

DISCRETIONARY POWER OF JUDICIARY IN THE MATTER OF BAIL

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Plato is said to have suggested the release of Socrates against a bond as early as 399 BC. Bail law is a "cobweb" that encompasses matters of personal liberty, public concern, and interests.²

BAIL: The term 'bail' refers to a security deposited in order to appear before a judge for release. The word comes from the old French verb "bailer," which means "to give" or "to offer." After presenting a bail bond to the court, an accused is granted bail.

The rules for the grant of bail are included in the Criminal Procedure Code, which deals with the procedures surrounding bail in India. The court has been given a lot of discretionary control over the amount of security, which means it can place a monetary limit on the bond. (SEC 436- 450)

The exceptions set forth in Section 437 of the code specify when a person can plead guilty to a non-bailable offense. In such cases, obtaining bail is not a right, but rather a matter of the bench's discretion, which is based primarily on whether they feel the applicant is eligible for bail. The section 437(3) contains certain unusual circumstances.³

TYPES OF BAIL

In India, depending on the stage of the criminal case, a person may apply for one of three forms of bail:

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² Mustafa Faizan, "Strange and Arbitrary bail orders", The Wire, *available at:* <https://thewire.in/law/judges-bail-orders> (last visited on 21st March, 2021).

³ Mukhopadhyay Richaa, "Bail and judicial discretion", Latest laws.com, *available at:* <https://www.latestlaws.com/articles/bail-and-judicial-discretion-a-judicial-analysis/> (last visited on 21st March, 2021).

1. **Regular Bail:** An individual who has already been arrested and held in police custody can be granted regular bail. A person can file for regular bail under Section 437 and 439 of the CrPC.
2. **Interim Bail:** Interim bail is a bail that is given for a limited time. Before the hearing for standard bail or anticipatory bail, an accused is given interim bail.
3. **Anticipatory Bail:** If a person suspects that he or she may be arrested by the police for a non-bailable offense, he or she may apply for anticipatory bail. It is like an advance bail obtained under **Section 438 of the CrPC**. A bail under Section 438 is a bail before arrest, and if the court has issued anticipatory bail, the individual cannot be detained by the police.⁴

Bail cannot be refused unless the accused or convicted has committed a heinous or more serious offense. Even, if the offense committed is punishable by a substantial sentence. The probability of the person fleeing is taken into account. If the judge believes the individual has the ability to flee the country, his bail application will be denied. Bail is often issued with certain movement limits. It implies that the person is unable to leave the city or country. If necessary, the lawyer must convince the judge that the individual will be present at the hearings. The judge must also recognize the risk that, once released, the individual has the power or reputation to tamper with or contaminate evidence, coerce witnesses, or obstruct the investigation. If there is even a remote chance of these occurrences, the judge will deny the bail application. Also, the possibility of committing a crime after being released must be taken into account. To avoid bail, the prosecutor must present compelling evidence in court or file a strict objection.⁵

Judicial authority is never arbitrary, and it often works by well-defined and predictable channels, even though it appears to be granted in broad terms by a statute. It is an appeal to the judge's judicial conscience. The discretion must be exercised in compliance with well-established legal standards, not in contrast to them.⁶

⁴ Atigre Ameyprasad, "Critical analysis on bail and judicial discretion" ITJ, *available at:* <http://lawtimesjournal.in/critical-analysis-on-the-concept-of-bail-and-judicial-discretion/>. (last visited on 21st March, 2021).

⁵ *ibid*

⁶ Bhatia Dakshit, "Bail and Judicial Discretion, a legal study in context of India", AEGAEUM JOURNAL, *available at:* <http://aegaeum.com/gallery/agm.j-2434.34-f.pdf>. (last visited on 23rd March, 2021).

CLASSIFICATION OF OFFENCE:

According to CrPC offences are classified into two:

- a) Bailable
- b) Non- bailable

This classification is based on the seriousness of the offense as well as the severity of the punishment. In most cases, a bailable offense is considered less serious and grave than a non-bailable offense. “Bailable Offence” means an offence that is shown as bailable in the First Schedule, or that is rendered bailable by some other statute for the time being in force; and “non-bailable offence” means some other offence, as specified in clause (a) of Sec 2 of the CrPC.

JUDICIAL DISCRETION AND ITS APPLICABILITY UNDER CODE OF CRIMINAL PROCEDURE, 1973

The power that judges have to make and interpret laws is referred to as judicial discretion. Simply put, judicial freedom implies that the court is granted some leeway on how it decides such cases. This falls under judicial independence under the doctrine of separation of powers. The majority of judicial jurisdiction is found in Section 360 of the Code of Criminal Procedure, which grants judges the authority on sentence convicts to probation.⁷

Bail is the protection provided by the defendant, and it serves as a surety or assurance that the defendant will appear in court when called. The rules for the issuance of bail are included in Sections 436 to 450 of the Criminal Procedure Code, which deal with the procedures surrounding bail in India. The court has been given a great deal of latitude in determining the level of protection in this situation.

