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Report No.268

Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail

May 2017

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Shri Ravi Shankar Prasad Ji,

The Law Commission of India was asked in 2015, by the Department of Legal Affairs, to examine the need for a Bail Act in India. However, during the 10th meeting of the Advisory Council for Justice Delivery and Law Reforms held on 18.10.2016, it was decided that there is no need for a standalone Bail Act and the reforms can be suggested as amendments to the relevant statutes.

The Commission started its study of the matter as far back as in March 2016. The Commission had occasion to interact with the Police Officers of various States during a Consultation held on 2 November 2016. The Commission further interacted with a cross section of Judicial Officers on 21 January 2017. During the course of the study, the Directors General of Prosecution of all the States were also consulted. The opinions and suggestions that emanated from these consultations were considered by the Commission and the whole issue was discussed in detail.

I have great pleasure in forwarding herewith the Commission's suggestions with regard to bail reforms in India as its **Report No.268** titled **"Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail"**.

The Commission would like to place on record a word of appreciation for the excellent efforts by Ms. Aditi Sawant, Consultant, in preparing the Report.

With warmest regards,

Yours sincerely,

Bschauhan

[Dr. Justice B S Chauhan]

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Acknowledgments

The Report No.268 of the Law Commission of India, on bail reforms, titled "*Amendments to Criminal Procedure Code, 1973 – Provisions Relating Bail*" has been possible with the able guidance from some of the eminent Judges, senior lawyers, researchers and Consultants to the Commission, apart from the Chairman and Members of the Commission. The Commission gratefully acknowledges the contribution made by the following persons in assisting it in preparation of the Report:

1. Hon'ble Mr. Justice A P Sahi, Sr. Judge, Allahabad High Court
2. Hon'ble Mr. Justice Pratyush Kumar, Judge, Allahabad High Court
3. Hon'ble Justice Ms. Mukta Gupta, Judge, Delhi High Court
4. Hon'ble Mr. Justice R Basant, Former Judge, Kerala High Court
5. Shri Sidharth Luthra, Sr. Advocate, Supreme Court of India
6. Shri Abhay, Addl. DG, CRPF
7. Ms. Kumud Pal, Principal Secretary (Judicial), Govt. of UP
8. Dr. Aparna Chandra, Professor, National Law University
9. Dr. Mrinal Satish, Professor, National Law University
10. Ms. Shikha Dhandharia, Former Consultant, Law Commission of India
11. Ms. Aditi Sawant, Consultant, Law Commission of India

The Commission would also like to place on record its sincere gratitude to the Bureau of Police Research and Development and the Indian Law Institute, for arranging consultations on its behalf to discuss bail reforms in India. Our sincere thanks are due to the participants of these consultations, viz., Hon'ble Judges of Supreme Court and High Court of Delhi, Ld. Judicial Officers from various districts across the country and the officers of police from the different States, for their valuable input. Thanks are also due to the Directors General of Police and the Directors General of Prosecution from the various States who responded to the Commission with their valuable suggestions.

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Report No.268

Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail

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CHAPTER – I
Introduction

1.1 In the recent times, bail in India is a highly debated issue. There are number of reports that shed light on the state of the criminal justice system in India. The epigraphs below captures the state of affairs aptly:

> …[i]f more than 50% of all detainees, and in some countries more than 70% are in pre-trial detention…, something is wrong. It usually means that criminal proceedings last far too long, that the detention of criminal suspects is the rule rather than the exception, and that release on bail is misunderstood by judges, prosecutors and the prison staff as an incentive for corruption…[1]
>
> Here the rod is, as it were, held '*in terrorem*' over the evildoer, innocuous so long as he behaves well, but ready to descend at any moment if he breaks his promise of good behaviour, for if he does, his bail can be forfeited[2].

1.2 Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing such a person from tampering with evidence or witness. Under the Criminal procedure Code of 1973 (*hereinafter* Cr.P.C.), the police, prosecutors magistrates and judges have been enjoined to exercise the best judgement and discretion within the confines of the law for ensuring the appearance of the person accused of an offence without jeopardizing the interests of the society.

