

RESEARCH PROJECT

ON

**BAIL REFORMS IN THE CONTEXT OF UNDERTRIAL
WOMEN PRISONERS: AN ACTION-ORIENTED RESEARCH
WITH SPECIAL REFERENCE TO SABARMATI CENTRAL
JAIL IN THE STATE OF GUJARAT**



**Submitted to: Department of Justice
Ministry of Law and Justice Government of India**

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LIST OF CASES

- i. Abdul Basit alias Raju & Ors. v. Mohd. Abdul Kadir Chaudhary & Anr. (2014) 10 SCC 754*
- ii. Aslam Babalal Desai v. State of Maharashtra (1992) 4 SCC272*
- iii. Atul Tripathi v. State of U.P (2014) 9 SCC 177*
- iv. Babu Singh & Ors. V State of Uttar Pradesh (1978) CrLJ 651*
- v. HDFC Bank Ltd. v. J.J. Mannan, AIR 2010 SC 618*
- vi. K.C. Sareen v. CBI Chandigarh, (2001) 6 SCC 584*
- vii. Maulana Mohammed Amir Rashadi v. State of Uttar Pradesh (2012) 1 SCC (Cri) 681*
- viii. Mazabar Ali v. State, 1982 CrLJ 1223, 1225 (J&K)*
- ix. Moti Ram v. State of M.P (1978) 4 SCC 47*
- x. Rama Narang v. Ramesh Narang & Ors., 1995 SCC (2) 513, JT 1995 (1) 515*
- xi. Rasiklal v. Kishore (2009) 4 SCC 446*
- xii. Re-Inhuman conditions in 1382 prisons (Writ Petition (Civil) No. 406 of 2013)*
- xiii. Sanjay Chandra v. CBI (2012) 2 SCC 281*
- xiv. State (Delhi Admn.) v. Sanjay Gandhi, (1978) 2 SCC 411*
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EXECUTIVE SUMMARY

INTRODUCTION

The Indian jurisprudence on bail establishes that bail is the rule and jail is an exception. To implement this mandate several interventions have been made by both the judiciary as well as by the legislative arm and yet the prisons of India present quite a different picture. Overcrowding in prisons has reached a chronic stage and the prison system is collapsing, the greatest hardship is being faced by women, due to their gender women often face discrimination due to lack of prison infrastructure or discrimination due to resultant social stigma caused by imprisonment, and also find it difficult to secure bail or even get a surety when bail is granted to them. As a result, their right of getting a fair trial is hindered and they often suffer imprisonment without following the due process of law.

PURPOSE OF THE STUDY

The study intends to identify the clogs that are preventing the implementation of law relating to bails in the context of women undertrials and provide suggestions for removing these clogs in the form of amendments to the existing codified law of bails.

METHODOLOGY

For the purpose of our study, we have relied upon the primary and secondary data.

For the purpose of collecting the primary data we visited the Sabarmati Central Jail in the State of Gujarat and the data was collected through questionnaires filled by the inmates.

We have also analyzed the Secondary data available in the form of the reports prepared by various Parliamentary Panels, statistics released by the National Crime Records Bureau and the reports prepared by NITI Aayog, Law Commission and Women Commission.

To study the implementation of the codified law we have also done a critical analysis of the precedents laid down by the courts of records.

KEY FINDINGS OF THE STUDY

1. Majority of the population of women inmates comprises of undertrials.
2. 1409 children of women undertrial inmates are in prison.

3. Due to their gender female undertrials face more discrimination in the form of lack of infrastructure and social stigma.
4. Even when bail is granted, they remain imprisoned for want of a surety.
5. The judicial discretion in granting bail is very wide and untrammelled; the precedents laid down by the courts of record fail to provide a uniform criterion.
6. The proviso to Section 437(1) CrPC requiring special consideration while deciding bail applications if accused is a woman is not being applied by courts in practice.

SUGGESTIONS

Intervention in the form of codification of the law on bails is required. The aim of codification needs to be such as to reduce judicial discretion, as well as reduction on dependency on legal counsel for securing bail for this purpose we make following suggestions:

1. Amendment to Section 167 of CrPC for default bail after completion of police custody where punishment for imprisonment is less than seven years.
2. For other offenses bail to be granted by default after completion of investigation unless grant of bail would hamper trial.
3. For women undertrial the eligibility of bail under Section 436A CrPC should be reduced to one third of the sentence in case of women undertrial.
4. Once bail is granted, women undertrials should be released on personal bond with or without sureties.
5. The onus of monitoring the compliance of Section 436A CrPC should be put on the Judge before whom the trial is being conducted.

To implement these suggestions, we have in this report proposed model amendments for Section 167, Section 436A and Section 437 of the CrPC.

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CHAPTER 1
INTRODUCTION

1.1. Background of the study

The cardinal rule of any criminal justice system is that every person is innocent until he is proven to be guilty beyond reasonable doubt. The principle is recognized under the International Law by Article 14(2) of the International Covenant on Civil and Political Rights, 1966 which reads as: - *“Everyone charged with a criminal offence shall have the right to be presumed innocent until he is proved guilty according to law.”* This principle is also recognized under Article 21 of our Constitution which provides that no person shall be deprived of his liberty except according to the procedure established by law. However, as per the Prison Statistics of India, 2019, out of the total 4,78,600 prisoners in India, the number of undertrial prisoners was 3,30,487, and the number of undertrial prisoners saw an increase of 2.5% in comparison to the previous year. The number of women prisoners stood at 19,913. It can be seen that comparatively women constitute a very small proportion of the general prison population, as a result the prison infrastructure has not been customized to hold women prisoners. In India only 15 States/Union Territories have women jails (24 women jails) with a total capacity of 5,593. Women prisoners suffer discrimination not only due to lack of infrastructure, but the prevailing social conditions in India also aggravate the sufferings of a woman inmate. It needs to be emphasized that the effect of incarceration in context of a woman prisoner is not limited to the inmate herself, but also extends to the children dependent on her, this is evident from the fact that 1409 children are accompanying women undertrial prisoners. Therefore, it can be said that women undertrial prisoners can be classified as a separate class amongst the undertrial prisoners. In this context, it becomes imperative to analyze the law of bail in relation to the women undertrials. The present research study aims at understanding the problems of women undertrial prisoners in availing bail and suggest necessary amendments to the Cr.PC.

1.2. Review of Literature

I. Books

a) Jai Raj Janak, *Bail Law and procedures with tips to avoid police harassment*, (7th ed. Universal Law Publishing, 2016)

The law on bail states that the grant of bail is a rule and the refusal to grant bail should be an exception, however the learned author in this book has shown that this rule has not been implemented, as a consequence the prisons have been overcrowded by a growing number of under trial prisoners. The learned author has thus concluded how this scenario has led to an unconstitutional interference with the right to life of those facing criminal charges. The learned

author in his work has highlighted the important steps taken to reduce pretrial incarceration, in furtherance to this endeavor the book traces important legislative changes with regards to the law of bail in India and also analyses various precedents laid down by the courts of record. Thus, the book is a comprehensive guide on the law of bail, its procedure, relevant Act and judicial precedent, the learned author in his book has systematically explained various concepts relating to bail under bailable and non-bailable offenses. The concepts have been explained by using simple and lucid language. Recent amendments and relevant case laws have been incorporated by the learned author. This book would thus be of great help to the researchers in understanding the concept of bail, its procedures and other allied aspects, which is necessary in order to carry out a further empirical research and to suggest bail reforms.

b) Sharma Pawan, *Journey of Women Law Reforms and the Law Commission of India: Some insight* (Universal Law Publishing, 2017)

The learned author has been associated with the Law Commission of India for decades and has made contributions to many reports dealing with women issues. The book has covered various Law Commission Reports which have dealt with suggestions given for women law reforms. It covers areas under marriage and divorce, maintenance, guardianship, custody and shared parentage, succession and inheritance and violence. In the last part of the book, it deals with Law Commission Reports with relation to women in custody. In this section that author has discussed 84th and 135th Law Commission reports. She has compared the suggestions and recommendations given in both these reports. The author has reiterated the important recommendation made along with the resultant amendments in the prevailing laws.

c) Pandya Asim, *Law of Bail Practice and Procedure* (4th ed. Lexis Nexis, 2015)

The learned author is a practicing lawyer and a lecturer and has previously authored various books. The learned author has written this book with an aim to explain the rationale behind bail provisions and has made suggestions to bring consistency and uniformity in the administration of bail jurisdiction. The book is divided into three parts. The first part contains comments by the learned author on the subject of Bail with case laws and other references. The second and third parts of the book contain the twenty frequently cited decisions of the Supreme Court and the bare text of the Code of Criminal Procedure, 1973. The book is aimed to make understanding the law of Bails easy and to prove convenient to the practicing lawyers. The book is of use to our research as it has exhaustively covered all relevant aspects and offers personal views on many important topics. All this has been done using simple language and thus helping the researchers understanding the law of Bails in a better manner.

II. Law Commission of India Reports and High-Powered Committee Reports

a) Women in Prisons: India, Ministry of Women and Child Development, Government of India (2018), <https://wcd.nic.in/sites/default/files/Prison%20Report%20Compiled.pdf> last visited 22 July, 2019.

The Report has been prepared by the Ministry of Women and Child Development, Government of India and studies the difficulties faced by women inmates in comparison to the male inmates. As per this report, only 17% of female inmates live in exclusive female prisons, the report further highlights that 66.80% of female inmates are undertrial inmates. The report highlights lack of accommodation in prison for female inmates, the report finds that necessities like sleeping arrangements, heating and cooling system in barracks, and availability of natural light are also absent for female inmates. Due to the lack of prison infrastructure for female inmates even those undergoing incarceration for petty offenses are kept with inmates who have committed a heinous and violent offense. The report notes that female prisoners on account of their incarceration suffer from social stigma and are prone to be isolated by their relatives, further due to lack of infrastructure the female inmates are often transferred to faraway prisons which leads to lesser visits by relatives. From an analysis of this report, it can be concluded that in a prison system where infrastructure has been developed keeping in mind the needs of male inmates, female inmates are faced with discrimination in as much as their hardship is aggravated due to lack of infrastructure and the social conditions make it more onerous for them to be imprisoned and difficult to rehabilitate after release. The Report also makes various suggestions for improving the condition of female prisoners; suggestions relevant for the present report are as follows:

1. Default bail for female undertrials who have been in prison for one - third of the duration of their maximum possible sentence.
2. Time frame be prescribed for release of women prisoners who have been granted bail is but surety is not produced.
3. The condition under Section 433A of the CrPC is made non-applicable to female prisoners.
4. Mechanisms such as bail, plea bargaining, free legal aid, non-penal fines, probation, etc. can be considered to help avoid the incarceration of women.

b) 'Women in Detention and Access to Justice', Committee on Empowerment of Women (2016) (Sixteenth Lok Sabha) Tenth Report (2017), http://164.100.47.193/lssco/committee/Empowerment%20of%20Women/16_Empowerment_of_Women_10.pdf last visited 18 July, 2019.

The Report highlights that the population of male prisoners is higher than the population of women prisoners; as a result, the prison system has been designed with a bias towards the male prisoners and has failed to take into consideration the gender specific needs to the women prisoners. As a consequence of this women inmates are deprived of the facilities that are available to the male inmates. The report comprehensively studies the discrimination faced by women inmates such as denial to access to justice, overcrowding, issues related to policing and modernization of jails while recognizing the principles of gender sensitive prison management. The Report was made after visiting several prisons in the states and union territories.

c) Women in Custody, 135th Law Commission Report (1989), <http://lawcommissionofindia.nic.in/101-169/Report135.pdf> last visited 11 September 2019.

The 135th Report of the Law Commission of India, submitted on 14th December, 1989, centered on the problems of „Women in Custody“. The Commission suggested the addition of a separate chapter containing the safeguards to protect the women in custody so that the police and jail authorities, the women concerned in criminal matters and other stakeholders can inform themselves of it.

The recommendations of the Commission were as follows:

In order to maintain the dignity, when a woman is arrested, the concerned police officer shall not touch the woman and may presume her submission to custody.

1. Unless in exceptional cases, no woman shall be arrested after sunset and before sunrise.
2. Medical examination shall be conducted under the supervision of a registered female medical practitioner, while maintaining strict regard to her decency.
3. The concerned woman shall be informed about her right to be medically examined, in order to bring on record any facts which may show that an offence against her has been committed after her arrest.
4. A copy of the medical examination report shall be given to the woman.
5. A woman shall not be interrogated under Section 160, Criminal Code at any place other than her dwelling house.
6. While recording her statement during investigation, a relative or friend of the woman or an authorised representative of an organisation interested in the welfare of women shall be allowed to remain present.
7. Due regard should be paid to the fact that the offender is a woman, while exercising the power of the court under Section 360, Criminal Code to release the offender on probation.
8. The prohibition on reduction of the period of imprisonment under Section 433A, Criminal Code should not apply to a woman.
9. Where a pregnant woman is sentenced to imprisonment, the court should have power to

direct that execution of the sentence be suspended till termination of the pregnancy and a specific period thereafter, subject to certain conditions.

d) Amendments to Criminal Procedure Code, 1973 – Provisions relating to Bail, Law Commission of India (2017), <http://lawcommissionofindia.nic.in/reports/Report268.pdf> last visited 5 Aug. 2019.

The Law Commission of India was asked in 2015, by the Department of Legal Affairs, to examine the need for a special Bail Act in India. However, the Commission concluded that there is no need for a special legislation, but there is a need to amend the current provisions related to bail in the Criminal Code. The Commission interacted with police officers of various states, judicial officers, Directors General of Prosecution of all the States and other stakeholders and came up with the report in May 2017. The recommendations made by the report are gender neutral.

The report first looks into constitutional manifestations of international standards on bail such as presumption of innocence; right to non-discrimination, right to speedy and fair trial and so on. The Commission has used these principles while recommending amendments to the present bail provisions.

The report then looks into the present legal provisions and bail mechanism in India. While doing so, the report first looks into provisions of arrest and remand. Then the report looks into provisions of bail in bailable offence and non-bailable offence. The report also looks into provision for bail in crimes, which have special legislations, such as bail in Narcotics Drugs and Psychotropic Substances Act, 1985 for narcotics related offences; provision for bail in Terrorist and Disruptive Activities (Prevention) Act and Maharashtra Control of Organized Crime Act for offences of terrorism; bail in organized crime; and bail in economic offences. The report also studies provisions for anticipatory bail, cancellation of bail and bail pending appeal.

