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LIBERTY UNDER LAW: THE SIGNIFICANCE OF BAIL AS A FUNDAMENTAL RIGHT

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Abstract

Freedom, I say, is not an absence of restraints; it is a composite of restraints. There is no liberty without order. There is no order without systematized restraint.

– Justice E. Barrett Prettyman, Former U.S. Judge

Bail, a legal mechanism that allows an accused person to be temporarily released from custody while awaiting trial, is fundamentally tied to the principles of justice and personal liberty. As a cornerstone of criminal jurisprudence, bail upholds the presumption of innocence—a key tenet of fair trial standards. The right to bail ensures that individuals are not unnecessarily deprived of their freedom prior to being found guilty of a crime, which would be a premature punishment. This concept is grounded in both constitutional and human rights frameworks, emphasizing that an accused must not be subjected to prolonged pretrial detention unless there is a valid and significant reason for denying bail, such as the risk of absconding, tampering with evidence, or threatening public safety.

In democratic societies, the right to bail is integral to preventing the arbitrary use of state power, ensuring that individuals are treated justly and equitably regardless of the accusations against them. By balancing the rights of the accused with the need to protect society, the judiciary plays a pivotal role in determining fair bail conditions. Despite its importance, debates around the accessibility of bail have surfaced, with concerns raised about discriminatory practices, excessive bail amounts, and inconsistencies in its application, particularly for marginalized communities.

This paper examines bail as a fundamental right, exploring its legal basis, significance, and the challenges associated with its implementation. It argues that, while bail is essential for protecting individual liberty and ensuring fairness, reforms are needed to make the bail system more just and equitable. Through a critical analysis of legal provisions, judicial decisions, and case studies, this paper highlights the need for a more consistent and rights-focused approach to bail within modern legal systems.

RESEARCH METHODOLOGY

The purpose of this secondary data-based analysis is to better understand the significance of bail as a fundamental right and the various challenges and criticisms of the bail system. The information gathered comes primarily from books, journals, articles, and various websites.

I. Introduction

The two options that are available in the criminal justice system for a person accused of an offence are either bail or Jail. These possibilities are accessible in both bailable and non-bailable offenses. The functional categorization of offenses into two categories has no influence on the actual functioning of the bail system, since bail is granted on the assumption that the accused will come before

the Court for trial on the specified day. The nature of the offense may be a consideration, but the exercise of judicial discretion in regard to release is mainly concerned with the individual charged and not the allegation leveled against him.

Bail-jail options are available in all cases, and the judicial authority is the last arbiter in the question of granting or denying bail, which may be considered before it at various stages of the criminal proceedings. Bail assumes the detention of an accused in the hands of state authorities for an alleged violation of a law. If the accusation is for a bailable offense, he may be allowed to bail if he is willing to provide the requisite guarantee. An accused may even be released if he signs a bond with or without sureties. In each of the above scenarios, he would be required to appear before the Court on the given day.

The following ingredients are taken into account while deciding a bail pleading: – Prima Facie there is any reason to believe that the person accused of an offence has committed the offence. The Nature and seriousness of the offence

- The risk of accused fleeing after granting of bail
- Whether the accused can influence the witness
- The grant of bail will result into miscarriage of justice

II. Meaning of Bail

Black's Law Dictionary (4th ed.) defines bail as "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court." Webster's Third New International Dictionary defines 'Bail' as "the process by which a person is released from custody." Law lexicon by Ramanth Iyer, (3rd ed.) defines bail as "the security for the appearance of the accused person on which he is released pending trial or investigation." The Criminal

Procedure Code, 1973/ The Bhartiya Nyaya Suraksha Sanhita, 2023, has not defined bail. But the terms bailable offence and non-bailable offence have been defined under the Code 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 enforce, and non-bailable offence means any other offence."⁹⁴⁰ Section 478 to 496 of the Bhartiya Nagarik Suraksha Sanhita, 2023 lays down the provisions for the grant of bail and bonds.

