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Prasanna S,

Chairman of Institute of Legal Education

No. 08, Arul Nagar, Seera Thoppu,

Maudhanda Kurichi, Srirangam,

Tiruchirappalli – 620102

Phone : +91 73059 14348 – info@iledu.in / Chairman@iledu.in



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BAILABLE AND NON-BAILABLE OFFENCES: A COMPARATIVE LEGAL ANALYSIS

AUTHOR – SANSKRITI UPADHYAY, STUDENT AT SHAMBHUNATH INSTITUTE OF LAW, JHALWA, PRAYAGRAJ

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Abstract:

Bail is an important part of how criminal cases work. It helps make sure that the person who is accused of a crime is treated fairly and that society is protected. In India, there are two types of crimes. Bailable and non-bailable. This means that the police and the courts have some freedom to decide whether or not to let someone out on bail, depending on what kind of crime they're accused of. Bail is a deal because it affects the freedom of the person who is accused, and it also affects how society is kept safe. The Indian criminal law says that some crimes are bailable and some are not, and this is what helps the police and the courts make their decisions about bail. The Code of Criminal Procedure 1973 has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023. This means that the rules for bail in India have changed a lot. The Bharatiya Nagarik Suraksha Sanhita, 2023, is trying to stop people from being held in jail for no reason. It also wants to make sure that people's rights as given by the Constitution are protected. The changes in the Bharatiya Nagarik Suraksha Sanhita, 2023, are big. They are changing the way bail works in India.

This paper looks at the difference between crimes where you can get bail and crimes where you cannot get bail. It talks about the rules that govern bail and the rights that people who are accused of a crime have at various stages of the process. The paper looks at how the idea of bail has changed over time in India. It examines the laws that are part of the BNSS and talks about the principles that judges use to decide whether or not to give someone bail. The paper also looks at how the laws about bail are actually used in real life and finds some problems that keep happening, such as too many people in jail waiting for trial, people being treated unfairly because of their social status and money and judges making different decisions in similar cases. Through this analysis, the paper underscores the importance of bail as an instrument of personal freedom and emphasises the need for a balanced and rights-oriented approach in the administration of criminal justice.

Introduction:

One of the most necessary concepts in the criminal procedure is the idea of bailable or non-bailable offences and the concept of bail. An example of petty crimes that are usually classified as bailable is petty theft, public nuisance and defamation. On the other hand, in the non-bailable offences, the court may refuse bail to a suspect/accused in case of a grievous assault and feels that the accused might tamper with the investigations.

To comprehend the scope of bailable and non-bailable crimes, it is necessary to know the definition of bail and the legislative acts of the equivalent.

Bail means the provisional release of an accused individual from jail. According to Section 2(1)(b) of the Bharatiya Nagarik Suraksha Sanhita, 2023, an act of setting a person accused of or suspected of a crime free of the custody of law is called bail. Bail: A bond between civil liberties and community.

The key purpose/ objective of this research paper is to learn about the history of bailable and non-bailable offences, the statutory framework which governs bail such as the BNS (CrPC), rights of the accused, etc.

Historical Evolution of Bail in India:

- **Ancient and Medieval Period:-** The idea of bail has been around for centuries before the modern legal system in India. A long time ago, a man named Kautilya wrote a book called the Arthashastra. In this book, he said that it is not right to keep people in jail for a time before their trial. He thought this was an important principle of justice.

During the time of the Mughal empire, there were two kinds of bail. One was called Mughalaka, which meant that the person had to promise to show up for their trial. The other was called Zamanat, which meant that someone else had to promise to pay an amount of money if the person did not show up.

These two kinds of bail made sure that people got a trial and that they were also responsible for their actions. If we look at records, we can see that people were often released on bail, and they had to find someone to promise to pay money for them. This shows that the bail system was working well in India a long time ago. The concept of bail is still a part of the Indian legal system today, and it is based on the idea that people should not be kept in jail for a long time before their trial, just like Kautilya said. Bail is a system that helps to make sure people get a trial, and it has been around for centuries in India.

- **Colonial Period (1861-1947):-** The British government that controlled India at that time made some rules about bail in the Code of Criminal Procedure of 1861. They made some changes to these rules in 1872 and 1898. These rules were based on the bail rules that they had in England. But the rules they made for India were not really about helping people; they were more about making sure the government had control. The police had a lot of power, and

people did not have the right to bail. The bail system in India was not fair; it was made to help the government, not to protect people's rights. The British government made the bail system this way so they could keep control over India, not to make things better for the people who lived there.

- **Post-Independence Constitutional Framework (1950-1973):-** The Constitution of India that came into effect in 1950 changed India's Constitution rules about bail in a way. This happened because of Article 21, which talks about life and personal liberty, Article 22, which talks about protection against detention and Article 14, which talks about equality before law.

The Code of Criminal Procedure, which was made in 1973, has rules about bail from Sections 436 to 450. These rules say that crimes can be put into two categories. Non-bailable crimes. The Code of Criminal Procedure also has Section 438 that talks about bail. This idea of bail was suggested by the Law Commission in their 41st Report that came out in 1969. The main goal of bail is to protect people against false prosecutions, and the Indian Constitution rules support this idea.