The report made recommendations regarding modification of 436A of the Criminal Code, amendment of Section 50 of the Criminal Code by making it mandatory to provide to the arrestee in writing, full particulars of the offence for which he is arrested, allowing use of electronic tagging instead of holding the accused in custody and such suggestions.

While focus of the present study is to look into bail reforms for women under-trial prisoners, and even though the report does differentiate women accused as a separate class from accused men and does not make any recommendation for women, studying the present report becomes

imperative as the report aims to amend deficiencies in the present bail provisions which equally affect both men and women under-trial prisoners.

e) Women in Detention, Committee on Empowerment of Women Thirteenth Lok Sabha (2002), http://wbcorrectionalservices.gov.in/pdf/empowerment_of_women.pdf last visited 10 August 2019.

The report was prepared in the year 2002 by the Committee on the Women Empowerment Thirteenth Lok Sabha. The Committee in its report found a paucity of infrastructure in prison for women, due to the lack of exclusive prisons women had to be kept in separate enclosures. Most of the inmates were undertrial and some of them had been in prison for a duration longer than the maximum imprisonment prescribed for the alleged offense. Most of the inmates had lost touch with their family members, even when bail was granted prisoners were not released due to the unavailability of a bailor, after release they face desertion by family members and relatives due to social stigma due to their gender. No initiative was taken by jail authorities for the early release of prisoners.

In light of these facts, the panel felt a need for simplification for bail procedures for women prisoners and for reducing the population of undertrial women prisoners made the following recommendations: -

1. Women arrested for vagrancy, loitering, begging, destitution, etc. should not be sent to jails and instead be sent to appropriate protection homes.
2. On being brought to the prison, the arrested women must be informed of the grounds of arrest immediately and communication in that respect should also be sent to the nearest relatives(s) of arrested women.
3. The prison administration should associate the students of Law Colleges to render legal assistance to women, follow-up cases for bail, and other procedures to get relief from the courts.

f) Children of Women Prisoners in Jails: A Study in Uttar Pradesh, Planning Commission of India (2004), http://planningcommission.gov.in/reports/sereport/ser/stdy_jailwm.pdf last visited 15 August 2019.

Pandit Govind Ballabh Pant Institute of Studies in Rural Development, Lucknow conducted a study on children of women prisoners in Uttar Pradesh. The study was sponsored by the Planning Commission and published in 2004. The findings of the survey were based on primary data collected from field survey in 21 jails of Uttar Pradesh. Out of these 21 jails, 2 were special jails and the rest were district jails. A total of 297 women prisoners were interviewed in the survey. The

interviewees were randomly selected however, preference was given to women who had young children living with them.

The study reviewed the socio-economic status of women prisoners and their children, programs for their rehabilitation, and facilities for care and development of young children. With this the study aimed to add to the scarce literature and empirical data available on the subject and suggest policy measures for better rehabilitation of women prisoners and their children and for their welfare.

The study found that the three – fourth of prisoners who were mothers were under-trial prisoners. Almost fifty-seven per cent interviewees were in the age group of 26-45 years with an illiteracy rate of 55.56. 50.37% of interviewees were from low-income background and a majority of them came from families which were dependent on agriculture or manual labor for sustenance.

It was found that a majority of jails were overcrowded. Except for two jails no other jails had separate women ward creating hindrances for women prisoners to participate in rehabilitative programs to which male prisoners had full access to. Work programs did exist, but they only prepared the women prisoners in traditional female roles and they were not being motivated to study.

A lot of women prisoners were worried about their future after release and women prisoners who lived without their children were anxious about treatment of children by in-laws. As regards to children, it was found that children received adequate nutrition through fruits, milk, eggs and supplementary nutrition. It was reported that jails had adequate facilities for health check-up and immunization against major diseases. However, only 8 jails had recreational facilities for children, educational facility for children was available only in 5 jails and there were no crèches in any jail.

Based on these observations, few policy recommendations were made, which include improving infrastructure to meet special needs of women and especially women with children; providing separate food and nutrition to children; providing facilities like crèche, anganwadi center, primary education center, recreation etc.; diversifying recreational and work programs; sensitizing prison administration about the needs of children; earmarking funds for welfare of children of women prisoners; and amending the Juvenile Justice Act to include young children of women prisoners, so as to enable them to derive benefits of the Act for their care, protection, development and rehabilitation.

g) Report of the All-India Committee on Jail Reforms (Mulla Committee Report), Ministry of Home Affairs (1983), <https://mha.gov.in/MHA1/PrisonReforms/report.html> last visited 20 August 2019.

The All-India Committee for Jail Reforms (1980-83), also known as Justice Mulla Committee is landmark for its detailed study of prisons in all the States and Union Territories and noteworthy recommendations which hold true even today. In 2001, the Home Ministry assigned this to Correctional Administrative Division which published the study of implementation of the reforms in 2003 in two volumes, Volume 1 contains details of the recommendations of thereport and Vol. 2 shows the status of each State/Union Territory for the same.

Firstly, regarding recommendations given to the Central government the report, inter alia observed that government has not yielded to formulating a new national policy for prisons under Part IV of the Constitution or included prisons under the Concurrent List of the Seventh Schedule.

On the subject of women prisoners, the report states that 19 out of the 35 States/Union Territories do not have separate jails for women. Women taken in protected custody for example those who were rescued or deserted women are also confined to prisons with convicts and under-trials. The situation for pregnant women fares better as all except one jail conducted medical examination and transferred to local hospital during child birth. It is recommended that the place of birth of children thus born should not be stated as 'prison' to avoid stigmatization, but 5 states follow the practice which should be reconsidered. 18 states do not provide for crèche facilities as per prison rules. Similarly, in all except one state they are allowed to retain certain items of personal hygiene as well as customary such as 'mangalsutra' and bangles. They are also adequately provided with clothing. In 10 out of 35 states, educational facilities are not provided to them nor are they given specific vocational training which is recommended to help them be self-dependent during their sentence and for rehabilitation also. Most Central jails have women staff but the data becomes skewed in District and further in sub-jails. While some states appoint women guards temporarily as and when need arises, 14 states do not do so even when such a need arises.

Concerning under-trials in general, the report observed that in some States convicts and habitual offenders are lodged in the same jail as under trials. Separate jails for under trials are only there in 2 states. It is highly discouraged to classify them into classes based on socio-economic status but 15 states still follow this system. A large number of states are unable to produce them before the magistrates on their date of hearing. The data is worse for some states but Gujarat is not lagging here.

In conclusion, this report highlights a lot of questions that we had not considered as aspects for our research such as place of birth of children of convicts, customary items for women, temporary or permanent women staff data, status of deserted/rescued women, etc. On the other hand, regarding the general recommendations for under-trials, it is observed that the data shows that the state Gujarat has complied to most of the recommendations.

h) Report on Conditions of Women in Detention in the State Of Punjab, National Commission for Women, (http://ncw.nic.in/sites/default/files/Report_On_Conditions_of_Women_in_Detention_in_The_State_Of_Punjab.pdf) last visited 5 September 2019.

The report studied 9 jails in Punjab with 809 women prisoners, out of which the number of undertrials greatly exceed the convicts in all the jails. Both do not live-in separate enclosures due to the acute lack of resources and overcrowding. The aspects of the study included observations on living conditions of inmates, outdated building structures, poor electricity fittings, poor kitchen conditions, scales of diet have not been changed since 1896 Jail manual. Apart from these the research also included study of administration in jails including need for infrastructure and training of the staff. One issue that cropped up is the children of inmates living in the jails. After attaining 6 years of age, the children should live with their relatives outside jails but as most women do not come from safe families or have no one, they prefer that their child stays with them inside the jail. The researchers observed that they were not aware of nor did they wish to talk about jail environment not being conducive for the growth of any child. Hence did not explore for alternatives.

In Chapter 2 of the report provides detailed recommendations to improve the life in jail. Thus to tackle overcrowding it is recommended to solve the issue of large number of under-trials and increase in area, new renovations and improvements were also suggested including tiled floors, dormitory type living arrangements for clean and spacious living, need for open space within the enclosure for some physical activity, restructuring of kitchens and need for new machines, fans and even aprons, etc., increase in the number of toilets to meet demands of inmates, changes in the food scale, work programs and training to rehabilitate them and make them independent, imperative need to appoint a female counselor. Also, regarding the jail administration, the report suggested need to recruit more staff on an urgent basis and reconsider and improve their pay scales and working conditions. And also conduct training programs.

Chapter 3 is detailed case studies of each of the 9 jails. Similar parameters were observed in each of the jails for a comprehensive study. The appendix further details two police lock-ups in Mohali

and Kharar with rare instances of women being lock-up. To bring reforms it is necessary to also study in depth the working conditions of police personnel and reforms in their job. Another issue which needs a detailed study and attention is drug trafficking among the Sansi tribe. The Government or the civil society has failed to give attention to reform and re-socialize them to mainstream occupations since Independence hence today a lot of women prisoners involved in drug related offences are from this tribe.

The report involves tremendous detailed study on the 9 jails in Punjab and further enumerates recommendations that should be adopted to not only for prisoners' reform but also the jail staff and police personnel and courts so as to bring out actual changes in the justice system.

i) Prison Statistics India 2019, National Crime Records Bureau (<https://ncrb.gov.in/en/prison-statistics-india-2019>) last visited on 11 February 2021.

The report Prison Statistics India 2019 has been prepared by the National Crime Records Bureau, Ministry of Home Affairs. As per this report the occupancy rate of prisons has increased to 118.5% of the total capacity of the prisons. The report further reveals that out of the total 4,78,600 inmates 3,30,487 (69.05%) inmates are those who are undergoing pretrial detention and convicted inmates comprise only 30% of the total population of inmates. The number of women inmates stood at 19,913. With regards to the condition of women inmates this report highlights that out of total 1350 prisons in India only 31 are women jails. The total capacity of women jails is 6511 inmates and occupancy rate stand at 56%. Occupancy of women inmates in other jails stand at 76% and overall occupancy stands at 71.9%. However, occupancy in Uttarakhand is as high as 170.1%, which is followed by Chattisgarh at 136.1% and Uttar Pradesh at 127.3%. Therefore, while in general the occupancy rate does not suggest overcrowding, however in some states show that the population of women inmates is higher than the capacity of prisons.

A disturbing scenario that emerges from analyzing the data of this report is that out 19,913 total women inmates 1543 were accompanied by 1779 children, further out of these 1543, 1212 were undertrial accompanied by 1409 children. Thus, the ill effects of pretrial detention are being suffered not only by the inmate but also her child. The report further indicates that capacity to hold women inmates in jails other than women jail has increased by 4% while the actual number of women inmates has increased by 10.77%. The analysis of the data makes out a case for intervention on urgent basis to prevent prisons from becoming overcrowded by undertrial women inmates.

III. Case Laws

a) Re-Inhuman conditions in 1382 prisons (Writ Petition (Civil) No. 406 of 2013)

The present petition arose out of a concern shown by former Chief Justice of India R.C. Lahoti on four issues, namely (a) overcrowding in prisons; (b) unnatural death of prisoners; (c) gross inadequacy of staff, and (d) the available staff being untrained or inadequately trained. The Union of India was then directed to furnish information regarding the same from the states. The Union sent a host of directives and suggestions but owing to the lukewarm response from the States and Union Territories, the court passed certain directions in April, 2015. Study of Prison Management System Software, assistance by National Legal Services Authority, establishment of Undertrial Review Committee and application of Section 436A of Criminal Procedure Code were some of the important directions given. Later, it was found out from the report submitted by National Legal Services Authority that these directions were not duly fulfilled and so the court issued further directions especially with regards to under trial prisoners. These directions included the involvement of State Legal Services Authority and State Legal Services Authority as well as the Inspector General of Police and Director General of Police in-charge of prisons for the proper implementation of the directions so as to oversee the proper implementation of the Model Prison Manual 2016, application of Section 436A of Criminal Procedure Code and secure release of undertrial prisoners. The petition arose out of concerns of deteriorating prison conditions and delayed justice to undertrial prisoners. The directions given by the court in the petition such as the establishment of Undertrial Review Committee; further the objective of release of undertrial prisoners. The said directions given by the court are thus necessary to be studied by the researcher.

IV. International Instruments

a) The United Nations Standard Minimum Rules for the Treatment of Prisoners (The Nelson Mandela Rules), United Nations (2015) (https://www.un.org/en/events/mandeladay/mandela_rules.shtml https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf), last visited 24 January 2021

The United Nations Standard Minimum Rules for the Treatment of Prisoners are known as Nelson Mandela Rules. They were adopted by through General Assembly Resolution 70/175 on 17 December 2015. This document was based on review of the Standard Minimum Rules for the Treatment of Prisoners, adopted first in 1955. The review was done by an open-ended Intergovernmental Expert Group which reached a consensus on all the rules opened for revision in 2015.

The rules aimed at setting just principles and practices for prisoners and prison management. The United Nation accepts that not all rules are capable of being applicable in all the places,

however, it expects members to constantly try to tackle practical hurdles in their way and to welcome new practices. The first Part of the rules covers the general management of prisons and its applicability to all categories of prisoners, while the next Part contains rules applicable only to the special categories. The rules contained in section A are applicable to prisoners under sentence, section B rules are applicable for prisoners with mental disabilities and/or health conditions, section C rules are applicable for under trial prisoners, section D rules are applicable for civil prisoners and section E rules are applicable for persons detained without charge. The Rules require under trial prisoners to be presumed to be innocent until proven guilty. As per the Rules under trial prisoners should be kept separate from convicted prisoners, be allowed to wear their own clothing, be given an opportunity to work but not mandated to work, be informed about the reasons for his or her detention and charges against him, and be given legal aid.

The Rules expect jail authorities to provide for welfare of women prisoners by having provisions such as keeping men and women in separate institutions, having special accommodation for all necessary prenatal and postnatal care and treatment, prohibiting solitary confinement in cases involving women and children, prohibiting use of instruments of restraint on women during labor, during childbirth and immediately after childbirth, giving responsibility of custody of keys to woman staff member in a prison for both men and women.

b) The United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, United Nations (2010), https://www.unodc.org/documents/justice-and-prison-reform/Bangkok_Rules_ENG_22032015.pdf last visited 10 September 2019.

The United Nations Rules for the Treatment of Female Prisoners and Non-Custodial Measures for Women Offenders, known as the Bangkok Rules, were adopted by the UN General Assembly (Resolution A/RES/65/229) in December, 2010. HRH Princess Bajrakitiyabha of Thailand played an important role in the developing the Rules. These Rules are important for the protection of the rights of female prisoners and offenders. The Rules explicitly address the needs of such persons as well as the needs of children in prison with their parent. 193 countries have unanimously voted for the Rules – acknowledging and agreeing to meet and respect the gender-specific characteristics and needs of women in the criminal justice system. The Rules protect the under-trial female prisoners and those who are convicted. They also protect female prisoners under protective custody by the state and those given a non-custodial sentence or sanction. Certain rules also apply to male prisoners.