III. Purpose of Bail

The right to personal liberty is a basic fundamental right of every person as recognised under Article 21, Constitution of India. But this right is not absolute; it can be curtailed to maintain a balance between individual interest and interest of society at large. However to ensure that individual right to liberty of a person is not unreasonably restrained, its curtailment requires procedure established by law to be followed. The procedure provided under Code of Criminal Procedure to curtail the liberty of person ensures that a person is not unreasonably detained if his detention is not required for securing ends of justice. So a person can be released on bail if his release would not defeat the ends of justice. Justice Krishna Iyer for the first time in *State of Rajasthan v Balchand*⁹⁴¹ raised the issue of unfair bail system in India and suggested rethinking over the issue. Again in the landmark judgment of *Moti Ram and Other v. State of M.P*⁹⁴²

Justice Iyer laid down that judges should be more inclined towards bail and not towards jail. The Hon'ble Supreme Court again discussed the need of balance between individual liberty and societal order while exercising power of arrest in the case of *Arnesh Kumar v. State of Bihar*⁹⁴³. It was held that all such cases where offence is

⁹⁴⁰ The Code of Criminal Procedure, 1973, No. 02, Acts of Parliament, 1974 (India) S. 2(a)

⁹⁴¹ *State of Rajasthan v Balchand* 1977 AIR 2447

⁹⁴² *Moti Ram and Other v. State of M.P* 1978 AIR 1594

⁹⁴³ *Arnesh Kumar v. State of Bihar* 2014)8SCC 27

punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine; police officers shall not arrest the accused unnecessarily and Magistrate shall not authorise detention casually and mechanically. Failure to comply with these directions, shall, apart from rendering police officers concerned liable for departmental action, also make them liable to be punished for contempt of court. Judicial Magistrate authorising detention without recording reasons shall be liable for departmental action by appropriate High Court.

IV. **Fundamentals Governing Bail**

While granting Bail under section 480 of the BNSS, the following fundamentals must be taken into consideration by the court:-

- Bail should not be rejected unless the offense accused is of the most serious kind and the penalty imposed by the law is severe;
- Bail should be denied when the court has a reasonable belief no amount of security will make the accused appear before the court for hearing.
- If the person seeking bail is hindering the legal process, bail should be denied.
- In case the accused has the capacity that he can influence the witness or hamper the administration of justice, he should not be granted bail.
- if the applicant has previous criminal record, they should be rejected or denied due to reason he may again commit offences while being released on bail.

V. **Bail as a Matter of Right**

As per the Code, 1973, the Judges has an absolute power to decide on bail. When the court is deciding on bail, instead of not deciding in the favor of not curtailing of accused liberty, the greater community interest must be considered. Article 21⁹⁴⁴ of Indian Constitution acknowledges every citizen's right to a timely

trial. The Speedy trial is the ultimate goal of the Code, 1973. The delay in completing the trial breaches the Constitutional provision of a fair, just, and reasonable process, as well as a basic right to a timely trial. The Court and as well the police in some offences has been granted the power to grant bail. However, in the case of bailable offenses, bail may be requested as a matter of right.

In this aspect, neither the police nor the magistrate has any discretion. However, since the public is unaware of the legislative restrictions, the police utilize their discretion in issuing bail. There is an essential need to raise awareness in this area so that police do not abuse their authority for illegitimate purposes.

The police officer has no jurisdiction to reject release under Section 436, implying that bail does not have to be granted only by the Court. It is upon the officer to determine whether the bail should be granted with or without a bond. The Police Officer has no right to deny bail in bailable offences under Section 436 as long as the accused is willing to give surety. The Investigating Officer is compelled to release the accused on bail as long as the accused is furnishing the bail bond. If the defendant is arrested for a crime for which bail is set, the police officer will post bail, and if he fails to do so for any reason, the court will.