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[1] Pre-Trial Release and the Right to be Presumed Innocent: A Handbook on Pre-Trial Release at International Law, Lawyers Rights Watch Canada (LRWC), March 2013, See also, Twelfth United Nations Congress on Crime Prevention and Criminal Justice, Proceedings of a "Workshop on the Survey of United Nations and Other Best Practices in the Treatment of Prisoners in the Criminal Justice System", Salvador, Brazil, 12-19 April 2010, at p. 15.

[2] Fletcher Moore. *Magistrates 'Law and Suggested Increase of Jurisdiction and Powers,* 9 J. OF THE STAT. & SOC. INQUIRY SOC'YOF IR. 671, 673 (1893).

1.3 In general parlance, bail refers to release from custody, whether it be on personal bond or with sureties. In *Moti Ram* v. *State of Madhya Pradesh*,[3] the Supreme Court clarified that the definition of the term bail includes both release on personal bond as well as with sureties. It is to be noted that even under this expanded definition, 'bail' refers only to release on the basis of monetary assurance—either one's own assurance (also called personal bond or recognizance) or third party's sureties.

1.4 Personal liberty and the rule of law find its rightful place in the Constitution in Article 22 which includes measures against arbitrary and indefinite detention. It further provides that no person shall be detained beyond the maximum period prescribed by any law made by the Parliament. Even with the adoption of an elaborate procedure by the judiciary to deal with matters regarding grant of bail, the system is somehow unable to meet the parameters of an archetypal system giving rise to the notion that the bail system is unpredictable.

1.5 Based on the recommendations of the Law Commission in its 41st Report on the Code of Criminal Procedure[4] – the law relating to bail got suitably modified, in tune with the constitutional objectives and sought to strike a fine equilibrium between the 'Freedom of Person' and 'Interest of Social Order'. The provisions namely sections 436, 437 and 439 of Chapter XXXIII Cr.P.C. were streamlined in 1973. In last few decades, the societal contexts, its relations, changing pattern of crimes, arbitrariness in exercising judicial discretion while granting bail are compelling reasons to examine the issue of bail and to chart a roadmap for further reform.

[3]AIR 1978 SC 1594.
[4] 41st Law Commission Report, 1969, The Code Criminal Procedure, 1898, Vol. I.

1.6 Bail in its essence is a fine balance between the right to liberty of the person accused of an offence and the interests of society at large. Thus, the task ahead would not only include stricter bail legislations optimal for dealing with the growing rate of crime, but at the same time making them equitable. This will harmonise the bail legislations with the current socio-legal problems and ensure that under-trials and indigent persons have access to justice.

A. Context and Scope of Review

1.7 The Department of Legal Affairs, Ministry of Law and Justice, Government of India, *vide* its letter dated 11.09.2015 forwarded a note from the Minister of Law and Justice dated 01.09.2015, on the need for a Bail Act in India. The Department made a reference to the Law Commission "to examine the desirability of having a separate Bail Act, keeping in view the similar provisions in the United Kingdom and other countries." Later however, the Law Commission *vide* letter dated 21.12.2016 was referred to achieve the objective by bringing necessary changes in the existing provisions of the Cr.P.C.

1.8 While the bail laws in India are refined in many ways through developments in law, a great deal remains to be accomplished. At the behest of the Ministry of Law and Justice, Government of India, this Law Commission of India has undertaken the task of reviewing the prevalent law and procedure on bail. Recognizing the fact that reforming the criminal justice system would be time-consuming, the Law Commission considers it appropriate to address issues relating to bail on a priority basis. The reason for prioritising this particular review was the recognition of the fact that there is a substantial public interest involved. More importantly, it has an impact on concept of rights in jurisprudence and the Indian constitution. In pursuance of the above mandate, the Commission entered

into consultation with various stakeholders like Bureau of Police Research and Development (BPR&D), Judiciary, Indian Law Institute, academicians, lawyers and public prosecutors to have comprehensive view of this issue[5].

