also binds him to appear in the court whenever he is asked to. When he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond. The bonds are to be strictly enforced, if the time and place for the appearance of the accused is not

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<sup>37</sup> The decision of *Hema Mishra V State of Uttar Pradesh* is limited only to the state of Uttar Pradesh and Uttarakhand.

<sup>38</sup> June 2019 onwards.

<sup>39</sup> (2015) 3 Gau LR 453

<sup>40</sup> *Gauhati High Court Bar Association V The State of Assam* [ Criminal Appeal No. 1562 of 2017].

<sup>41</sup> Section 440 of the code reads as under: “Amount of bond and reduction thereof.

(1) The amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(2) The High Court or Court of Session may direct that the bail required by a police officer or Magistrate be reduced.

mentioned, the bond becomes vague and void<sup>42</sup>. Execution of bail bond though release the accused but it makes it mandatory for him to be present before the High Court or the Court of Session for the purpose to determine whether the sureties are sufficient or not. Along with it, the courts may also accept the affidavit regarding the sufficiency of the sureties and may also conduct inquiry for the same.<sup>43</sup> And as soon as the bond is executed, the accused is released and if in case he is in the custody or jail, the court passes an order to the jailor to release him.<sup>44</sup>

According to section 441 A, every person who has agreed to act as a surety to the accused for the purpose of execution of bail shall disclose all the related particulars about as to how many other cases he stood surety for accused persons. The aforesaid provision reads as under:

*“Declaration by Sureties: Every person standing surety to an accused person for his release on bail shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.”<sup>45</sup>*

Section 443 of CrPC reads as ***“Power to order sufficient bail when that first taken is insufficient.***

*If, through mistake, fraud, or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and on his failing so to do, may commit him to jail.”<sup>46</sup>* According to this provision, if in case the court finds that the surety attached by the accused is not sufficient, it may issue a warrant of arrest in order to call upon the accused before the court and demand for the additional surety to convert the insufficient surety into a sufficient one. However, if the accused failed to do so, the bail granted will be considered to be cancelled and the court may commit him to the jail again.

On the other hand the law also gives the right to the surety to withdraw his bond either wholly or as far as his share. Such surety may apply to the Magistrate for such withdrawal. On the receipt of the application from the surety the court issues the warrant of arrest to call the person

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<sup>42</sup> *Allah Bux* AIR 1953 Raj 48

<sup>43</sup> Section 441 CrPC

<sup>44</sup> Section 442 CrPC

<sup>45</sup> Inserted by the 2005 Amendment Act.

<sup>46</sup> Section 443 CrPC

so released before him and discharges the surety. Once a surety is discharged, the person so released is called upon to produce another surety to make the sureties sufficient. If in case he fails to do so, the court may commit him to jail.<sup>47</sup>

Deposit instead of recognizance<sup>48</sup> as stated under section 445 of the Code means the court may permit a person to deposit a certain amount of money in order to execute a bond. Such amount must be equivalent to the surety required for the execution of such bond. The exception provided in this case is in the case of a bond for good behavior. This section, however, provides concession to the accused person who is unable to produce sureties. This is meant to provide help to the person who is a stranger to the place.

Section 446 of the Code deals with the forfeiture of shares. In accordance of this provision if the court considering the matter gets satisfied that the bond has been forfeited, the court records the grounds of such proof and it may also call upon any such person who is bound to pay the penalty. If in case the penalty is not paid or if such person fails to submit the cause why it should not be paid, the court may impose the penalty as a fine and even then if the fine is not recovered the person will be punished with imprisonment in a civil jail for a period of six months. The court may after recording the reasons in writing<sup>49</sup> remit a portion and enforce the part payment only. If during the period the surety dies before the bond is forfeited, all his liabilities is attached to his estate. However if the bond is taken from the only surety, the penalty amount cannot be recovered by the accused himself and he shall not be charged with any matter of disobedience under the purview of this section.

*“Forfeiture of a bond would entail the penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot claim to share the amount by half and half as each can be made liable to pay”<sup>50</sup>*

Furthermore, when a surety becomes insolvent or dies or when the bond is forfeited, the court is empowered to call upon the person from whom the security is demanded to produce a fresh security and if in case the person fails to produce the security, the court may proceed with the matter as if there is a default in complying with the original order.<sup>51</sup>

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<sup>47</sup> Section 444 CrPC

<sup>48</sup> “When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may if in lieu of executing such bond.”

<sup>49</sup> Substituted by 2005 Amendment Act for the words “at its discretion”.

<sup>50</sup> *Mohd. Kunju V. State of Karnataka*, AIR 2000 SC 6; Also see comment under section 446 CrPC

<sup>51</sup> Section 447 CrPC

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In a case where a minor is to execute a bond, a bond executed by his surety may be considered and accepted by the court for the same purpose.<sup>52</sup>

Where a party is aggrieved under the section 446, it may file an appeal as per section 449 of the CrPC, which reads as under:

*“Appeal from orders under section 446.*

*All orders passed under section 446 shall be appealable,-*

*(i) In the case of an order made by a Magistrate, to the Sessions Judge;*

*(ii) In the case of an order made by a Court of Sessions, to the Court to which an appeal lies from an order made by such Court.”*

In the 2<sup>nd</sup> clause of the aforesaid provision the words “....to the Court to which an appeal lies from an order made by such Court.” refers to the High Court where the appeal against the original orders to the Court of Session is heard.<sup>53</sup> Furthermore, any Magistrate may be directed by the High Court or the Sessions Court to impose the amount due on a bond to appear or to attend before such court.<sup>54</sup>

## CONCLUSION

The relation of Article 21 of the Constitution with the granting of bail shows that bail is a fine balance between the right to liberty of the person accused and the threat to the society. Therefore, from this research paper it can be concluded that the legislature in its futuristic approach must come up with a stricter bail legislation in order to control the rapidly increasing crime rate as well as making them equitable.

Justice Krishna Iyer had once raised an important point to ponder upon, i.e., “*BAIL OR JAIL?*” to answer this question he further stated that, “*is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue 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>55</sup>

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<sup>52</sup> Section 448 CrPC

<sup>53</sup> *Ibid.*

<sup>54</sup> Section 450 CrPC

<sup>55</sup> *Gudikanti Narasimhulu V Public Prosecutor, High Court of AP, (1978) 1 CrL LJ 502 (SC)*



What is to be done in order to decide “*BAIL OR JAIL?*” is that to balance or maintaining the equilibrium between the two most import factors, i.e., the life and liberty of the person accused and the interest of the society at large. Hence, there must be significant efforts to make a justified and effective judicial system which looks into the bail inquiry in an impartial and judicious way, i.e., by maintaining a fine balance between the statutory provisions and the fundamental rights as conferred in the Constitution of India.

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