There are seventy rules, providing guidance to the legislators, policy makers, prison staff and

sentencing authorities regarding the reduction of unnecessary imprisonment of women and meeting the needs of the female prisoners. The Rules provide gender-sensitive alternatives for both pre-trial detention and sentencing post-conviction. One such alternative to prison is the provision of counseling services, for female offenders who are mothers, along with child-care facilities. This would enable them to reintegrated into the society while continuing to care for their children. It is required that the physical and psychological needs of the children who are in prison with their mothers must be taken care of.

The Rules deal with equal access to reproductive healthcare, mental health, treating substance abuse as well as preventative healthcare like breast cancer screening. As a measure of treating the female prisoners with dignity and humanity, there is prohibition on solitary confinement and disciplinary segregation of such prisoners who pregnant, with infants and breast-feeding mothers. Care of the woman's dignity needs to be taken while conducting search procedures. Only female staff should carry out pat-down searches and strip searches. Alternative screening methods should be developed. The Rules also address the issues of sexual misconduct and humiliation by the prison staff and other prisoners.

1.3. Research Objectives

1. To identify the key factors and grounds for refusing in granting bail for under trial prisoners.
2. To study the problems faced by women under trial prisoners for availing bail in bothailable and non-bailable offences.
3. To study the problems of women prisoners languishing in jails in the State of Gujarat with special reference to Sabarmati Central Jail.
4. To contribute in formulating new policy in terms of reforming in the existing provisions related to bail enshrined under the Code of Criminal Procedure.
5. To suggest appropriate suitable amendments in the existing bail provisions in general and especially for women prisoners.

1.4. Research Methodology

1.4.1. Criteria for identification of sample

This action-oriented research is based on primary and secondary sources. Primary data was collected from structured interview schedules and questionnaires, which were administered to men and women prisoners languishing in the Sabarmati Central Jail in the State of Gujarat. The women convicted and undertrial prisoners were studied as a case study method and, the information was

collected from all the women, convicted and undertrials housed in Sabarmati Central Jail, Ahmedabad.

Secondary data was collected from various books, journals and official reports, records of National Crime Records Bureau and internet sources. The secondary data was collected to supplement, clarify and elucidate the primary data and to supplant them.

1.4.2. Sample Size

For primary data collection, the sample comprised of:

- i. Women Undertrial Prisoners
- ii. Convicted Women Prisoners
- iii. Male Undertrial Prisoners

The total sample size for the proposed action-oriented research was a total of 200 respondents.

The division proposed was as follows:

- i. Women Undertrial Prisoners – All the undertrial prisoners (or up to 50)
- ii. Convicted Women Prisoners – All the convicted prisoners (or up to 50)
- iii. Male Undertrial Prisoners – 100 samples

The female inmates count as on 11th November 2019 was:

Undertrial Prisoners	64
Convicted	44
Detained	06
Total No. of Inmates	114

The male inmates count as on 13th November 2019 was:

Undertrial Prisoners	1823
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Due to the size of the women prisoner sample being small along with other reasons such as unwillingness and apprehension of women prisoners to answer, the required sample of 50 undertrial female prisoners and 50 convicted female prisoners could not be collected. The researchers collected a total of 165 responses out of the proposed 200 respondents. Out of which 35 are women undertrial prisoners, 18 convicted women prisoners and 112 male undertrial prisoners.

Data Collection

Primary Data – Primary Data was collected through a structured questionnaire. The sample includes both convicted and under trial women prisoners along with male under trial prisoners. For the selection of samples from under trial male prisoners random sampling was used. From the collection of data from a heterogenous population of both female and male inmates the researchers were able to identify the gender specific problems faced by female prisoners. The filled in interview schedules and questionnaires containing information about women and male prisoners were analyzed quantitatively and qualitatively to draw inferences, trends, patterns to give recommendations and conclusions.

Secondary Data - Secondary Data was collected through books, reports, research articles and websites etc.

CHAPTER 2
LEGISLATIVE FRAMEWORK FOR BAIL IN INDIA AND THE
JUDICIAL APPROACH

2.1. Concept of Bail

Under the codified criminal law in India no statutory definition can be found, of bail, as a result to discover the meaning and concept we will have to inspect the precedent laid down by the Hon'ble Supreme Court in the case of Vaman Narain Ghiya v. State of Rajasthan¹, wherein the Hon'ble Supreme Court has explained the concept and meaning of bail in the following words: -

"6. Bail remains an undefined term under the Cr.P.C.. The term has not been statutorily defined. Conceptually, it continues to be understood as a right for assertion of freedom against the State imposing restraints since the U.N. Declaration of Human Rights of 1948, to which India is a signatory, the concept of bail has found a place with the scope of human rights. The dictionary meaning of expression "bail" denotes a security for appearance of a prisoner for his release. Etymologically, the word is derived from an old French verb „bailer" which means to „give" or „to deliver", although another view is that its derivation is from the Latin term baiulare, meaning „to bear a burden". Bail is a conditional liberty. Stroud's Judicial Dictionary (Fourth Edition 1971) spells out certain other details. It states:

"When a man is taken or arrested for felony, suspicion of felony, indicated of felony, or any such case, so that he is restrained of his liberty - And being by law bailable, offence surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sum of money, or body for body, that he shall appear before the Justices of the Peace at the next sessions etc. Then upon the bonds of these sureties, as is aforesaid, he is bailed, that is to say, set at liberty until the day appointed for his appearance."

Bail may thus be regarded as a mechanism whereby the State devolves upon the community the function of securing the presence of the prisoners, and at the same time involves participation of the community in administration of justice."

The Indian jurisprudence on bail has often been identified to be inherited from common law, however instances of bail can be found even prior to the British conquest; reference can be found from the record of the Italian traveler Manucci who visited India during the Mughal period. Manucci himself was granted bail after furnishing a surety in the courts of the ruler of Punjab. With the coming of British and establishment of Company Rule, the laws of England saw a gradual adaptation in India. The Nizamat Adalats and Fouzdary Courts had two main forms of bails - through a declaration in writing called *muchalka* and release through surety called *zamanat*. The British institution of bails was later established by the enactment of the Criminal Procedure Code in 1861.²

The 41st Law Commission Report which later led to amendments and new Code of 1973 sent various suggestions that enhanced the understanding of the theory of bail in India. It criticized the concept of denial of bail for people once accused of serious offences (punishable with life imprisonment or death) and accused again for another offence, as the approach was based on the assumption that such people may commit an offence again. On the other hand it stated that in

¹ (2009) 2 SCC281

² William Irvine, II Mog/III India 198 (J 907).

cases where liberty would likely be abused or the accused had earlier abused the provision or absconded, then bail can rightly be denied/cancelled.³

Further, in the 48th Commission report, the recommendation for introduction of Anticipatory bail was stated. This was further developed in 203rd Report and led to the Code of Criminal Procedure (Amendment) Act 2005. In the 154th Report in 1996, the issues regarding bail, anticipatory bail, sureties were discussed in detail. The Commission also explained that- “The Law relating to bail is contained in Sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. The law of bails, which constitutes an important branch of the procedural law dovetails two conflicting interests namely, on the one hand the requirements of shielding the society from the hazards of those committing crimes and on the other, the fundamental principle of criminal jurisprudence namely, the presumption of innocence of an accused till found guilty.”⁴

2.2 Provisions regarding Bail

The law relating to bail under the Criminal Procedure Code, 1973 is contained under Chapter 33. For the purpose of bail, the Criminal Procedure Code identifies offense as bailable and non bailable offense. While no exact definition for either of these offenses has been provided under the Criminal Procedure Code, Section 2(a) of the Criminal Procedure Code states that offenses specified under Schedule I of the Criminal Procedure Code are bailable offense, therefore as a corollary offense not specified under Schedule I would be non bailable offense. A more functional difference between bailable and non – bailable offense has been provided under Section 436 of the Criminal Procedure Code.

Section 436 reads as follows:-

“Section 436 In what cases bail to be taken:-

- 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 here in after 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).*
- 2) *Notwithstanding anything contained in sub-section (1) where a person has failed to comply with conditions of the bail bond as regards the time and place of attendants the court may refuse to release him*

³ Law Commission of India, 41st Report on tile Code of Criminal Procedure, Vol. J. p. 311 (969)

⁴ Law Commission of India, 154th Report on tile Code of Criminal Procedure, 1996

on bail, when on a subsequent occasion in the same case he appears before the court or is brought in custody and 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."

A bare reading of this section establishes that in bailable offenses bail is granted as a matter of rights, while in non – bailable offenses bail is subject to the discretion of the Court. The law on the point of granting bail in bailable offense has been conclusively discussed by the Hon'ble Supreme Court in the case of *Rasiklal v. Kishore*⁵ wherein the Hon'ble Supreme Court has held as follows:-

"The grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. The said section reads as under: -

"436 - In what cases bail to be taken - (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, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

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

- (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."*

There is no doubt that under Section 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on

⁵ (2009) 4 SCC 446

him.”

With regards to the right of the accused to be heard at the time of deciding bail applications for bailable offenses, the Hon’ble Supreme Court has held as follows:-

“8. It may be noticed that sub-Section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action under Section 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers under Section 436 of the Code is not bound to issue notice to the complainant and hear him.”

The following position emerges from the above cited judgment of the Hon’ble Supreme Court:- Section 437 of the Code deals with procedure for non-bailable offences and granting of bail for the same rests on sound discretion guided by principles of law.

“The section reads as:

1. *When any person accused of, or suspected, or the commission of any 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 other than the High Court or Court of Session, he may be released on bail, but –*
 - a. *Such person shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable within death or imprisonment for life;*
 - b. *Such persons shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of (cognizable offence punishable with imprisonment for three years or more but not less than seven years).*

Provided that the court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm; Provided further that the court may also direct that a person refused to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any special reason; provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the court.”⁶

Generally while granting bail, certain circumstances are to be taken into consideration, such as (i) the enormity of charge; (ii) the nature of the accusation; (iii) The security of the punishment which the conviction will entail; (iv) The nature of the evidence in support of the accusation; (v) The nature and gravity of the circumstances in which the offence is committed; (vi) The position and

⁶ Criminal Procedure Code, 1973, s 437

status of the accused with reference to the victim and the witnesses; (vii) The danger of witness being transferred with; (viii) The livelihood of accused fleeing from justice; (ix) Probability of the accused committing more offences; (x) The protracted nature of the trial; (xi) Opportunity to the applicant for preparation of his defence and access to his counsel. (xii) The health, age and sex of the accused person etc.⁷

The bail, as under sections enumerated above can be fulfilled through three modes. A Bail bond or generally referred to as Cash Bond, Personal Bond with or without surety as per discretion of Court or commonly through Sureties where a person takes responsibilities of the accused.

2.3. Types of Bail

a) Bail in Bailable offence

Section 436 of CrPC provides that bail can be availed as a matter of right where there is an accusation for the commission of a bailable offence. When a person accused of and arrested for a bailable offence applies for bail, neither the police nor the Court can deny it – even if the accused is unable to provide surety.

In the same way, it is the duty of Court and police to release the accused of bailable offence on personal bond even if s/he fails to furnish surety within seven days from order of surety. When for the same case an accused appears before a Court on any subsequent occasion, the Court may refuse his/her release on bail because of his/her inability to meet the conditions of bail like the time and place of attendance. The right to claim bail granted by Section 436 in a bailable offence is absolute and indefeasible. In the bailable offences, there is no question of discretion in granting bail as the words of section 436 are imperative.⁸

b) Bail in Non-Bailable offences

Section 437 of Criminal Code grants the Court or police power to release an accused on bail in a non-bailable offence. However, this is not applicable when there appears reasonable grounds that s/he has been guilty of an offence punishable with death or with imprisonment for life. But in any of the following situations s/he may be released on bail even if the offence charged is punishable with death or imprisonment for life:

- 1) A person under the age of sixteen; or
- 2) A woman; or
- 3) A sick or infirm person.

Where s/he is charged with a non-bailable offence, but it is found upon enquiry that s/he is not

⁷ Vrinda Bhandari, “Inconsistent and Unclear: The Supreme Court of India on Bail” (2013) 6 NUJS L. Rev. 549

⁸ Rasiklal v. Kishore Khanchand Wadhvani, AIR 2009 SC 1341

guilty of such offence then the person shall be released on bail. The same can be followed after the trial is concluded and before a judgment is pronounced if and when s/he is not believed to be guilty of a non-bailable offence. Section 437 also mentions review of the release order which acts as a safeguard. Here, it is pertinent to mention that the power of Magistrate under Section 437 is not at par with the Sessions Court and the High Court under Section 439.

Grant of bail is the rule and its refusal is an exception. But while granting it, the Court has to be satisfied that the order to be passed is in the interest of justice.⁹

c) Mandatory Bail (436A)

This new section, introduced in the year 2005, envisages the release of the accused on bail on his own surety if he has served half of the maximum time prescribed for that offence for which death is not one of the prescribed punishments. In such cases also the prosecution should be heard and on recording the reasons the court may order continued detention beyond one half of the said maximum or release him.

In no case, a person can be detained beyond the maximum period prescribed for the offence. If delay was, however, caused by the accused the period may not be computed as aforesaid.¹⁰

d) Bail under Section 167 of the Code of Criminal Procedure

Referring to the concept of 'default bail' under Section 167(2) of the CrPC wherein trial Judges grant bail upon failure to file charge-sheet by the police within the statutorily stipulated time period after taking an accused in custody. There are two subparts of this Section providing for entitlement of an accused for obtaining default bail.

According to Section 167(2)(a)(i) of the Criminal Code, "90 days would be the maximum permissible custody in the case of investigation relating to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years".

While Section 167(2)(a)(ii) of the Code provides that "the maximum period of custody would be sixty days for any other offences not being punishable with death, imprisonment for life or imprisonment for a term of not less than ten years."