B. Statistical data and analysis

1.9 The data collected regarding prison population in India represents a grim scenario. It indicates that 67 per cent of the prison population is awaiting trial in India. Inconsistency in bail system may be one of the reasons for the over-crowding of prisons across the country and giving rise to another set of challenges to the Prison Administration and 'State' thereto. Freedoms as guaranteed under Part III of the Constitution has a unique relation with the ideas and objectives enshrined in the Preamble of the Constitution of India i.e. Justice – economic, social and political. It remains one of the solemn duty of the republic and its realisation in its full sense is one of the cherished goal. It has become a norm than an aberration in most jurisdictions including India that the powerful, rich and influential obtain bail promptly and with ease, whereas the mass/ common / the poor languishes in jails.[6] Thus, it is one of the malaise which is affecting the common citizens and family thereto, which not only deny the basic tenets of 'justice' but even human dignity is at stake. A majority of under-trials (70.6 per cent) are illiterate or semi-literate.[7] In the absence of data regarding economic status of prisoners, 'literacy' serves as a useful proxy to appreciate that, the majority of under-trials belong to the socio-economically marginalized groups.

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[5] For further details see **Annexure – C**

[6] Jason Gilbert, "Blame our bail system for overcrowded Ottawa jail" The Ottawa Sun (Jan. 14, 2016) *available at*: http://www.ottawasun.com/2016/01/14/blame-our-bail-system-for-overcrowded-ottawa-jail (last visited on Jan. 25, 2017).

[7] National Crime Records Bureau, *Prisons Statistics* (Ministry of Home Affairs, 21st Edition, 2015).

1.10 Various reports from the Ministry of Home Affairs show that a total of 2,31,340 under-trial prisoners from various States and Union Territories were lodged in jails for committing crimes under Indian Penal Code (IPC), and 50,457 were under-trials under special laws, e.g. Customs Act of 1962, Narcotic Drugs and Psychotropic Substances Act of 1985, Excise Act of 1944, etc.[8]. A large number of 12,92,357 under-trials were released during 2015 out of which 11,57,581 were released on bail.[9]

1.11 The right of a fair trial requires moderation not only to the person accused of an offence, but also consideration of the public and society at large as represented by the State. It must also instill public confidence in the criminal justice system, including those close to the accused person, and those affected by the crime.[10] Imprisonment rates widely varies around the world; for instance, the incarceration rate in US is 707 per 100,000 of the national population, while in India it is 33 per 100,000 of the national population.[11] Thus, even after adjusting for different factors and indices, it may be surmised that India has one of the lowest imprisonment rates.

	Total Population*	Prison Population*	% Population in Prison	% World Prison Population	% World population
United States	296	2.19	0.74	23.68	4.36
United Kingdom	54	0.08	0.15	0.86	0.8
China	1554	1.55	0.1	16.76	22.89
Russia	142	0.87	0.61	9.41	2.09

[8] *Id.*
[9] *Supra* note 7
[10] South African Supreme Court in *Zanner* v. *Director of Public Prosecutions* [2006] 2 AllSA 588.
[11] Institute for Criminal Policy Research , "World Prison Brief" , *available at* : http://www.prisonstudies.org/country/india (last visited on Dec. 23, 2016).

India	1092	0.33	0.03	3.57	16.08
Brazil	361	0.19	0.05	2.05	5.32

*Population in Millions.

Table 1: Comparison of Prison Population
Source: World Prison Brief, Institute for Criminal Policy