In the case of *Dharmu Naik v. Rabindranath Acharya*,⁹⁴⁵ his brother were arrested by the respondent police officer despite having previously been granted bail by the court. Despite the fact that the appellant and his brother had previously been freed on bail and the bail order had been brought before him, the Hon'ble High Court found that the respondent police officer unjustly apprehended and detained them. It was unthinkable that the appellant and his brother, who had acquired a release order after appearing in court in fear of arrest, would keep quiet, fail to show the bail order, and submit to police imprisonment. Even if no bail order had been presented to the

⁹⁴⁴ INDIA CONST . art. 21

⁹⁴⁵ Dharmu Naik v. Rabindranath Acharya,1978CRILJ864

respondent police officer, evidence showed that surety had been offered at the time of the appellant's arrest, and thus the respondent was required to release him on bail. In a bailable offense, the police officer does not have any kind of discretion to refuse to bail to the accused if he is willing to furnish bail bonds. As a result, the respondent police officer was found guilty of breaching IPC (The Indian Penal Code, 1860).

The Hon'ble Supreme Court in the case of *Sanjay Chandra v CBI*⁹⁴⁶ ruled that the decision of the Court to grant or deny bail is completely dependent on the wisdom of the judge of the presiding court.

The Facts and the circumstances of the case should be taken in to consideration while deciding the bail plea. The Bail should not be denied due to public emotions and pressure. The Primary purpose of the bail after or before the conviction is to free the accused from the restriction put upon him by barring him beyond the walls of the prison and also to relieve the burden of the state which the state is spending on him for keeping him, maintaining him constructively while he is in the prison and in the custody of the court and the purpose of Bail bond is to ensure the presence of the accused on the date of hearings.

VI. The Fundamental Right to a speedy and Fair Trial

The Accused of an offence has a fundamental right of speedy trial under article 21 of the constitution of India, this fundamental right is an extension of the provided under article 21 and 22 of the constitution which is right against illegal detention. This is a universal privilege that the accused does not have to seek or use. An accused individual has the right to appear in court as quickly as feasible so that the court may decide whether the detained person should be freed on bail and his detention was needed or not (Bare Acts Live, n.d.)

The ICCPR, OUNHCHR, 2013 and ECHR, 1950, provide that an accused's release on reasonable bail constitutes a remedy for a delay in deciding the charges. Furthermore, according to article 9 (3) of the ICCPR, the person who has been detained by the authorities should be brought before the court as soon as possible (The International Covenant on Civil and Political Rights, 1966). The right of speedy trial has also been upheld by the United States Supreme Court, any intentional delay in the trial can result in dismissal of charge as well as the case.

In one the landmark case, the Hon'ble Supreme court ordered those prisoners whose time in jail has been more than the punishment for the offences, irrespective of trial being completed or not, the judge went on to say that these people are lying in jail because of the delay in the judiciary and there are oppressed having not much means to fight the system or avail the provisions avail in the system. (*Hussainara Khatoon v. Home Secretary, State of Bihar, 1979*)⁹⁴⁷

The Hon'ble Supreme Court set nationwide norms for quick trials for all courts in the case of *Abdul Rehman Antulay v. R.S. Nayak*⁹⁴⁸, 1991: The right to a speedy and fair trial was guaranteed under Article 21 of the Constitution of India In the circumstances, it is in everyone's best interest to ascertain the accused's guilt or innocence as quickly as possible.

- The right to a speedy trial, guaranteed by Article 21, applies to all phases of the legal process, including investigation, inquiry, trial, appeal, review, and retrial.
- Prior to their conviction, the accused shall not be subjected to excessive or needless incarceration.
- In terms of concern, anxiety, money, and interruption to his work and peace of mind, a too long investigation, inquiry, or trial should be avoided. (Bare Acts Live, n.d.)

⁹⁴⁶ Sanjay Chandra v CBI 2011 1SCC 40

⁹⁴⁷ Hussainara Khatoon v. Home Secretary, State of Bihar, 1979 SCR (3)532
⁹⁴⁸ Abdul Rehman Antulay v. R.S. Nayak 1991 SC1701

- Unnecessary delay may undermine the defendant's capacity to defend himself, whether because the witness has died, vanished, or is unavailable, or for other reasons; and
- It should be remembered, however, that the accused is generally the one who asks a delay of the proceedings.
- The use of delay is a typical defensive strategy. Because the prosecution has the burden of demonstrating the defendant's guilt, the delay is detrimental to the prosecution. Furthermore, the prosecution's interests are injured by the absence of witnesses and the loss of evidence owing to the passage of time. Thus, in relation to bail, the guarantee of a speedy trial serves several purposes: it protects against oppressive pre-trial detention; it relieves a person charged with a crime of the public anxiety and suspicion that comes with unresolved criminal charges; it protects against evidence loss; and it allows the accused to defend himself. (Bare Acts Live, n.d.)