In computing, the period of 90 days or 60 days the day on which the accused was remanded to judicial custody should be excluded and also the day on which the challan is filed in the Court.¹¹

⁹ Mazahar Ali v. State, 1982 CrLJ 1223, 1225 (J&K)

¹⁰ Mohd. Shahabuddin v. State of Bihar, 2009 Cri LJ 3877 (Pat)

¹¹ State of M.P. v. Rustam (1995) 3 (Supp) S.C.C 221

e) Anticipatory Bail

Section 438 of the Criminal Code deals with anticipatory bail which means “a bail in the event of arrest; when any person has the apprehension or reason to believe that he may be arrested of an accusation of having committed a non-bailable offence; he may apply to High Court or Court of Sessions for a direction that in the event of arrest he shall be released on bail.” The Sessions Court or the Hon'ble High Court will then consider the nature and gravity of accusation, the antecedent of applicant, the possibility to flee from justice and whether the accusation has been made to cause injury or humiliation to the applicant. On perusal of the considerations mentioned, the respective court may either reject the application or issue an interim order for the grant of an anticipatory bail. If such an interim order is not granted then the respective police station can arrest the accused without a warrant. The interim order coupled with a notice of seven days must be served respectively to the Public Prosecutor and Superintendent of Police in order to give them an opportunity for hearing on the application. The applicant's presence is mandatory during the final hearing while seeking anticipatory bail. However, the Public Prosecutor must have to apply for procuring the same.

Section 438(2) of Code provides that, “the High Court or the Sessions Court may also impose some conditions while granting the application. The conditions may be as follows: a) that the persons shall make himself available for the interrogation by police officer as and when required; b) that the person shall not directly or indirectly make any inducement, threats or promise to any witness; c) that a person shall not leave India without the previous permission of the Court.”

It is now a settled legal position that where the accused has been declared as an absconder, and has not cooperated with the investigation, he should not be granted anticipatory bail.¹² Object of Section 438 is that a person should not be harassed or humiliated in order to satisfy the grudge or personal vendetta for the complainant.¹³

f) Bail after conviction

Section 389 of the Code deals with a post-conviction and pre-appeal period situation. There is a provision in law where in the circumstance of a pending appeal against conviction the appellate court has the power to release the convicted on bail. For instance, the High Court can exercise this power where the pending appeal against conviction lies to the Sessions Court. The court passing the conviction order is obligated to grant the accused bail (pending order passed by the appellate court or the High Court) in the following cases:

¹² State of Madhya Pradesh v. Pradeep Sharma, AIR 2014 SC 626.

¹³ HDFC Bank Ltd. v. J.J. Mannan, AIR 2010 SC 618

- a) Where the accused was already on bail and has been sentenced to imprisonment for a term not exceeding three years; or
- b) Where the offence was a bailable offence.

Under the provision of this section, an intention to present an appeal by the convicted person is a ground sufficient to justify the release of a convict on bail. Even if the above conditions are fulfilled, the convicting court may refuse bail if there is existence of a special reason.

2.4 Judicial approach towards Bail

Bail Pending Appeal

Once the trial court has concluded a matter and has held the accused guilty, such accused person has a right to appeal. Owing to backlog of cases, the appellate Court might not be in the position to hear the appeal within a reasonable time period. It would be a travesty of justice if the accused is kept incarcerated if it is later found that the accused person is innocent. The rationale of provision for bail pending appeal is to ensure that such travesty of justice does not take place.

The Appellate Court as well as High Court and the Supreme Court have the power to release the accused on bail. While the Courts have the power to suspend an order of conviction, apart from the order of sentence, under section 389(1) of the Code, its exercise should be limited to very exceptional cases.¹⁴

For obtaining an order under section 389(1), the applicant needs to show the Court the consequences that is likely to fall upon conviction and the Court is required to give reason in writing according to such consequence¹⁵ and other relevant factors.

The Supreme Court in the case of *Atul Tripathi v. State of U.P.*¹⁶ laid down the legal position for bail pending appeal, which is as follows:

- a) *“a. The appellate court, if inclined to consider the release of a convict sentenced to punishment for death or imprisonment for life first give an opportunity to the public prosecutor to show cause in writing against such release.*
- b) *On such opportunity being given, the State is required to file its objections, if any, in writing.*
- c) *In case the public prosecutor does not file the objections in writing, the appellate court shall, in its order, specify that no objection had been filed despite the opportunity granted by the court.*
- d) *The court shall judiciously consider all the relevant factors whether specified in the objections or*

¹⁴ K.C. Sareen v. CBI Chandigarh, (2001) 6 SCC 584

¹⁵ Rama Narang v. Ramesh Narang & Ors., 1995 SCC (2) 513, JT 1995 (1) 515

¹⁶ (2014) 9 SCC 177

not, like gravity of offence, nature of the crime, age, criminal antecedents of the convict, impact on public confidence in court, etc. before passing an order for release.”

Cancellation of Bail

A Court which has released a person on bail under Section 437(1) and 437(2) of the Code can cancel such bail and direct such person to be arrested and be committed in custody, if it deems it necessary.¹⁷ High Courts and Courts of Session have the power to direct any person released on bail under Chapter XXXIII of the Code to be arrested and be committed in custody.¹⁸

Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to fair trial to allow the accused to retain his freedom during the trial.¹⁹ Such powers have to be used only in appropriate cases where by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tempering with witnesses.²⁰

It is, therefore, necessary to understand grounds or acts which are considered to make freedom of the accused non-conducive to fair trial. Supreme Court in the case of *Abdul Basit alias Raju & Ors. v. Mohd. Abdul Kadir Chaudhary & Anr.*²¹ specified an illustrative list of grounds for cancellation of bail, which includes: (i) the misuse of liberty by the person accused of an offence by indulging in criminal activity, (ii) interference with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatening witnesses or indulging in similar activities that

¹⁷ The Code of Criminal Procedure, 1973, s 437(5)

¹⁸ s 439 (2), Ibid.

¹⁹ *State (Delhi Admn.) v. Sanjay Gandhi*, (1978) 2 SCC 411

²⁰ Ibid.

²¹ (2014) 10 SCC 754

hamper investigation, (v) likelihood of fleeing to another country, (vi) attempts to make oneself scarce by going underground or being unavailable to the investigating agency, (vii) attempts to be beyond the reach of the surety, etc. There has been a catena of judgements where either ground specified in this list have been reiterated or more grounds have been added, however, the principle has remained the same i.e., the Court has reason to believe that the bail is leading to hindrance in delivery of justice. Not just a bail under section 437(5) or 439(2), even a bail for a bailable offence can be cancelled on these grounds.²²

A question on cancellation of default bail arose in the case of *Aslam Babalal Desai v. State of Maharashtra*,²³ the Supreme Court was asked whether a statutory bail is cancelled on mere filing of a charge sheet. The Court said that through a legal fiction, a bail order under section 167 is an order under section 437(1) or (2) or section 439 of the Code. Since section 167 does not empower cancellation of bail, the power to cancel bail comes from section 437(1) or (2) or section 439 of the Code, and therefore, the same standards apply. This means that an accused released on bail under section 167(2) cannot be taken back in custody merely on the filing of charge sheet but there must exist special reasons for so doing besides the fact that the charge-sheet reveals commission of a non-bailable offence.²⁴

Indigent Persons and Bail

Execution of a bond is one of the most common condition set by Court while adjudicating a bail application, this raises a criticism for the present bail system, where the rich/financially stable accused are able to furnish bonds, however, similarly placed accused from poor and marginalized background languish in bail for their inability to raise money.

Section 440 to section 450 of the Code deal with conditions for bond and surety, and while previous section of this chapter discusses these provisions in greater detail, this sub-section attempts to look into judicial interpretation of these provisions.

*Moti Ram v. State of M.P.*²⁵ is a landmark judgement which discussed the plight of poor and the bail system. In this case, the petitioner who was a lowly paid mason was granted bail on a surety of Rs. 10,000. However, he was unable to procure the required sum and the Magistrate had refused to

²² *Rasiklal v. Kishore*, (2009) 4 SCC 446

²³ (1992) 4 SCC272

²⁴ *Ibid.*

²⁵ (1978) 4 SCC 47

accept the petitioner's brother's surety ship because he and his assets were in another district. The Court was faced with three legal issues viz., (1) Can the Court, under the Code of Criminal Procedure, enlarge, on his own bond without sureties, a person undergoing incarceration for a non-bailable offence either as undertrial or as convict who has appealed or sought special leave? (2) If the Court decides to grant bail with sureties, what criteria should guide it in quantifying the amount of bail, and (3) Is it within the power of the Court to reject a surety because he or his estate is situated in a different district or State? The Court answered by saying that an accused may be enlarged on bail on his own bond with or without sureties, and not insisting on local sureties. The Court then reduced the bond to Rs. 1,000.

Women and Bail

The first proviso to section 437(1) of the Code states that "the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail."

With this proviso, the legislature has given a discretionary power to the Courts, courts other than the High Court or Court of Session, to release on bail women who are believed to have committed an offence punishable with death or imprisonment for life. The word used in this proviso is may and not shall, and therefore, it is not mandatory for the Court to grant bail.

CHAPTER 3
INMATES OF SABARMATI CENTRAL JAIL, AHMEDABAD

3.1. Sabarmati Central Jail, Ahmedabad, Gujarat

The prison was established in 1851 in the city of Ahmedabad in Gujarat. Mahatma Gandhi was housed by the jail in the March of 1922 during the nation’s struggle for Independence. In remembrance of the historic freedom fighter, a yard has been preserved and named after him as “Gandhi Kholi”. The jail currently houses women inmates and male prisoners in separate enclosures.

3.2. Women Inmates of Sabarmati Central Jail

1. Age

Out of the 53 under trial and convicted women prisoners interviewed in Sabarmati Jail (Ahmedabad), majority are in the age groups of 31-40 years (34%) and 41-50 years (26%). Followed by 23% in the age bracket of 21-30 years and the rest 17% aged 51 years and above. This also corresponds with the „Women in Prisons” Report published by Ministry of Women and Child Development, India in June 2018, which states 50.5% of female prisoners are in the age group of 30-50 years in India.²⁶ This is the mainly the age group which are married and hadfamily either in jail with them as co-accused or on the outside. They had children staying outside staying with their husbands or old parents; and separation from them was their major worry. The prisoners in the age bracket of 21-30 years, had children living with them in prison too. Lastly, the prisoners above 51 years of age were mostly convicts and senile.

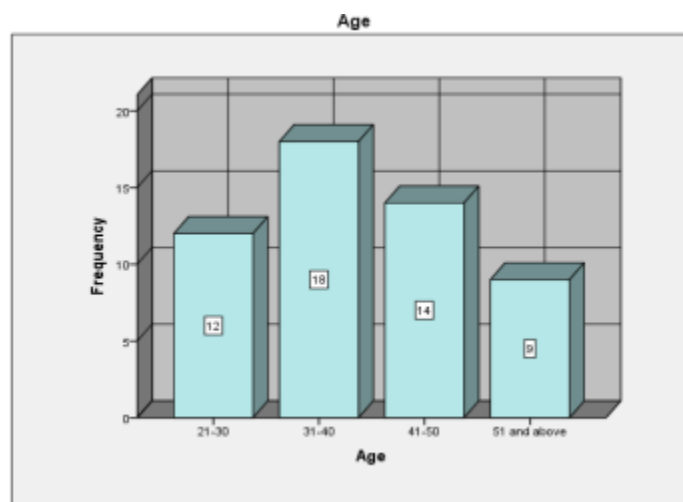


Figure 1 Age of Women Respondents

²⁶ Supra Note 36

2. Religion

An overwhelming majority of women prisoners, interviewed were Hindu (77%). While the rest were Muslim (19%), Christian (2%) and other religions (2%). The data regarding their castes could not be obtained as most were unaware about the same.

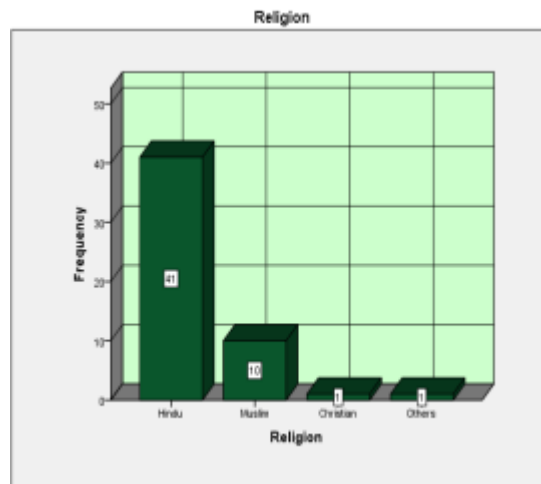


Figure 2 Religion of Women Respondents

3. Education

47% of women inmates are uneducated, with no formal/informal opportunity for learning. While 32% had some form of education up to Standard XII. 17% were graduates and 4% postgraduates, as observed in the table below. As seen majority of the inmates are uneducated while the rest possess basic education which directly co-relates to their unawareness about their case, arrest, legal proceedings or rights available to them. There is a lack of general awareness about law in the public and this is more so in case of women. This puts them in a disadvantaged position.

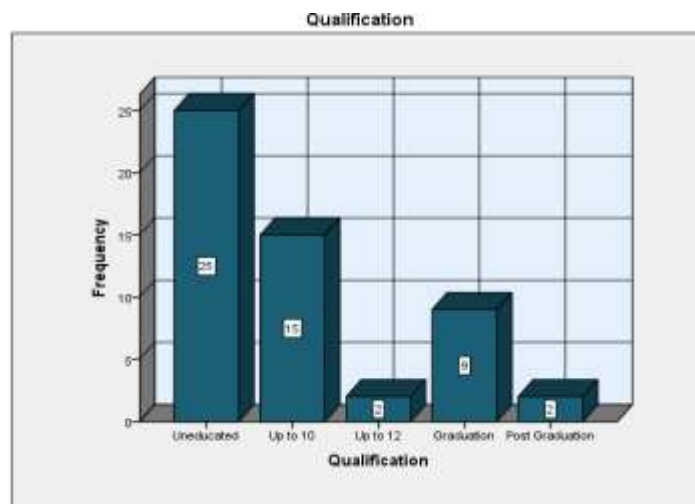


Figure 3 Education of Women Respondents

4. Marital Status

The chart below shows the marital status of women prisoners, with the vast majority of them being married (64%) or widowed (28%), while the rest were single/unmarried (8%). In some cases the husbands were also incarcerated for the same or other offence, thus putting the women in a vulnerable state as the children if any, are left abandoned with in-laws or old parents and no one to file an application for bail. This was again seen to be a graver problem in case of widowed prisoners who complained of being abandoned. The unmarried/single prisoners interviewed complained of being marked as a disgrace and having brought shame to the family were left abandoned. According to them, their prospects of finding a husband and a job were lost due to incarceration.