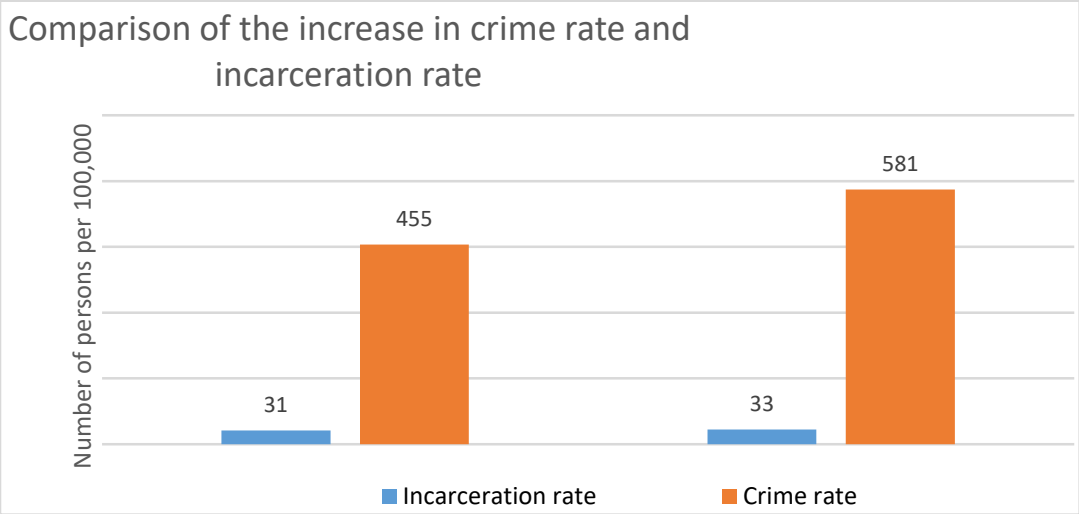

Figure 1: Comparing the increase in crime-rate and the under-trial rate
Source: National Crime Records Bureau and International Centre for Prison Studies at King's College

1.12 Despite increase in crime rate for a given decade, the rate of incarceration has remained unchanged (see Fig. 1 above). In quantitative comparative indices, India ranks higher than many countries of the world in terms of its low incarceration rates. There may be various reasons for the findings. Despite low incarceration rates, it is reflected from Table 2 below that the percentage of bail being granted is far lower than ideal, it shows that a mere 28 percent of the person accused of an offence have been granted bail.

	Special Laws	IPC
Total number of persons arrested	4,8,57,230	3,6,36,596
Total number of persons charge-sheeted	4,7,27,419	3,2,99,161
Total number of persons in custody	74,139	2,94,857

Total number of persons granted bail	3,20,392	1,0,18,760

Table 2: Tabular representation of disposal of cases
Source: National Crime Records Bureau

1.13 It certainly remains one of the vexed question to map the socio-economic impact of the 'Right to Bail – its grant or Refusal' by the appropriate authority. However, the certain inalienable guidelines and streamlining certain procedures would further make the legal process more humane and subservient to the idea of fundamental liberty, justice and good governance. Statistical information provided by the National Crime Records Bureau (*hereinafter* NCRB) recognizes the importance of questioning the operations of the bail system in India.

CHAPTER – II
International standards on bail and its constitutional manifestations

2.1 The concept of bail has been recognized in the various international covenants and instruments upholding human values. Article 9(3) of the International Covenant on Civil and Political Rights, 1966 [12] (*hereinafter* ICCPR) states that the general rule shall not be detention in custody of persons awaiting trial and release may be conditioned on the guarantees to appear at the trial. Similarly, Article 10 (2) (a) of ICCPR also refers to the same principle as it states that accused must not receive same treatment as a convict[13] Above all, Article 14 (2) cardinally provides for the presumption of innocence until proven guilty as an axiomatic principle of law. This principle imposes on the prosecution the burden of proving the charge, ensures that the accused has the benefit of doubt and obliges public authorities to refrain from prejudging trial outcome. It shifts the burden of proof on the prosecution and postulates for an unbiased trial.[14]

2.2 The UN Working Group on Arbitrary Detention (WGAD) observed in their Report [15] that indigent and socially vulnerable groups of populations are disproportionately affected where bail is discretionary.[16]

2.3 Research on the subject has indicated that defendants who are granted bail have significantly better/ higher chances to obtain an

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[12] 999 UNTS 171.
[13] Article 10 (2) (a) of ICCPR reads: "Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons."
[14] Human Rights Committee, CCPR General Comment No. 32, at para 30.
[15] Commission on Human Rights, Report of the Working Group on Arbitrary Detention, Dec. 12, 2005 (E/CN.4/2006/7), *available at:* http://ap.ohchr.org/documents/alldocs.aspx?doc_id=11600 (last visited on Dec. 24, 2016).
[16] *Id.* at para. 66

acquittal than those detained pending trial. Further, the data analyzed from the NRCB reflects that the existing norms of grant or refusal of bail in India have close nexus with the economic well-being and literacy standards.[17] However, principles such as presumption of innocence; right to non-discrimination; right to liberty from arbitrary detention and right to speedy and fair trial – serve as the benchmark for the State and various authorities.