The exceptions set forth in Section 437 of the code define when a person can plead for bail, even though the crime committed is not bailable. In such a situation, getting bail is not a person's right, but rather the bench's discretion, which is based primarily on whether the petitioner is eligible for bail. Section 437, paragraph (3), provides for certain exceptional circumstances.

⁷Diva Rai, “Bail and Judicial Discretion,” available at www.blog.ipleaders.in, (last visited on 24th March 2021)

The principle of a speedy trial is interpreted as a constitutional right of people under Article 21 of the Indian Constitution. Investigation, inquiry, conviction, appeal, revision, and retrial are all stages of such a trial. The victim has the right to apply for bail if hearings and court charges are delayed for an extended period of time. The right to appeal is a constitutional right, and as a result, after a trial begins, it can go on for years, if not decades, and where parole is not given, the accused can languish in prisons for the same amount of time. The reason for the delay is a significant consideration in this case, and it influences the exercise of judicial power in granting bail. Thus, judgments made with the discretion of judicial minds in this respect cannot be unjustified or unconstitutional. Speedy justice entails quick decisions based on constitutional and other considerations.

In the case of *Gudikanti Narasimhulu v. Public Prosecutor*, 1978⁸, It was stressed that in India, bail is granted based on the hunch and discretion of the bench hearing the case. Our penal code is unobtrusive and lacks a comprehensive collection of circumstances for its award, leaving it entirely to the discretion of judicial minds.

Bail is therefore simply a matter of judicial judgment, and issues concerning one's individual liberties as well as the broader social and public interest must be weighed, with the aim of ensuring a speedy trial in mind.

PRESENT SITUATION IN INDIA: A DEVIATION FROM THE ARTICULATED PATH

Zahira Sheikh, a primary witness in the 2002 Gujarat riot trials, was ordered by a Supreme Court bench in 2006 to amend her testimony. The judge presiding over the case began his decision with a quotation from the "Manu Samhita" regarding the virtues of dharma and truth. Though, these quotations from religious scriptures can seem innocuous to a follower of that faith, they have deeper dimensions. It represents the judge's "inarticulate major principle" in the case. "Bail is the law, and prison is an exception," Justice V.R. Krishna Iyer cautioned in the late 1970s. However, this has not been followed in many cases. For example, the case of *Rehana Fathima*⁹ clearly depicts how judges deviate from the path articulated.

⁸Richa Mukopadhyay, "A Judicial Analysis through precedents," available at www.indialawjournal.org, (last visited on 24th March 2021)

⁹Prashant Padmanabhan, "Rehana Fathima Case: A problematic bail order," available at www.legalservices.com, (last visited on 24th March 2021).

Rehana Fathima, a body inequality activist, requested her two daughters, ages 14 and 8, to paint on her nude body above the naval. She captured it on tape and posted it to YouTube with the caption, "Body art and politics." She went on to say that family members should raise awareness and that better sex education is needed to minimize violence against women.

Each person now has the freedom to free expression and speech. The police need not be concerned with an expression of a belief that has no overtones of vulgarity. However, a criminal report was filed in the police department for possible violations of the Protection of Children from Sexual Offenses Act, 2012 ('POCSO') and Information Technology Act, 2000.

Her bail plea was heard by the Kerala High Court. Though refusing the bail appeal, the High Court educated Judge debated the merits of the case and went to some lengths to justify why her behaviour was not ideal. However, there is no question of bail jurisprudence. This is a risky strategy that deviates significantly from the catena. The relevant questions the Judge should have asked are if the accused has a chance of jumping bail if it is granted, and whether custodial questioning is needed at all. In the Order, those questions were neither asked nor answered. The Judge sees no problem with the Petitioner's nude body being painted on inside the four walls of her home, but posting the video is not permitted. The last five pages of this decision are the most dangerous. There is a lengthy discussion on the elevated status of a "mother" in our culture. Our patriarchal society has a long history of stereotyping women as tolerant mothers. The learned Judge cites Manu Smriti and the Holy Quran to this bail petitioner after such exposition of the role of an ideal mother. As a result, these decisions are the result of a misconception of the position of the Court. In a representative system, the educated Judge has forgotten that the party petitioning the Court is an equal person, much as any other Judge or civil servant. She sees the Court as a supplier of services rather than a moral preacher.