- **Modern Reforms (2005-2023):-** Section 436A Amendment (2005) established statutory bail: undertrial prisoners detained for one-half the maximum sentence period must be released on bail. The Bharatiya Nagarik Suraksha Sanhita (BNS), 2023, implemented July 1, 2024, modernised bail law by providing statutory definitions, reducing detention thresholds to one-third for first-time offenders, mandating jail superintendent bail applications, and restricting anticipatory bail in rape cases. These reforms represent the culmination of five decades of constitutional jurisprudence evolution.

Definition / Relevant Legal Provisions:

In India, the law says that some crimes are bailable and some are not. The main difference between these two types of crimes is decided

by the First Schedule of the code. The Bharatiya Nagarik Suraksha Sanhita, which is a law from 2023, explains what a bailable crime is. It says that a bailable crime is listed as such in the schedule or by another law that's currently in effect. On the other hand, a non-bailable crime is any crime that is not considered bailable. The Bharatiya Nagarik Suraksha Sanhita and the criminal code are very clear about this. The criminal code, which includes the CrPC, helps us understand what crimes are bailable and what crimes are not. This classification is what decides how much freedom an individual has when they are being investigated and during the trial. The classification of the individual is what determines the level of restriction placed on the individual's liberty during these phases. The individual's classification is very important because it serves as the threshold for determining the level of restriction.

For offences, the law says that the accused person has the right to be released. This means they can get out of jail.

According to Section 478 of the BNSS, which was formerly Section 436 CrPC, if the police arrest someone for an offence without a warrant and that person is willing to pay bail, the police officer or the court has to let them go.

In these cases, the court or the police do not have a choice. They have to release the accused person if they're willing to pay bail. The main goal is to make sure the accused person shows up for their trial. The law is very clear about this when it comes to offences. These offences are not as serious as some others. They usually have punishments that're less than three years. The offences include things like hurt, defamation or public nuisance. These are the kinds of things that are considered serious.

Non-bailable offences are serious crimes. These crimes are so bad that the person who committed them does not have the right to get bail. It is up to the court to decide if they can get bail or not.

The court looks at things when it makes this decision. It looks at how bad the crime was. It looks at how strong the evidence is against the person who committed the crime. The court also thinks about whether the person who committed the crime will run.

The court even thinks about whether the person who committed the crime will try to scare the witnesses. This is all part of non-bailable offences like these. Section 480 of the BNSS is what the court uses to make decisions about people who are accused of non-bailable offences. The police do not have the power to let people out on bail in these situations. The court can say no to bail if they think the person has done something very bad, like a crime that can get them the death penalty or put them in jail for the rest of their life. The law is a little kinder in some cases, though. The court can let women out on bail, or kids who are under sixteen years old or people who are really sick. This can even happen in serious cases. The court can grant bail to women or to minors under sixteen or to the sick and infirm because the law wants to be fair to these people.

The procedural shift from the CrPC to the BNSS has maintained these core definitions but emphasises a more streamlined judicial process. For a law student tracking these changes, it is essential to note that while the definitions remain tied to the Schedules, the numbering of the procedural sections has changed. The transition underscores the principle that while liberty is the rule in bailable cases, it is a balanced judicial decision in non-bailable ones, aimed at protecting society from grave threats while upholding the presumption of innocence until proven guilty.

Rights of the Accused in Bailable Offences:

In India, when someone is suspected of a crime that's not very serious, they have the right to get out of jail by paying some money. This is because of the Bharatiya Nagarik Suraksha Sanhita, which is a law that says the police or courts must let the accused person go if they pay this money or if someone promises that

they will show up in court. The Bharatiya Nagarik Suraksha Sanhita says that the accused person must be given bail when they ask for it, and they have to be told why they were arrested. The police or courts do not have a choice in this matter.

The law also says that the accused person must be set free if they pay the money or if someone promises that they will show up in court. This is to make sure that the accused person is not kept in jail for no reason. The Bharatiya Nagarik Suraksha Sanhita is very clear about this. It is different from cases where the crime is more serious.

- **Bail as a Right:** The person who is accused has the right to be let out on bail when they have done something that allows for bail. The police at the station or the court have to make sure this happens. If they do not let the person out on bail, they can be held for detention. The Supreme Court has made decisions like the one in Rasiklal vs. Kishore in 2009 that say this is something that must happen. The court does not need to hear from the person who made the complaint. Even people who do not have a lot of money can be released if they promise to show up in court, even if they cannot find someone to vouch for them. The accused person still has the right to bail in these cases, and the Supreme Court decisions like Rasiklal vs. Kishore support this.

- **Arrest and Notification Rights:** When the police arrest someone without a warrant, they have to tell the person what they are accused of if they can get bail under Section 478 BNSS and that they have the right to tell a family member or friend about what's happening to them, as it says in Section 47 BNSS.