A. Presumption of innocence

2.4 Presumption of innocence and the duty of the prosecution to prove the guilt of the person accused of an offence, is the golden thread in criminal law jurisprudence.[18] Every individual charged with a crime has a right to be presumed innocent until proven guilty.[19]

2.5 The guideline that bail be the general rule and jail an exception, is the "logical and consistent adaptation of the principle of presumption of innocence to the pre-trial stage."[20] The principle is enshrined in Article 11 (1) of the Universal Declaration of Human Rights, 1948 (UDHR), Article 6 (2) of the European Convention on Human Rights (hereinafter ECHR), Article 48 (1) of the Charter of Fundamental Rights of The European Union (hereinafter EU Charter) and Rule 111 of the United Nations Standard Minimum Rules for The Treatment of Prisoners also known as the Nelson Mandela Rules[21].

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[17] *Supra* note 7

[18] *Woolmington* v. *DPP* [1935] UKHL 1; See also *Golbar Husain* &Ors. v. *State of Assam & Anr.* (2015) 11 SCC 242 and *Vinod Ku*mar v. *State of* Haryana (2015) 3 SCC 138.

[19] *Smirnova* v. *Russia*, Applications nos. 46133/99 and 48183/99 (2003).

[20] Christoph J. M. Safferling, *Towards an International Criminal Procedure* 46 (Oxford University Press, Oxford, 2001).

[21] These rules were recently amended in 2015, the right to be presumed innocent until proven guilty was first found in Rule 84, but in the new rules it is to be found in Rule 111. These rules are also known as the Nelson Mandela Rules.

2.6 The United States Supreme Court has adopted both restrictive and liberal interpretation of presumption of innocence. In *Stack* v. *Boyle*[22], the court conclusively held that unless this right to bail before trial is preserved, the presumption of innocence, secured after centuries of struggle, would lose its meaning. However, in *Bell* v. *Wolfish*[23] it states conversely that the right to be presumed innocent until proven guilty is not operative at the stage of bail. Similarly, the U.S Supreme court in *United States v. Salerno*[24] has clarified the exceptional nature of detention pending trial to be in effect only when it is found that there is an unequivocal threat to the safety of individuals and community. Justice Marshall in *Salerno (supra)* stated that presumption of innocence in favor of the accused is the undoubted law…and its enforcement lies at the foundation of the administration of our criminal law." He concludes that such provision in the Bail Reform Act would eviscerate the presumption of innocence and is unconstitutional.

2.7 The Supreme Court of Canada in *R.* v. *Hall*[25] held that the denial of bail has a detrimental effect on the presumption of innocence and liberty rights of the accused. However, in *R.* v. *Pearson*[26], the court clarified that this principle must be applied at the stage of trial and not at the stage of bail because during bail, guilt or innocence is not determined and hence, penalty must not be imposed.

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[22] 342 U.S. 1, 4 (1951).
[23] 441 U.S. 520, 533 (1979). The Court opined that: "…[t]he presumption of innocence is a doctrine that allocates the burden of proof in criminal trials…[b]ut it has no application to a determination of the rights of a pre-trial detainee during confinement before his trial has even begun…"; See also Nico Steytler, *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* 134 (Butterworths, Durban,1998) (contending that the right to bail does not stem from the presumption of innocence).
[24] United States v. Salerno, 481 U.S. 739 (1987)
[25][2002] 3 S.C.R. 309.
[26][1992] 3 S.C.R. 665.