A bond hearing is a court process that must be handled in a fair, judicial, and lawful manner. Due to a lack of cash or resources, the right to justice guaranteed by articles 21, 19, and 14 of the Constitution, as well as the Directive Principles of State Policy, cannot be denied. The major aims of the bail institution, as stated in Article 39A, are to assure the presence of the individual accused with a crime at trial while protecting personal liberty in accordance with the Constitution's principles. (Bare Acts Live, n.d.)

VII. **Bail to be non arbitrary:-**

Bail or incarceration in the criminal justice system's pre-trial or post-conviction phases is essentially governed by the court's decision, which is known as judicial discretion. Personal liberty, which is taken away when bail is refused, is much too important a value in our constitutional system to be overlooked; it is a substantial trust that can only be handled responsibly and with a thorough knowledge of the implications for the individual and society. Personal liberty restrictions, whether temporary

or permanent, must be founded on the most severe considerations pertinent to the Constitution's welfare aims. (Bare Acts Live, n.d.)

Bail is used to force a defendant to show up for his trial or any other time when his presence is legally necessary, as well as to comply with the court's authority and punishments. Bail is never refused to someone who has been charged with a crime as a form of punishment. Bail's main goal is to get a defendant out of pretrial detention without the constraints and criminal consequences that come with it. Bail should not be rejected just because the defendant wants to be freed and has a strong probability of doing so. Bail may be rejected if there is a probability that the defendant would engage in a activity that jeopardizes the administration of justice if released on bail

VIII. **Discretionary power of Judiciary on Bail:-**

A case may be separated into two categories to determine whether it is bailable or not: bailable and non-bailable. In reviewing a bail application in light of the principles and criteria, a court must use judicial discretion. Any bail request must be backed by compelling evidence based on the facts and circumstances of the case. The accused may be released on bond under the Code of Criminal Procedure, 1973. In the event of offences entitled to bail, Section 436(478 BNSS) of the Code allows for release on bond. (The Code of Criminal Procedure, 1973)

Bail is a matter of law, according to Section 436 (1) of the Code, which implies that the official in charge of a police station or any court has no authority to provide bail for offences entitled to bail. (The Code of Criminal Procedure, 1973) In the event of offences not subject to bail, Section 437 of the Code allows for release on bond. In such instances, security deposits are not accessible on a first-come, first-served basis. The judge has the authority to grant or deny bail. The court must find a balance between personal liberty and the public interest while deciding on bail for non-bailable offenses.

When granting bail for nonbailable offenses, the likelihood of recommitment, the risk of frightening witnesses, the risk of tampering with evidence, the defendant's seniority, the likely punishment that the defendant will receive if convicted, the strength of the evidence against the defendant, and the Reasonable possibility of ensuring the presence of a witness must all be considered.

In the case of *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav*⁹⁴⁹, the Hon'ble Supreme Court held that, 'the court should exercise the bail granting power cautiously not arbitrarily. While a full examination of the evidence and lengthy documenting of the case's merits are not required when giving bail, it is vital to state in such orders the basis for the prima facie determination that bail was granted, especially when the defendant is charged with a crime. Every organization would lack mental application if such explanations were not offered.

The Hon'ble Supreme Court ruled in the case of *Amarmani Tripathi* that the courts must consider the defendant's "character, behavior, means, status, and position" while granting bail. While the presumption of innocence ensures that a defendant is innocent until proved guilty, a conditional order instructing the defendant to deposit a specified amount of money allegedly misappropriated by the defendant jeopardizes the trial court's independence instance, because it is evident that the trial court would make an unfair presumption against the defendant's innocence after examining such a bail order. (*State Through C.B.I v. Amaramani Tripathi*,⁹⁵⁰)

It's also worth noting that in order to grant bail, the Legislature replaced the words "reasonable grounds to believe" with "the evidence," implying that the Court can only decide whether there is a genuine case against the defendant and that the prosecution must be able to present prima

facie evidence in support of the accusation. At this point, there is no way to know whether the defendant is guilty beyond a reasonable doubt.