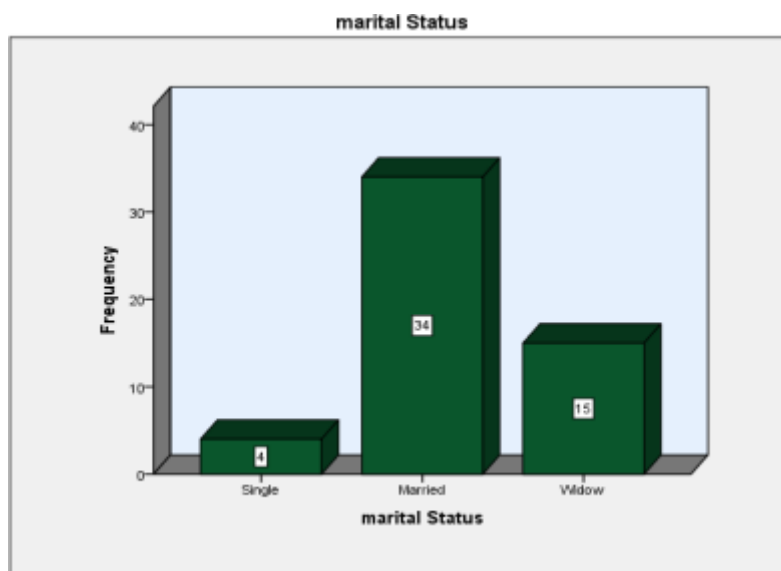


Figure 4 Marital Status of Women Respondents

5. Dependents and Family Members

A palpable majority of women, almost 85% had dependents or family members in their family. Out of which 34% had less than 3 family members, while 51% had more than 3 dependents/members including children. The prisoners interviewed mostly had children and old parents or in-laws in their family outside of jail. Most women thus complained that they had to leave their children with older family members/parents or alone. The rest 15% had no dependents and family members leaving them helpless without any guidance or help.

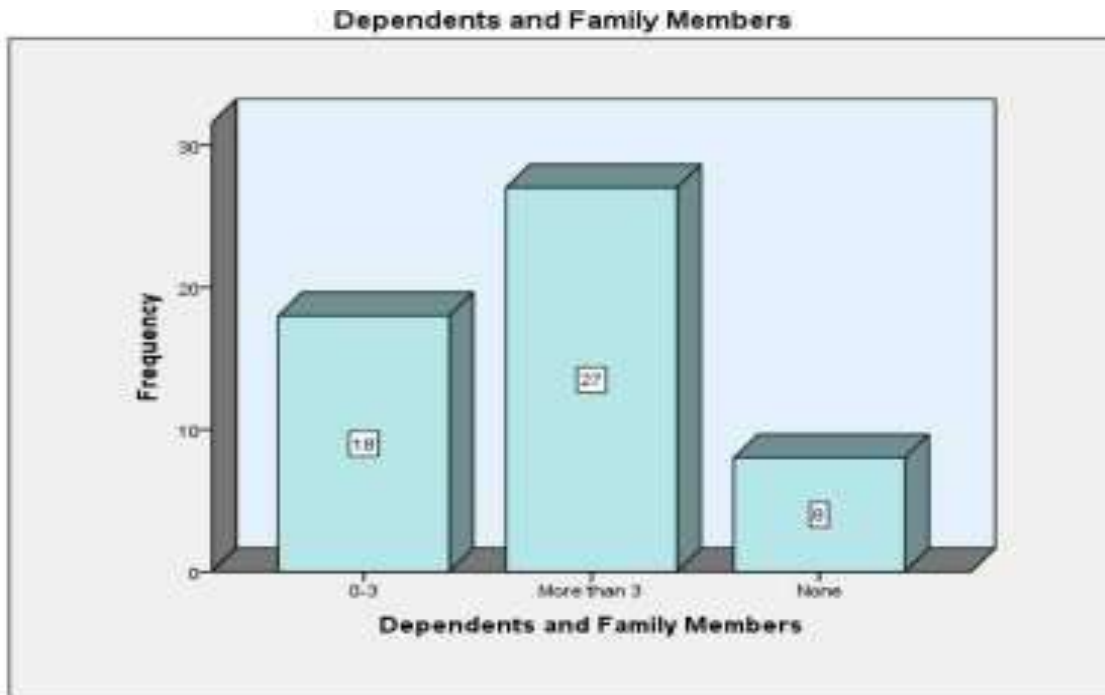


Figure 5 Dependents and Family Members of Women Respondents

6. Details regarding home/property

An equal number of women prisoners in the jail lived in owned house and on rent (45%) as seen in the chart below. The ones who owned houses were mostly in the outskirts of cities, in slums or in rural areas. While 10% were homeless or lived in temporary shelters.

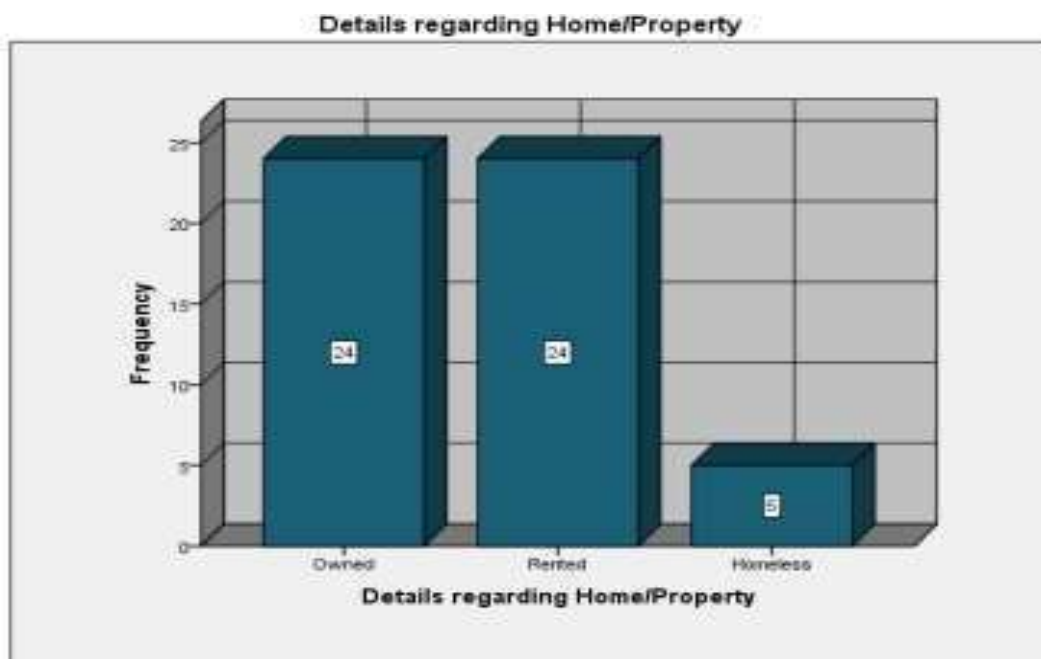


Figure 6 Details regarding Home/Property of Women Respondents

7. Occupation

As previously seen in Figure 3, most women did not have opportunities with respect to education hence 40% of those interviewed were unemployed or homemakers. While, 36% were self-employed and involved in a range of work such as assisting family businesses, tailoring or construction. The rest were employed in private sector (6%) and government service (4%) or other professions (15%). A few women brought up the issue that their children or parents were solely dependent on them, in the event of their time in prison the family continues to suffer.

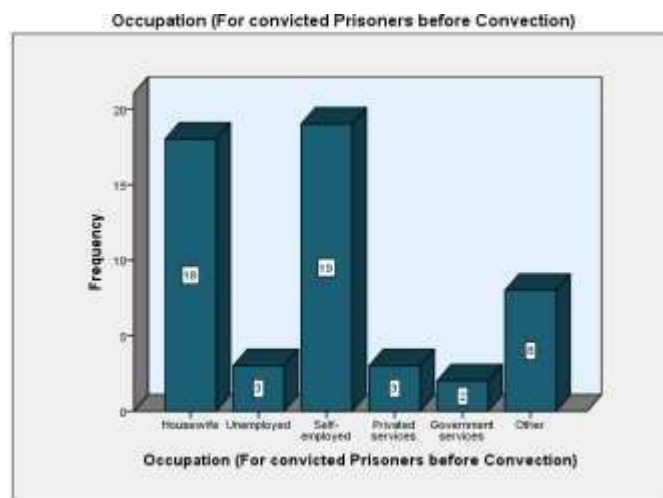


Figure 7 Occupation of Women Respondents

8. Annual Income

As seen in Fig. 7, 40% of the inmates were seen to be homemakers or unemployed. Work done by these women at home is exhausting and important but lacks any appreciation and is considered to be free labour and profitless. The rest 36% who are self-employed comprises of women who either helped in family owned businesses or in agricultural activities. Therefore, they do not have separate incomes or have a meagre income.

The data collected shows that 77% of the women in the jail fall within the bracket of an annual income of rupees 0 to 35,000/- p.a.

This shows how majority of the women belong to the economically backward class which becomes the primary hurdle in their release on bail for furnishing the bail amount and availability of a surety.

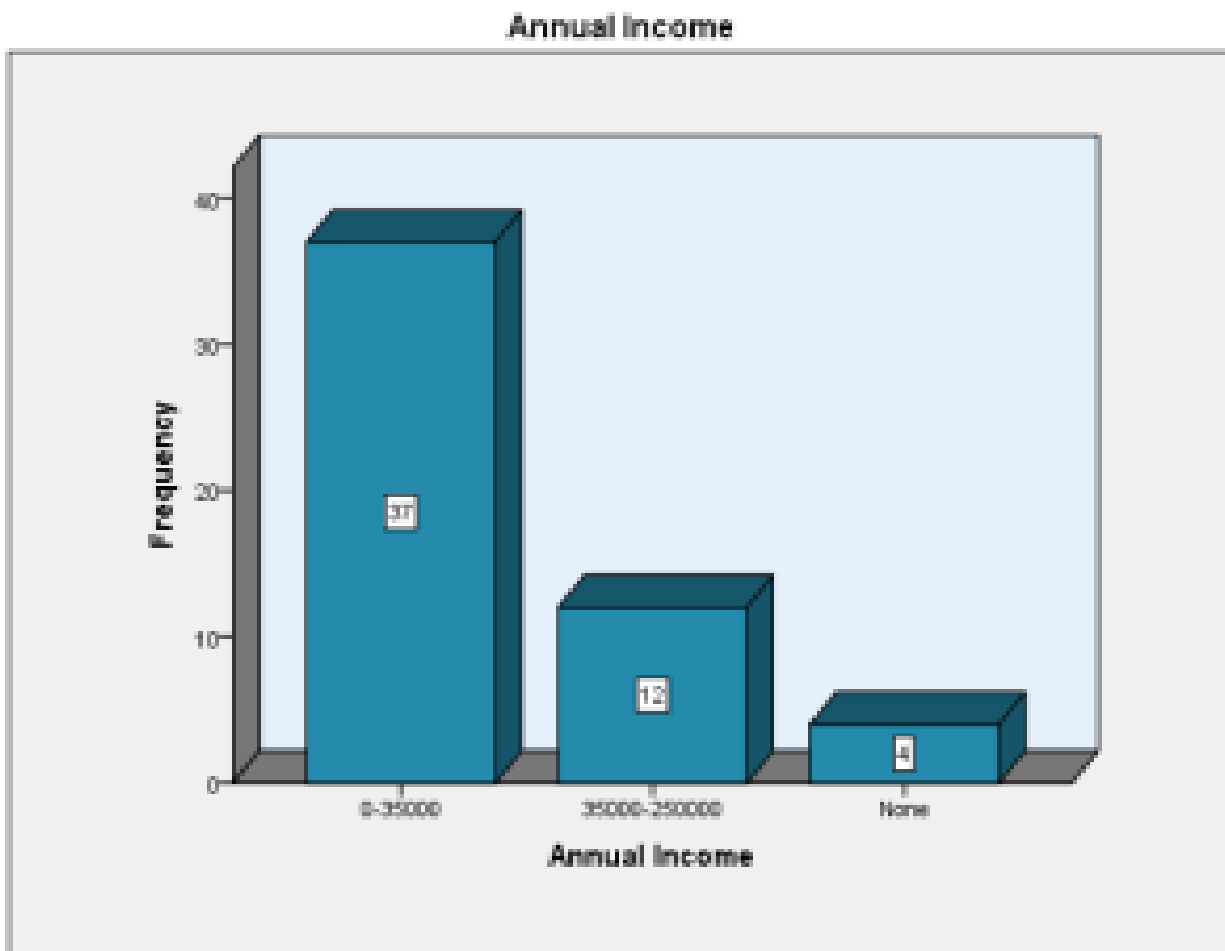


Figure 8 Annual Income of Women Respondents

3.3. Male Undertrial Inmates of Sabarmati Central Jail

India has incarcerated 466, 084 prisoners according to the recent National Records Bureau report in 2018, of which a staggering 95.9% are male. Out of this, the state of Gujarat houses 14,980 inmates in its 29 prisons.²⁷

1. Age

52% of the 110 male prisoners interviewed are aged 21-30. While 31-40 years consisted of 34%. Most in these age brackets are bread-earners with families' dependent on them. Amongst the rest of the prisoners, 9% are in the age groups 41-50 and 5% are 51-60 years old. 9% of the total prisoners were young adults below 20 years of age

²⁷ National Crime Record Bureau, Prison Statistics India 2018 <<https://ncrb.gov.in/sites/default/files/PSI-2018.pdf>> accessed 20 April 2020

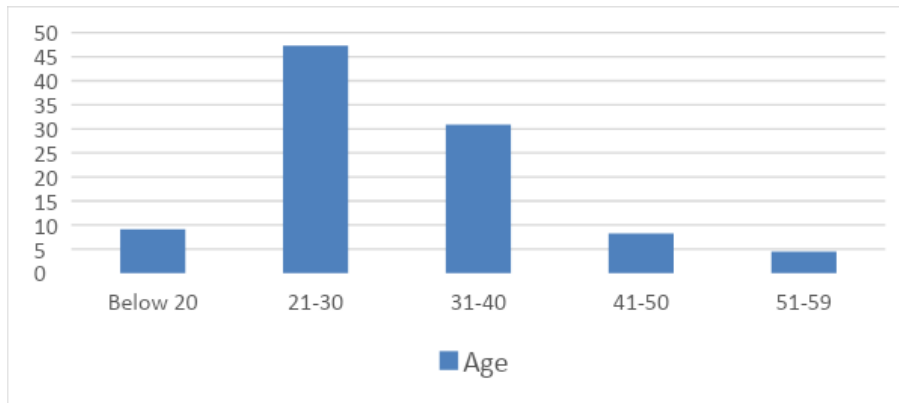


Figure 9 Age of Male Respondents

2. Religion

Similar to women prisoners, a majority of male prisoners (82%) are also Hindus. While the rest, 18% are Muslims. Information about the specifics such as caste was not taken in this interview, which would have provided more input on the demographics.