The police cannot keep someone in jail for more than 24 hours without a magistrate saying it is okay, as stated in Section 58 BNSS, which is supposed to protect the person's freedom just like Article 21 says.

- **Procedural Safeguards:** Courts may impose reasonable conditions like court

appearances or no reoffending, but cannot deny bail arbitrarily. If evidence is lacking, release on bond occurs under Section 192 BNSS (formerly 169 CrPC). Medical exams and legal aid access further protect dignity during proceedings.

Rights of the Accused in Non-Bailable Offences:

Indian law has something called bailable offences. These are covered by the Bharatiya Nagarik Suraksha Sanhita, which is also known as the BNSS, 2023. When someone is accused of a non-bailable offence, they do not have the right to get bail for sure. It is different from cases. In bailable cases, the court or the police officer decides if the accused can get bail. They think about how serious the offence's what evidence they have, and if the accused might run away. The court or police officer uses their judgment to decide if the accused can get bail or not. Non-bailable offences are treated seriously under the Bharatiya Nagarik Suraksha Sanhita. The courts look at the rules under Section 480 BNSS, which used to be Section 437 CrPC. They do not give bail if they think the person who is accused really did something and that wrong thing can be punished by death or by putting them in jail for their whole life. There are some safeguards.

- **Bail Discretion Factors:** When someone is accused of a crime, the Magistrates or Sessions Courts look at the accused person's past, the type of crime they did if they might try to change the evidence and whether they are a danger to the public before they decide if they can get bail.

If someone has never been in trouble with the law before, they can usually get bail after they have been in jail for an amount of time which is one-third of the longest time they could be in jail or half of that time if they have not been found guilty yet. This does not apply if the crime is so bad that it could mean the death penalty.

The High Courts have a lot of power when it comes to bail because of something called Section 483 BNSS.

Arrest and Safeguards: When the police arrest someone, they have to tell that person why they are being arrested. The arrested person can also tell their family or friends what is happening to them. This is stated in section 47 BNSS. The police cannot keep someone in jail for more than 24 hours without getting permission from a magistrate.

If the person who is arrested is under 16 years old or is a woman, they might get treatment when it comes to bail, even if they have done something very serious. Arrested persons need to have a lawyer because if their lawyer does not do a good job, the court might not give them what they want.

Problems and Challenges in the Bail System:

In India, the bail system has some problems. The Bharatiya Nagarik Suraksha Sanhita, which is a law from 2023, is supposed to help people who are waiting for their trial. There are still a lot of issues. Many people are in jail for a time before they even get a trial. This is because the courts are slow, and it takes time to make decisions. The bail system is also not fair to everyone. Over 75% of the people in jail are waiting for their trial.

- **Undertrial Overcrowding:** Jails have a lot of people who are waiting for their trial, more than 5 lakh people. These people are still in jail even though they should be let out on bail because they have already spent one-third or half of the time they could be in jail. The problem is that the courts are very slow, and this is stopping these people from getting out.

In some cases, the police do not want to let people out on bail even though the law says they should. This is not fair because the law also says that people have the right to a trial, which is written in Article 21. Jails are holding people for a time, and this is a big problem for undertrials.

- **Socioeconomic Barriers:** The rules about surety requirements are not good for people who do not have a lot of money. This means they have to borrow money from people who charge a lot of interest, or they have to stay in jail for a time. Even when people want to help them by paying their bond the court looks at this closely. People from rural areas who are accused of a crime have a hard time getting to the court in the city and finding a lawyer to help them. The surety requirements are a problem for these people.

- **Judicial and Systemic Issues:** Inconsistent application of bail factors like flight risk leads to misuse; police overreach in arrests without warrants adds to burdens. Digital updates in BNSS aim to track cases, but implementation lags in under-resourced areas. Supreme Court interventions, like Armesh Kumar guidelines, seek reform, but enforcement remains weak.

Conclusion:

The distinction between bailable and non-bailable offences is the foundation of the jurisprudence of bail in India itself, and it is the representation of the greater aim of balancing the freedom of an individual with the safety of society. Bail is essentially regarded as an absolute right in bailable offences, which supports the notion that detention is not to be a punitive provision before conviction. Non-bailable offences, on the other hand, give discretionary authority to the judiciary, and the court must be keen to examine certain issues, including the seriousness of the crime, the probability of absconding, and the possibility of pathology in the course of the delivery of justice. Although this discretion needs to be made to serve the greater good of the people, it has to be used wisely and in line with the constitutional guarantees.

Finally, bail has to be viewed not only as a formality of the procedure but as a crucial right to the right to life and personal freedom, which is guaranteed by the 21st Article of the Constitution. To make it possible to maintain the



primary principle of a rule and an exception, it is necessary to enhance judicial uniformity, decrease the use of monetary bonds, and guarantee the efficient enforcement of legislative protection. The humane and reasonable bail system can never be dispensed with since it is necessary in maintaining the trust that the people have in the criminal justice system, and also ensuring that justice is upheld as effective and fair.