Bail denial should not be used as a form of punishment prior to a conviction. Let us not forget that under criminal law, the presumption of innocent exists until guilt is proven. The defendant's guilt must be established beyond a reasonable doubt. The defendant's right to a fair trial is further harmed by the rejection of bail, since he has very limited contact with his counsel, especially in such a restricted setting.

IX. Challenges and Criticisms of the Bail System

Despite its noble intentions, the application of bail is fraught with challenges that can undermine its role as a fundamental right.

A) Economic Inequality and Bail

One of the most glaring issues in the bail system is economic disparity. Cash bail requirements can effectively jail the poor while allowing wealthier defendants to go free, irrespective of risk factors. Inability to pay bail fees leaves many economically disadvantaged individuals in pre-trial detention, facing the risk of job loss, family strain, and significant psychological impacts. This inequality violates the fundamental principle of equal treatment under the law, leading to disproportionately high rates of pre-trial incarceration among marginalized groups.

B) Risk Assessment and Public Safety

While liberty is a paramount value, it must be weighed against potential risks to public safety. Courts are often tasked with balancing individual freedom with the need to protect the community from serious offenders. However, this balance can be difficult to achieve. In cases where defendants pose a significant flight risk or a threat to witnesses, courts may deny bail or set conditions, potentially infringing on the accused's liberty. Risk assessment tools, while helpful, are also imperfect and can sometimes reinforce biases, leading to unjust outcomes.

⁹⁴⁹ *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav* (2004) 7 SCC 528

⁹⁵⁰ *State Through C.B.I v. Amaramani Tripathi* 2005,

X. Proposed Reforms for a Just and Equitable Bail System

To address the flaws in current bail practices, several reforms could be considered:

A) Implementing Non-Monetary Bail Alternatives

Non-monetary bail options, such as electronic monitoring, supervised release, and regular check-ins, could help reduce reliance on cash bail. Such alternatives focus on community safety without financially penalizing defendants who cannot afford bail, creating a more equitable system.

B) Risk-Based Assessments with Safeguards

Improved risk assessment tools that take into account individual circumstances while mitigating bias could help the courts make more informed decisions. Proper training and oversight could ensure that these tools are used effectively and justly, supporting the goals of public safety and personal liberty.

C) Establishing Uniform Guidelines for Bail Decisions

Implementing standardized guidelines for bail decisions could promote consistency and fairness across jurisdictions. These guidelines should take into account both the seriousness of the offense and the accused's ability to pay, reducing the arbitrary application of bail and minimizing socioeconomic and racial disparities.

XI. Conclusion

Bail is a fundamental right that upholds the principle of liberty under law, yet its current application raises significant ethical and legal questions. Disparities based on socioeconomic status and inconsistencies in judicial discretion hinder the realization of a just and fair bail system. By implementing reforms focused on non-monetary alternatives, unbiased risk assessments, and standardized guidelines, legal systems can better balance individual liberty with community safety. Such reforms are essential to actualize the promise of liberty

under law, ensuring that pre-trial freedom is not a privilege but a fundamental right accessible to all.

Reference

- 1) DD.BASU, COMMENTARY ON CONSTITUTION OF INDIA (Lexis Nexis, Delhi 1981).
- 2) M.P.JAIN, INDIAN CONSTITUTIONAL LAW (LexisNexis Butterworths, Nagpur, 2011)
- 3) RATAN LAL AND DHIRAJ LAL, LAW OF CRIMES (Bharat Law House, New Delhi, 1995).
- 4) SEERVAI, CONSTITUTIONAL LAW OF INDIA (Law and Justice Publishing Company, Delhi, 1984).
- 5) V.N.SHUKLA, CONSTITUTION OF INDIA (Eastern Book Company, Lalbagh, Lucknow, 2017)