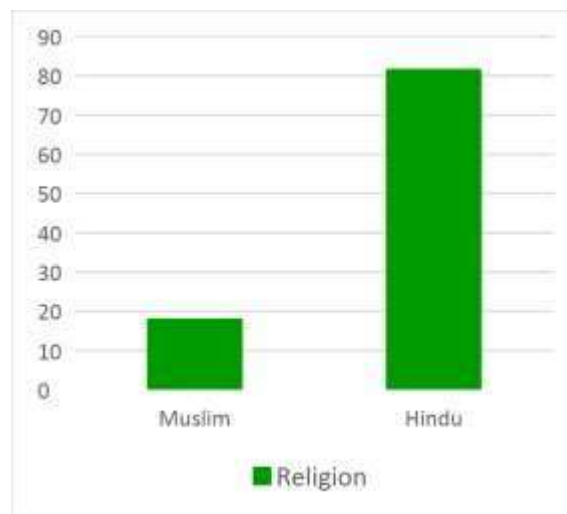


Figure 10 Religion of Male Respondents

3. Education

66% of the total prisoners interviewed have completed education up to standard 10. While 16% were uneducated still involved in casual employment. Most of the inmates were employed and have been working since a long time. This is in contrast with the status of women prisoners, who were mostly uneducated and non-working. It could be one of the reasons why the men were more aware of the details of their case than the women. 10% of the interviewees have studied up to Standard 12 and 8% went on to complete Graduation. One of the inmates has also completed his Post-graduation.

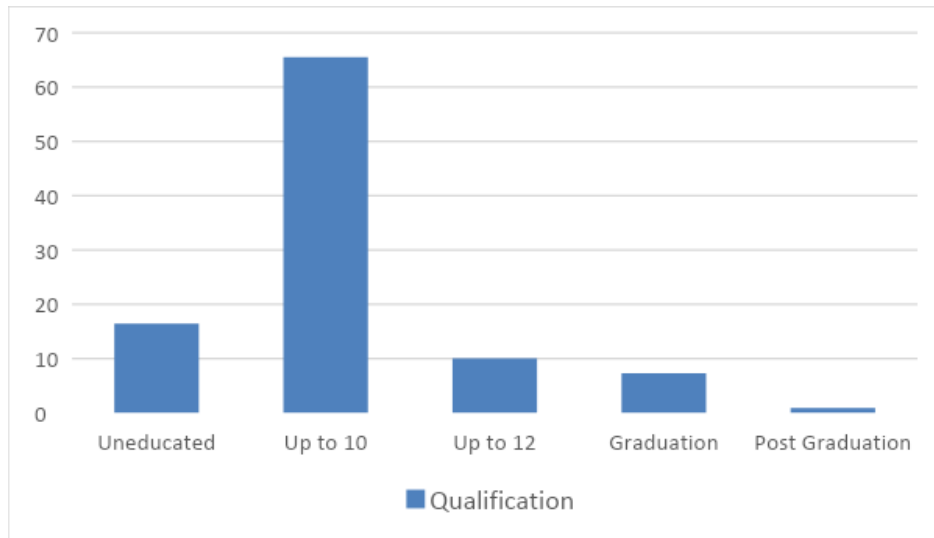


Figure 11 Education of Male Respondents

4. Marital Status

As observed in the figure below, majority of the prisoners are married (57%) and 37% were single. In comparison to the statistics observed for women inmates, while a majority were married only 4% of women prisoners are single. The rest of the population amongst men, were either divorced (3%) or Widowed (2%) or separated (1%).

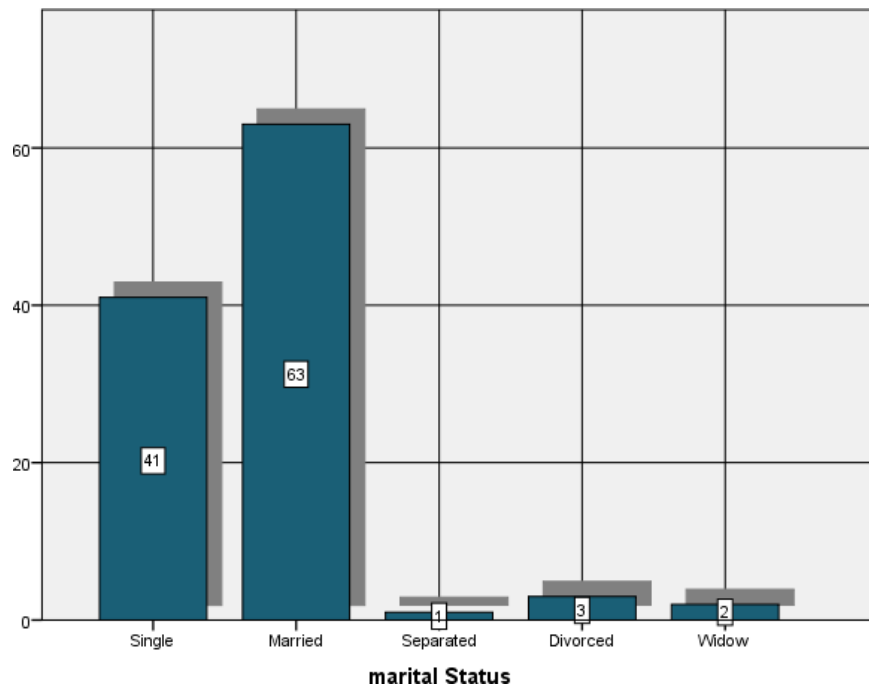


Figure 12 Marital Status of Male Respondents

5. Dependents and Family Members

Most of the prisoners, almost 97% have dependents or other family members. 39% have maximum 3 members while 58% have more than 3 members in their family. Only 3 of the men interviewed had no family dependent on them.

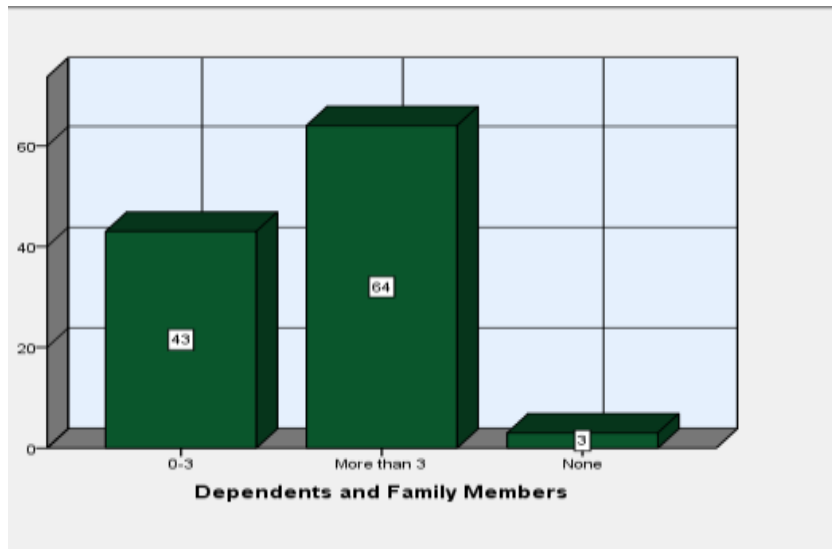
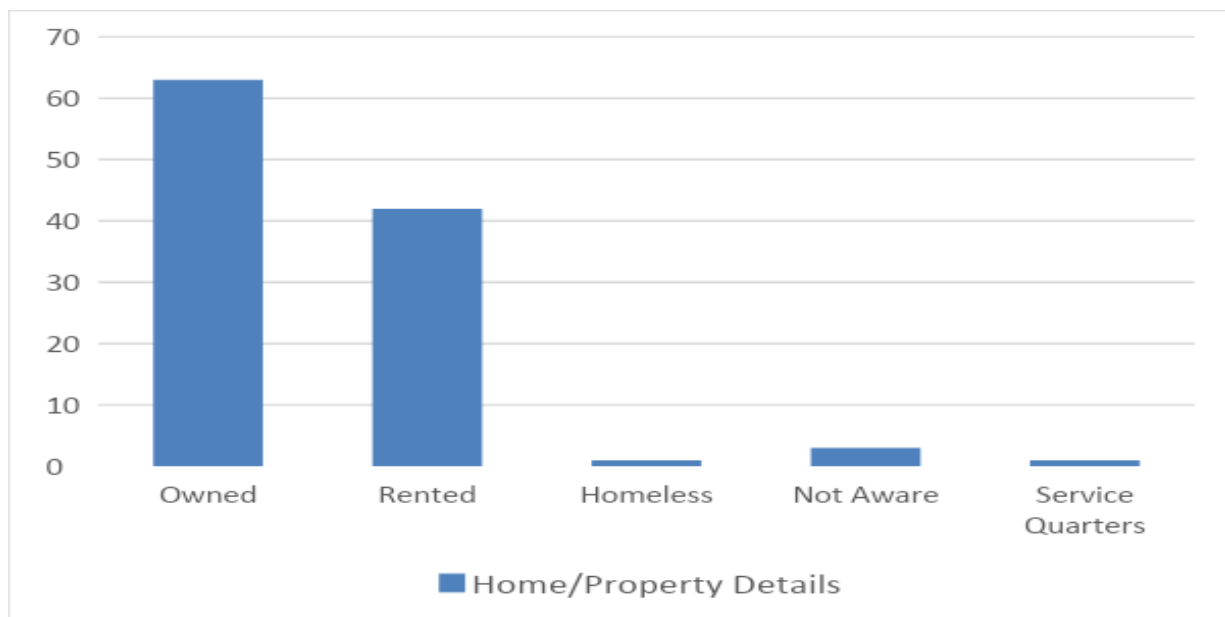


Figure 13 Dependents and Family Members of Male Respondents

6. Details regarding home/property

A majority(57%) of prisoners lived in self-owned property while 38% lived on rented homes. 3% were not aware of the nature of their property and 1% lived in service quarters provided by their



employer. 1 of the prisoner is also currently homeless.

Figure 14 Details regarding Home/Property of Male Respondents

7. Occupation

In a stark contrast to the women prisoners, only 3% of men were unemployed. 57% are employed either in private sector (19%) or self-employed and involved in their own businesses (38%). A major number of prisoners, about 40% are employed as casual laborer with no fixed jobs.

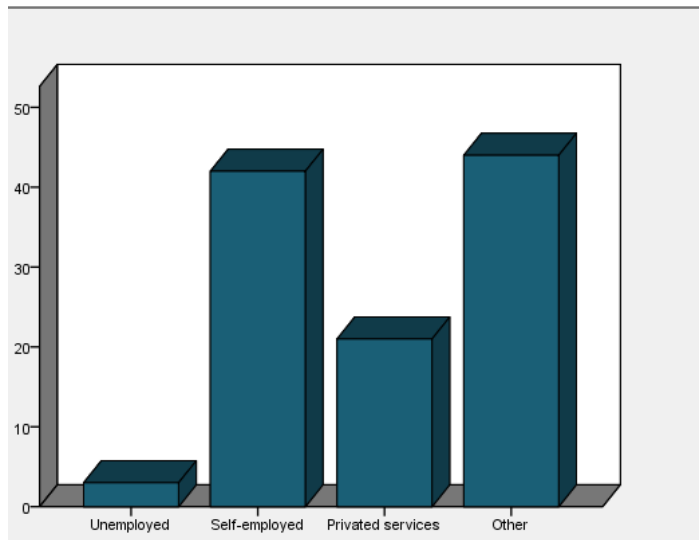


Figure 15 Occupation of Male Respondents

8. Annual Income

As observed in the figure below, the 70% of the men had an annual income between INR 35000-250000. 8% used to earn between INR 250000-500000 and around 5% earn more than INR 500000. Around 10% used to earn between 0-35000 while 7% had no income.

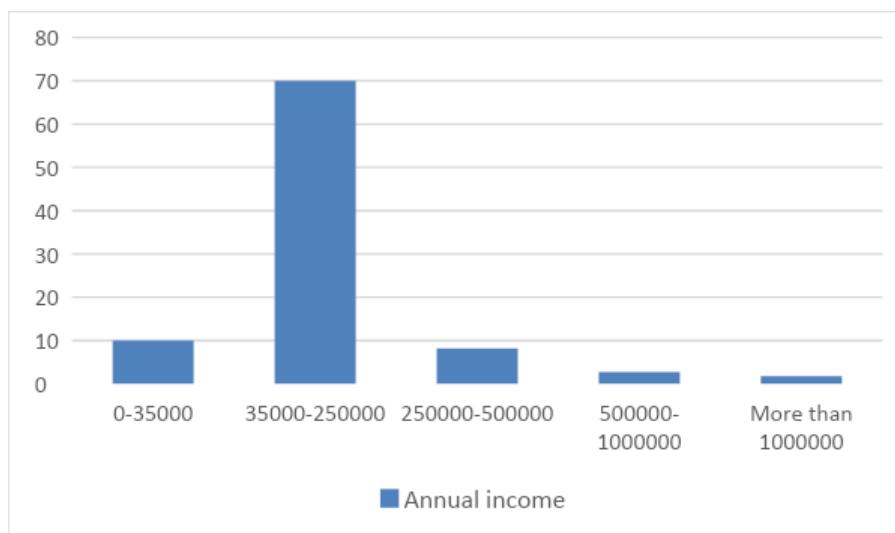


Figure 16 Annual Income of Male Respondents

CHAPTER 4
EMPIRICAL STUDY OF BAIL AND UNDERTRIAL
PRISONERS OF SABARMATI CENTRAL JAIL, AHMEDABAD

4.1. Arrest and Detention of Women Respondents

In order to understand the perpetuated stay of women prisoners it is important to take note of the offences for which they were arrested or convicted for. Out of the women inmates interviewed in the jail, 59% were either arrested or convicted for the offence of murder and cheating under the Indian Penal Code. Other offences for which they were arrested for included offences under Gujarat Prohibition (Amendment) Act, 2017 and Narcotic Drugs and Psychotropic Substances, Act, 1985.