Thus, even after doing their best and considering the statute and some rules to follow for its exercise, the Indian criminal justice system remains dysfunctional from a broader standpoint, despite dealing with certain discretionary control in hand. There is also a need for a reform in the current bail regime, which can take into account the socioeconomic status of the majority of our people. The courts should still take into account the accused's socioeconomic situation, take a humane view, and conduct background checks to prevent him from leaving the justice system, resulting in the citizens' civil and other rights being restored.

DISCRETION IN GRANTING BAIL CANNOT BE USED ARBITRARILY

Bailable and non-bailable offences are the two forms of crimes. The accused can request bail as a matter of right in the first case. Bail is set at the judge's discretion in the above case. The Supreme Court held in Govind Prasad (1975) that granting bail is a judicial, not a ministerial, act. The discretion cannot be exercised unilaterally. The Supreme Court stated in Harnairain Singh (1958) that this discretion must be exercised judicially, according to the limitations set out in Section 437 of the CrPC and taking into account the gravity of the charge, the nature of the accusation, the severity of the punishment if convicted, the possibility of the accused absconding if released on bail, the risk of evidence being tampered with, health, age, and sex. The court can also enforce any requirements it deems necessary "in the interests of justice."

Vikram Bagri, who had been held in the Ujjain jail for two months on charges of assaulting a woman with the intent to outrage her modesty under Section 354 of the Indian Penal Code, was granted bail by the Madhya Pradesh High Court. The court issued an unusual and contentious order, instructing the accused to visit the victim's home on Raksha Bandhan with a package of sweets and insist that he tie a Rakhi and "promise to defend her to the best of his capacity for all times to come." He was also told to give Rs 11,000 to the new sister as part of the Raksha Bandhan ceremony, and Rs 5,000 to her son for clothes and sweets. The fact that the injunction would have little bearing on the proceedings is irrelevant because it is blatantly discriminatory and violates women's autonomy. Our women do not need any defence since they are on par with our men. They should not need defence from those who are accused of attempting to molest them. Jurisprudence on Article 14 in India has stepped away from the outdated notion that women are vulnerable and need special care or defence.

A rape suspect was granted bail by the Bombay High Court so that he could mediate with the victim. The bail had to be revoked, and the Supreme Court had to intervene. The Allahabad High Court made remarks against the survivor for not speaking up about her traumatic experience of sexual assault when it granted bail to Swami Chinmayanand (2020), a former

Union minister and BJP leader who was accused of sexual harassment of a female law student at his college. The practice of blaming victims should have been stopped.¹⁰

CONCLUDING REMARKS

LEGAL REFORMS PROPOSED

Bail legislation has been a slow-moving process in the legislature. Only in 2017 did India's Law Commission issue a study emphasizing the need to change the legislative system around bail. Under-trial inmates make up 67 percent of the total jail population, according to the commission. It claimed in its study that a bail provision must not unreasonably infringe on constitutional rights. It was further proposed that under trial inmates serving up to seven years in prison be released after completing one-third of their sentence, and those serving longer sentences be released after completing half of their sentence. While the study highlighted the need for bail improvements, it was heavily criticized in many areas. The report found a number of issues with the bail system, but only modest changes were proposed in the end.

The theory of 'innocent unless found guilty' governs bail. When proposing bail reforms, keep in mind that the victim is still facing charges and has not been charged. The seriousness of the crime does not sway the courts; instead, they should value the facts and apply their minds in a rational manner. A standardized checklist should be used to direct the courts in issuing bail. The test should compel courts to refuse bail only where there is a flight risk, a lack of compliance on the part of the convicted, or the likelihood of evidence tampering.

The terms of bail should include the person's socio-economic status and shall not be unreasonable. Bail for the vulnerable has been inaccessible due to 'surety' in the form of monetary consideration. For the presence of the convicted at the trial, alternative types of requirements may be enforced. Conditions that are entirely incidental to the subject of the

¹⁰ Mustafa Faizan, "discretion in bail can't be used arbitrarily", The Tribune, *available at*: <https://www.tribuneindia.com/news/comment/discretion-in-granting-bail-cant-be-used-arbitrarily-125345>. (last visited on 23rd March, 2021).

bail or that enforce a high level of 'surety' inadvertently harm the socially disadvantaged parts of society. The new bail rules are completely disconnected from the country's social realities. Though bail is considered a right and is a formally equitable statute, the provision of discretion leads to misuse of authority and a shift away from the rule of law.¹¹

The rule of law shall direct judicial discretion in all bail-related cases, and it should be exercised by reasoned decisions. The order shall explicitly state the relationship between the terms and the issuance of bail. When considering a bail appeal, the court must strike a balance between the individual's right to liberty and the societal/public interest at large.

¹¹ Kaur Bhavnish, Bail reform: curbing judicial discretion, Samvidhi, *available at*: <https://www.samvidhi.org/post/bail-reforms-curbing-judicial-discretion>, (last visited on 24th March, 2021).