Section	Details	Nature	No. of Respondents	Percentage
Indian Penal Code, 1860				
302	Punishment for Murder	Non-Bailable	31	59
189	Threat of injury to public servant	Bailable	1	2
420	Cheating and dishonestly inducing delivery of property	Non-Bailable	3	6
376	Punishment for criminal conspiracy	Non-Bailable	3	6
160	Punishment for committing affray	Bailable	1	2
379	Punishment for theft	Non-Bailable	2	4
Prevention of Corruption Act, 1988				
12	Punishment for abetment of offences defined in section 7 or 11	Bailable	1	2
Gujarat Prohibition (Amendment) Act, 2017				
65	Penalty for illegal import, etc. of intoxicant or hemp.	Bailable	3	6
Dowry Prohibition Act, 1961				
3	Penalty for giving or taking dowry	Non-Bailable	1	2

Narcotic Drugs and Psychotropic Substances, Act, 1985				
Not Aware	-	Non-Bailable	5	9
Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974				
Not Aware	-	Non-Bailable	1	2

Table 1 Details of Nature of Offence

The intended sample was to consist of 50 undertrial women inmates and 50 convicted women prisoners. At the time of data collection the available respondents were 114, out of which 53 inmates were interviewed. This was due to reasons such as unwillingness and apprehension of women inmates to answer and hence the required sample could not be collected. The following pie-chart depicts the data collected:

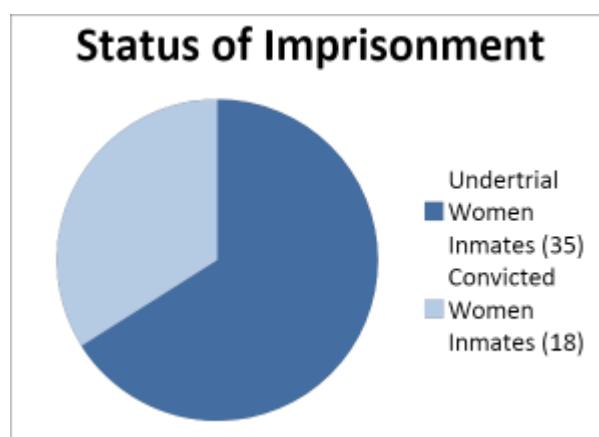


Figure 17 Status of imprisonment of Women Respondents

According to the World Prison Brief, out of the 4,78,600 prison population in India 69.1% population consists of pre-trial detainees or remand prisoners as on 31st December, 2019. The data clearly shows that the prisons in India have been overcrowded with undertrial population and it has a direct impact on the physical and mental health of the prisoners. When the bail mechanism is not utilized efficiently the prisons tend to be crowded as the length of stay of prisoners gets elongated. As a consequence to this, social rehabilitation of the prisoners is hindered. As seen by the researchers in Sabarmati Central Jail, majority of the respondents were hauled in prison for a period ranging from less than one year to five years.

Duration	Respondents	Percentage
Less than a year	21	40
1-2 years	8	15
2-3 years	4	8
3-5 years	6	11
5-7 years	6	11
More than 7 years	8	15
Total	53	100

Table 2 Duration of detention of Women Respondents

According to the Ministry of Home Affairs guidelines²⁸ “Invariably it has been found that only the poor and indigent who have not been able to put up the surety are those who have continued to languish as under-trials for very long periods and that too for minor offences. The lack of adequate legal aid and a general lack of awareness about rights of arrestees are principal reasons for the continued detention of individuals accused of bailable offences, where bail is a matter of right and where an order of detention is supposed to be an aberration.” This is partially backed by the data collected at Sabarmati Central Jail where more than half of the respondents answered in a dissentient manner as depicted in the table below. It is the obligation of every magistrate so as to inform the accused before making an order of remand that the accused is entitled to bail and a lawyer to apply for the same and to make the accused aware of the bail system.²⁹

Have you been informed about your ‘Right to Free Legal Aid’?	Number of Respondents	Percentage
Yes	24	45
No	29	55
Total	53	100

Table 3 Legal Awareness among Women Respondents

Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty four hours of such arrest excluding the time necessary for the

²⁸ Ministry of Home Affairs, “Use of Section 436A of the CrPC to reduce overcrowding of prisons’ (17th January 2013) <https://www.mha.gov.in/MHA1/PrisonReforms/NewPDF/AdvSec436APrison-060213_0.pdf> accessed 23May 2020

²⁹ *Hussainara Khatoun & Ors. v. Home Secretary, State of Bihar, Patna* 1979 AIR 1369

journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.³⁰ The respondents in Sabarmati Central Jail were asked as to whether they were produced before a magistrate within the prescribed time so as to enable them to apply for bail.

Accused produced before the Magistrate within 24 hours of arrest	Respondents	Percentage
Yes	41	77
No	12	23
Total	53	100

Table 4 Status of production before Magistrate within 24 hours of arrest

From all the respondents interviewed, 77% were produced before the Court within the prescribed time frame while the remaining 23% were enquired as to factors not leading to their production before court. Majority of the respondents were unaware as to why they were not produced within 24 hours while the rest cited the reason that they were first kept in police custody for a few days before producing before a Magistrate. The initial review of literature indicated that the prisoners were unable to be produced before the court due to unavailability of escorts or vehicles. Hence, an increase in female staffing can help remedy this difficulty. The prison facilities are now equipped with the facility of video conferencing for production purposes which can be another remedy. On enquiry upon the respondents it was found that a functional video conferencing facility is available at Sabarmati Central Jail. While the below table indicates that it is not employed to its full potential.

Mode of production of accused before the Magistrate after arrest	Respondents
Personally	52
Videoconferencing	1
Total	53

Table 5 Mode of production of accused before the Magistrate after arrest

The Supreme Court Constitution bench through its judgment³¹ has laid down certain guidelines which state that under sub-section (2) of Section 167 of the Criminal Procedure Code, a magistrate before whom an accused is produced while the police are investigating into the offence, can authorize detention of the accused for a maximum of 90 days or 60 days depending upon the offence. On the expiry of said period of 90 days or 60 days, an indefeasible right accrues in favour

³⁰ Constitution of India, Article 22 (2)

³¹ *Sanjay Dutt v. State Through C.B.I. Bombay*, Special Leave Petition (crl.) 1834-35 of 1994

of the accused for being released on bail on account of default by the investigating agency in completion of probe within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the magistrate.” In light of this provision of law, the respondents were questioned about their status of filing of charge-sheet. While a majority of them answered in affirmative about their charge- sheets being filed in the prescribed number of days, 6% of them answered in negative and the remaining respondents were seen to be unaware about the status. The unaware respondents complained of their lawyers not making them aware of such provisions or keeping them updated as to the status of their case as they are rarely visited by their „sarkari vakeel“. Even the 3% of the respondents informed that they were unaware of such provision or whether or not such an application was filed by their lawyers.

Filing of Charge-sheet within 60-90 days	Respondents	Percentage
Yes	42	79
No	3	6
Not aware	8	15
Total	53	100

Table 6 Status of filing of charge-sheet

4.2. Women Prisoners and Bail

Out of all the 53 respondents interviewed, 57% had applied for bail, 3% replied saying that the application is pending and the remaining 40% answered in negative. Further questions were asked based on inmates' response to this question, and for under-trial women inmates, this was further analyzed on the following scenarios:

- If the inmate applied for bail and was granted bail
- If the inmate applied for bail but the bail application was rejected
- If the inmate did not apply for bail

For the respondents who applied for bail and were granted the same, it was seen that in the majority of the cases bail was furnished by legal aid (60%) as opposed to friends and family (40%). In some cases the women respondents stated that the family, friends and relatives broke all ties with them as they were perceived to have bought shame to the family and society. In most cases, they said that their family could not afford paying the bail amount.

Application for Bail	Respondents
Yes	30
No	21
Pending	2
Total	53

Table 7 Status of Application for Bail by Women Respondents

It was seen in the study that excluding inmates who are not aware of the bail conditions, a majority of the inmates were given bail on personal bond and the rest of the inmates were given bail on cash bonds. Further into enquiry about the conditions which were imposed by the court in the grant of bail, the figure depicts that excluding inmates who are not aware of the bail conditions, a majority of the inmates were given bail on personal bond and the rest of the inmates were given bail on cash bonds. It is usually believed that people owning houses have a firmer connection with the community, which decreases their chances of bail jumping and also when a bail guarantor is provided by the accused.



Figure 18 Details of Bail furnished while granting Bail

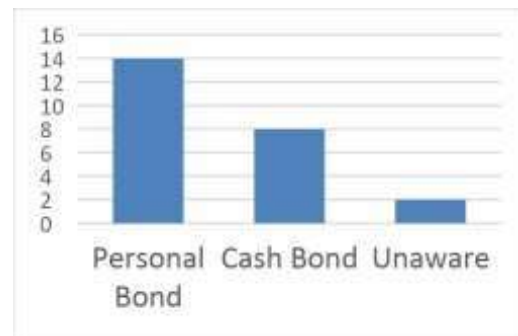


Figure 19 Conditions imposed on accused

A majority of inmates are not aware of the time taken by the Court in granting bail. Out of those aware, in a majority cases it took the Court 3-6 months to adjudicate on the bail application. There has only been one instance where the Court took more than 12 months to grant bail and only one instance where the Court took only 0-3 months to grant bail. Bail matters should be disposed off in a manner which is time bound, especially in case of undertrial prisoners as the issue of personal liberty is involved. Undertrial bail applications shall be treated on a priority basis.

Duration of Bail Application filed and grant of Bail	Respondents
0-3 months	1

3-6 months	7
More than 12 months	1
Not aware	15
Total	24

Table 8 Time taken for disposal of Bail Application

26% of the inmates who applied for bail got their bail application rejected once, 20% of the inmates who applied for bail got their bail application rejected twice and out of 30 only 1 inmate had her bail application rejected thrice. It can be seen from the below table that a majority of the inmates are not aware of the reason for rejection of their bail application. While being arrested for non-bailable offence is not a reason that the Court gives while rejecting a bail application, this reason has been recorded in the table based on the responses received. Majority of the appeals filed against rejection of bail were found to be pending or rejected.

Sr. No.	Grounds of rejection	1 st time	2 nd time	3 rd time	Total
i.	Crime committed is of serious nature or offensive to public morality	2	1		3
ii.	Arrested for non-bailable offence	2	1	1	4
iii.	Unaware or not informed by the lawyer	11	3	2	16

Table 9 Grounds of rejection of Bail Application

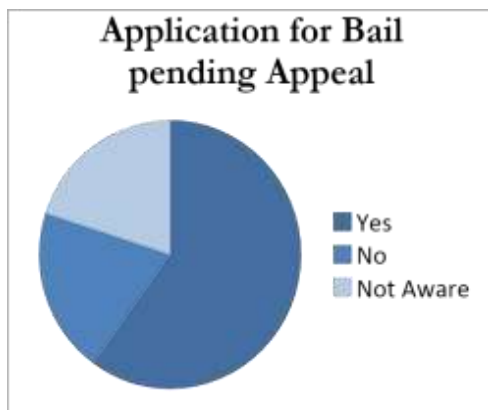
It was seen that the most common reason for not applying for bail is that the inmate comes from a poor economic background and they cannot afford to furnish bail as out of all the inmates who did not apply for bail almost 38% of inmates did not apply for bail because of it. This is directly reflective of the fact that how this is unfair and entirely defeats the purpose of access to justice. The reasons of not being aware about legal procedure and unavailability of effective legal aid can be together indicative of the inadequacy of the prison system in providing free legal aid. In some cases the women are arrested along with their husbands or their family and there is no left behind to arrange for their bail requirements or to engage a private lawyer in case of being unsatisfied with the government lawyer.

Reasons	Respondents
Poor economic background and so cannot furnish bail	8

Family and friends have cut off ties	2
Widowhood	3
Imprisonment of husband and/or of family members	2
Unavailability of effective legal aid	2
Unawareness about legal procedures	4

Table 10 Reasons for not applying for Bail

During the process of this study, along with undertrial prisoners 18 inmates who were convicts were also interviewed with regard to problems faced by them in the process of applying for bail. 83% of the convicted prisoners had filed an appeal against their conviction. There were instances of a few inmates who had no knowledge about the same or given by their lawyers hence did not look into the same. Out of the 15 inmates who filed for an appeal against conviction, 14 inmates filed it in the High Court, as the first court of appeal and one in the Supreme Court.



While 60% of the prisoners answered in positive, it is to be noted that most of the inmates who did not file a bail pending appeal was also due to unawareness about legal procedures pertaining to their bail/release. In this case, the lawyers of such inmates did not inform them of about the same. In case of status of bail applications, a similar pattern as that seen in the case of undertrial prisoners was noticed wherein

Figure 20 Application for Bail pending Appeal

almost 50% of the applications were pending and their disposal was seen to be delayed. Mandating a speedy disposal of bail applications seems to be the need of the hour looking at the findings of the present study.

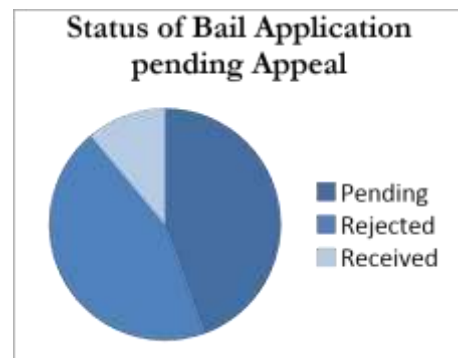


Figure 21 Status of Bail Application pending Appeal

4.3. Male Undertrial Prisoners and Bail

Application for Bail	Respondents
Did not apply for bail	47
Applied for bail	37
Applied for bail but the application is pending	15
Not aware	11
Total	110

Table 11 Details of Bail Application of Male Respondents

As can be seen from the above table almost ½ of the inmates applied for bail, with 14% of inmates' bail applications still pending. It should be noted that 11 inmates which is 10% of the total respondents were not aware if they had applied for bail. Further questions were asked based on inmates' response to this question, and for under-trial men inmates, this chapter is divided into the following sections:

- If the inmate applied for bail but the bail application was rejected
- If the inmate did not apply for bail
- If the inmate was unaware of the bail application status

Out of the 37 inmates who had their bail applications adjudicated, none was granted bail. The further section takes into account responses from such set of inmates.

Rejection of Bail Application	Respondents
One time	25
Two Times	8
Three Times	2

Table 12 Frequency of rejection of Bail Application of Male Respondents

It can be seen from the above table that almost 67% of the inmates who applied for bail got their bail application rejected at least once, 22% of the inmates who applied for bail got their bail application rejected twice and only two inmates applied for bail three times and all these applications got rejected. On perusal as to what were the reasons for such rejection of bail

applications it was seen that a majority of the respondents were not aware of the reasons for rejection of their bail application(s). The most common cited reason by the Court was likelihood of the accused to abscond; this was followed by rejection on grounds of non-filing of chargesheet and the lower court asking the petitioner to approach High Court for bail. The respondents were further enquired as to whether they filed an appeal against the rejection of the bail application. It was found that only two inmates filed an appeal against rejection of their bail application. Apart from them five inmates made second bail application which the result was still pending on the date of the interview.

Grounds of rejection	Respondents
Crime committed is of serious nature or offensive to public morality	2
Likelihood of the accused absconding	6
Necessity of the accused to remain in custody for the purpose of investigation	2
Unaware or not informed by the lawyer	20
Lower Court asked the petitioner to approach High Court for bail	5
Charge sheet not filed	5
The petitioner is the primary accused	3
Prima facie evidence of crime committed by the petitioner	1
Not Aware	3
Bail application was not rejected but withdrawn	11

Table 13 Grounds of rejection of Bail Application of Male Respondents

Moving on the respondents who had not filed a bail application, these respondents were interviewed as to the reasons for it. It was seen that the most common reason amongst the respondents for not applying for bail was because they came from a poor economic background and they could not afford furnishing bail. Seven respondents who came from poor economic background did not even have anyone else in the family who could attempt to arrange for money to furnish bail or even pursue legal proceedings. The second most common

reason for not applying for bail was unawareness of legal proceedings amongst the respondents.

Reasons	Respondents
Poor economic background and so cannot furnish bail	19
Family and friends have cut off ties	1
Unawareness about legal procedures	14
Will apply after co-accused gets bail	3
Advocate's advice	3
Charge sheet not filed	1
Too early to apply for bail	3
Primary accused	1
Waiting for an advocate to be appointed	1
No one at home to provide bail	1

Table 14 Reasons for not applying for Bail by Male Respondents

The following table throws more light on background of these respondents:

Education	Respondents
Illiterate	8
Studied up to 10 th	7
Annual Income (in Rs.)	Respondents
0-35,000	4
35,000-2,00,000	11

Table 15 Background of the Respondents

Looking into the educational level of the above respondents it can be seen that a majority of them are illiterate and those who have studied were able to only complete their primary education. As can be seen from the above table, all the respondents who were unaware of legal proceedings came from a lower income family background. It should be noted that for a majority of the respondents, whose annual income fell between 35,000- 2, 00,000, their

family income was nearer to 35,000 than it was to 2, 50,000. Reasons for not applying for bail such as: waiting for co-accused to get bail; advocate’s advice; waiting for charge sheet to be filed can be clubbed together as these reasons are based on well-thought legal strategies. Together they form the third most common reason for not applying for bail.

A total of eleven inmates were not aware whether they had applied for bail or not. A closer scrutiny of their responses with respect to their educational status and income level showed the following:

Education	Respondents
Illiterate	4
Studied up to 10 th	7

Annual Income (in Rs.)	Respondents
0-35,000	4
35,000-2,00,000	6
2,00,000-5,00,000	1

Table 16 Education and Income of the Respondents who were not aware whether they had applied for bail or not.

The above table shows a similar trend as shown in the first table. Based on statistics of both the tables, it would not be farfetched to state that amongst male under trial prisoners there is a positive co-relation between awareness about the legal procedure and understanding of their own case vis-à-vis their income level and educational background.

CHAPTER 5
CONCLUSION & RECOMMENDATIONS

The purpose of the study was to provide a holistic view of the way the law relating to bails is being applied to the women undertrial prisoners. For this purpose we have studied the codified law relating to bails, the judgments rendered by the Hon'ble Supreme Court and the High Courts, reports prepared by Law Commission, Parliamentary Panels and National Commission for Women, Prison Statistics of India for the year 2019. We also collected primary data by way of interviews and questionnaires from the women prisoners at Sabarmati Central Jail, Ahmedabad. The key findings that emerge by studying the primary and secondary source are as follows:

1. Majority of the female prisoners were undertrials and the rate of increase in prison population is faster than the rate of increase in the capacity of prisons to hold women inmates.
2. Majority of the female prisoners were either illiterate or less educated.
3. The adverse effects of pretrial detention in case of female inmates is not limited to them but is also experienced by the children who accompany them in prison. As per the Prison Statistics of 2019, the female undertrials were accompanied by 1409 children in prison.
4. Female undertrials often loose contact with their relatives, some are abandoned by their husbands and even after their release suffer from the social stigma associated with being in prison. Thus, imprisonment causes female prisoners an irreparable damage.
5. Due to the requirement of surety, female undertrials abandoned by their family continue to languish in prisons even after bail has been granted to them. Therefore, they are deprived of their liberty due to procedural formalities which force them to be dependent on third parties.
6. Even though bail matters should be decided as swiftly as possible, however due to judicial backlog many inmates who would otherwise be eligible for bail continue to languish in jail because of the delay in deciding their bail application.
7. Section 437 leave a very wide room for judicial discretion, however the precedents laid down by the Hon'ble Supreme Court and Hon'ble High Courts are not consistent, as a result the probability of getting bail depends on engaging effective legal service, the same is verified by the fact that persons belonging to lower socio – economic section of the society form a large chunk of the undertrial population.
8. The mandate of bail being a rule and jail being an exception is being ignored by the

trial courts, this can be verified from the data available on the website of National Judicial Data Grid, as of 30.01.2021 a total of 98,412 bail application were pending before various High Court, pendency of such large amount of bail applications before the High Courts which is an appellate court from filing bail applications show that the trial courts are not treating bail as a rule.

9. Although the proviso to Section 437(1) of the CrPC provides that special consideration be given to woman when deciding their bail application, however the proviso has not been implemented in its letter and spirit.
10. The majority of female undertrial prisoners are charged for offense of murder. However, as per the report of the National Crime Records Bureau the probability of conviction for offenses like Murder and Kidnapping is only 41.90% and 24.90% respectively, therefore the chances are most of the female undertrials would be acquitted on completion of trial.

Therefore, while the intention of the law is to be liberal when granting bail and prevent undue pretrial detention, however, the law in practice is quite different from what it was intended to be findings of our study show that in practice the current law on bails leads promotes pretrial detentions. It need not be emphasized that prolonged stay in prison without being proven guilty is contrary to the fundamental right of personal liberty as guaranteed under Article 21 of our Constitution.

SUGGESTIONS

Keeping in view that all the accused are entitled to be presumed innocent until proven guilty and the fact that an undertrial is suffering incarceration even before his guilt has been established, also considering that women undertrial suffer more hardships during incarceration and the effect of pretrial detention is more severe on women undertrial in comparison to the male undertrials and the codified law on bail has failed to address this issue, we make the following suggestions:

1. Amendment in Section 437 CrPC to reduce the delay in transferring of bail application from Magistrate to Sessions Judge where offense is triable by Sessions court.
2. Nonailable offenses which are triable by Magistrate should be madeailable for women.
3. While deciding bail applications of women who are accused for offences triable by Sessions Court consideration should only be limited to the following questions:

- a) Whether the accused is a flight risk?
- b) Whether any recovery is to be made from the accused?
- c) What is the nature of the investigation conducted by the Investigation Officer before seeking police custody?
- d) Whether before seeking police custody the accused has refused to cooperate with the investigation officer?
- e) Whether there is a possibility of accused influencing the witnesses or tampering evidence?

4. Bail should be granted by default to women undertrials in offenses triable by Sessions once charge sheet has been filed if there is no possibility of influencing the witness, tampering of evidence, hamper the trial or the accused fleeing.

5. The onus of monitoring the compliance of Section 436A Cr.PC should be put on the trial court before which the trial is being conducted.

6. The period of eligibility of bail under Section 436A Cr.P.C should be reduced to one third of the sentence in case of women undertrial.

PROPOSED AMENDMENTS

Amendment to Section 167 of the CrPC: -

As has been reflected in our study that most of the times the female inmates have to be in prisons without bail because: - (a) Pendency of bail applications in courts; or (b) Lack of the undertrial to seek legal help; or (c) Want of a surety. Hence, in our view there is a need for grant of default bail at least for some category of offenses.

Although, we had considered proposing an amendment to Section 2(a) of the Cr.P.C to make all offenses triable by Magistrate as bailable when the accused is a woman, however, if such amendment is made the scope of custodial interrogation would be erased for offenses like theft, extortion, robbery, cheating and forgery.

Therefore, to balance the rights of the accused as well as the investigating agencies we propose the grant of default bail after completion of police custody, where the maximum imprisonment prescribed for an offense is seven years. To achieve this objective we propose the following amendment to Section 167 of the Cr.PC: -

In 1st provision of Section 167 of the Cr.PC, after Clause (a), add Clause (a)(a), which shall read as follows:

“Provided when the person arrested is a woman and where the investigation relates to any non – bailable offense not punishable with death, imprisonment for life or imprisonment for a term exceeding seven years, clause (a) of the Proviso to Section 167(2) to be read as follows – the Magistrate shall not authorize the detention of the accused person, beyond the period of fifteen days, the accused person shall be released on bail on personal bond with or without sureties, and she shall be deemed to be so released under the provisions of Chapter XXXIII for the purpose of that Chapter.”

Amendment to Section 436A of CrPC: -

Various committees have recommended to reduce the time limit prescribed under this section for eligibility for release of undertrial prisoners after completion of half of the maximum possible sentence to one third of the maximum possible sentence for female undertrial, for this purpose we propose the following amendment: -

Present Section	Proposed amendment(highlighted)
<p>Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one – half of the maximum period of imprisonment specified for that offence under that law, s/he shall be released by the Court on her/his personal bond with or without sureties;</p> <p>Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one half of the said period or release her/him on bail instead of the person with or without sureties:</p> <p>Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than</p>	<p>Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one – half of the maximum period of imprisonment or one – third of the maximum period of imprisonment if the person is a woman, sick or infirm, specified for that offence under that law, s/he shall be released by the Court on her/his personal bond with or without sureties;</p> <p>Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one half of the said period or release her/him on bail instead of the person with or without sureties:</p>

the maximum period of imprisonment provided for the said offence under that law.	Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.
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Proposed Amendment to Section 437 of the CrPC:

The law relating to bail after arrest for non bailable arrest has been codified under Section 437 of the CrPC. However, the law in its current state is not only vague but applies equal standards between male undertrials and female undertrials. As a result, the law is devoid of any uniformity and the prison population is overcrowded by undertrial prisoners, even the proviso to Section 437 which has been inserted to provide for sympathetic consideration of bail application of women, old and infirm has not been given full effect and has been treated merely directory in nature by the courts, and no special consideration is being given while considering their bail applications.

Thus, to make the provision of this section more efficient and more accessible to vulnerable groups like women, old and infirm and at the same time not hindering investigation and trial, we have proposed to divide the grant of bail into two stages, first stage is during investigation and the second stage is after completion of investigation.

Grant of bail during the pendency of investigation:

We have proposed addition of a new clause after Section 437 in the form of Section 437 (B), the Section shall start with a *non obstante clause*, this has been done to ensure that while deciding the bail applications of women, old and infirm special consideration be made on account of their different status. Further, unlike Section 437, we have used the phrase “*shall*” instead of “*may*”, the intention is to make bail the rule and jail an exception, to ensure free and impartial investigation we have provided exceptions when bail may be declined. The proposed amendment is as follows: -

Add Section 437 (B) which shall read as follows: -

“Notwithstanding anything stated in Section 437(1) where any woman, sick or infirm is arrested or detained without warrant for a non – bailable offence, on execution of bond with or without sureties and on giving an

undertaking to comply with such directions as given by Court, shall be released on bail by Court, including Court of Session, unless the Court has reasonable ground to believe:-

- a) custody of the accused is required to conduct further investigation; or*
- b) the accused if released on bail is likely to hamper investigation; or*
- c) the accused is likely to abscond.”*

Grant of bail after completion of investigation:

It is submitted that the purpose of pre-trial arrest is to conduct investigation from the accused, however once the investigation is completed no purpose is to be served by keeping the accused in custody, therefore, we submit that bail should be granted as a default even without surety, as many times female inmates are abandoned by their family members and are unable to afford sureties. The bail has been made as default because woman accused during incarceration may not be able to avail the desired legal service. Further, if there is a possibility that bail to the accused can have adverse effect on trial, remedy under Section 439A of CrPC for cancellation of bail will always be available to the prosecution and the complainant. The proposed amendment is as follows: -

Add Section 437 (C) which shall read as follows: -

“Notwithstanding anything stated in Section 437(1), where any woman, sick or infirm is arrested or detained without warrant for an offense punishable with death or imprisonment for life or with imprisonment exceeding 7 years, and ninety days from arrest have elapsed where the investigation relates to an offense punishable with death, imprisonment for life or imprisonment for a term exceeding ten years, for any other offense if sixty days have elapsed, such person shall be released on bail by the Court having jurisdiction on execution of bond with or without sureties, if the person given an undertaking that he or she shall be ready to comply with such directions as may be given by the Court.”

NEED FOR EFFECTIVE LEGAL AID

Although the scope of this study was limited to analysing the law relating to bail and how it impacts women undertrial prisoners, however, during the course of collecting the primary data from inmates imprisoned at Sabarmati Central Jail, Ahmedabad, a constant grouse expressed by the inmates was the lack of effective legal aid being provided to them.

As can be seen from the primary data which has been collected, most of the inmates were either illiterate or uneducated, as a consequence it can be assumed that they were not aware about their

legal rights, as a result a majority of them were even unaware that about the existence of the Legal Service Authority.

In cases where a lawyer has been appointed, the lawyers were not meeting with their clients or updating them with regards to their proceedings, some inmates complained that the lawyers who were appointed to them through Legal Service Authority were often demanding extra money from them. As a result, there was lack of trust in the lawyers provided by the Legal Service Authority and inmates fell prey to touts or were left dependent on their relatives for availing legal service.

The response of the inmates and the data collected point towards a chronic malice plaguing the legal system and the effectiveness of legal aid, therefore, we propose that a separate study be conducted to analyse the law relating to legal system and how it can be made more accessible and customized to ensure the right to free and fair trial is available to everyone. To make the law more effective a comprehensive analysis of the CrPC, Advocates Act, Prison Manual, General Rules of High Courts and Legal Services Act is required as all these laws operate in tandem with each other.

In the meanwhile, based on the incidental findings from our present report we propose the following amendments:

- 1) After Section 41A (4), add (5) to be read as follows: - *“(5) When the person to whom notice is being sent is a woman, the notice shall contain the details of an advocate registered with the District Legal Service Authority.”*
- 2) After Section 41B (c), add (d) to be read as follows: - *“(d) inform the District Legal Service Authority about the arrest.”*
- 3) In Section 41D add sub – clause (2) to be read as follows: - *“When any person is arrested and is not represented by an advocate, an advocate shall be appointed by the District Legal Service Authority who shall be entitled to meet such person during interrogation.”*

However, at the cost of repetition we need to emphasize that the amendments are only preliminary and a thorough study needs to be conducted in this field.