2.8 The stance taken by the Supreme Court of Canada in *Pearson* is in consonance and conformity with the perspective of the Kerala High Court in *State* v. *P Sugathan*[27] where the court held that the salutary rule is to balance the defendant's liberty with public justice. Pre-trial detention in itself is not opposed to the basic presumptions of innocence. It observed that:

> Ensuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming considerations in the nature aforesaid require denial of bail, it has to be denied.

2.9 Consequently, it may be surmised that pre-trial detention beyond the strictly necessary limits, poses a serious threat to the principle of 'presumption of innocence of the accused'. The revocation of bail is dependent on the presumption being dislodged by strong material pointing towards *substantial probability* and *clear and convincing evidence* of the guilt in relation to an offence.[28] The Supreme Court of India has opined that the presumption of innocence would be effective by favoring bail.[29]

B. Right to non-discrimination

2.10 The Supreme Court of India in the case of *Gudikanti Narasimhulu* v. *Public Prosecutor, High court of Andhra Pradesh*[30] observed that:

> Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions,

[27] 1988 Cr.LJ 1036 (Ker).
[28] *Bandy* v. *United States*, 81 S. Ct. 197 (1960).
[29] *Siddharam Satlingappa* v. *State of Maharashtra*, AIR 2011 SC 312.
[30] AIR 1978 SC 429.

> make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Art. 21 are the life of that human right. The doctrine of Police Power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.

2.11 Under the Indian Constitution, the Rule of Law is perceived as an indispensable tool to avoid discrimination, and arbitrary use of force.[31] The present system of bail is heavily influenced by economic status and discriminates against the impoverished and the illiterate. Our judicial system seems to have evolved two approaches to bail—bail as a right for the financially able; and for rest, bail is dependent on the judicial discretion, exercised through manipulation of the amount of "reasonable" bail that will be required[32]. Often the criteria for setting bail amounts fails to take into account the accused person's ability to pay, hence, the loss of liberty is imminent in the pre-trial detention. Accused person's economic status appears to have become the decisive factor for granting pre-trial release.[33]

2.12 The UDHR in Article 2 states that every person is entitled to all the rights and freedom in the declaration without any discrimination. Article 2(1) of ICCPR also reiterates the same and further obligates each State party to respect and ensure to all persons within its jurisdiction the

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[31] Article 14 of the Constitution of India.
[32] Caleb Foote, "The Coming Constitutional Crisis in Bail" 113 *U. PA Law Review.* 1125, 1180 (1965).
[33] See Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform, 9 *Val. U. L. Rev.* 167 (1974)

rights recognized in the Covenant without discrimination.[34] More importantly, Article 26 not only provides for equality before the law but also equal protection of the law. Thus it prohibits any discrimination based on capricious factors such as race, colour, sex, language, religion, political or national origin.[35]

2.13 The United States Supreme Court in *Edwards* v. *California*[36] held that the mere state of being without funds is a neutral fact-constitutionally an irrelevance like race, creed or colour. Further, expanding upon indigence and equality in the case of *Hobsen* v. *Hansen*[37] the court observed that indigent groups are not always assured a full and fair hearing through the ordinary political processes as the present power structure is inclined to pay little heed to even the deserving interests of the politically silent and the invisible minority. These considerations impel a close judicial surveillance and review of administrative judgments that adversely affect them.

2.14 The Supreme Court of United States has stated bail cannot be said to be excess when set at an amount that is higher than the defendant's ability, if the said amount is reasonable.[38] Contrarily, in *Griffin* v. *Illinois*,[39] the U.S Supreme Court in its *dissenting* judgment has questioned: "Why fix the bail at any reasonable sum if a poor man can't make it?" The effect of mandating an *unreasonably high* bail is that the

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[34] UN Human Rights Committee (HRC), *ICCPR General Comment No. 18: Non-discrimination*, 10 November 1989

[35] *Id*; See also Principle 5(1), UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment; Rule 6(1), Standard Minimum Rules for the Treatment of Prisoners.

[36] 314 U.S. 160 (1941).

[37] 296 F. Supp. 401 (D.D.C. 1967) *affirmed sub nom. Smuck* v. *Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

[38] *Stack* v. *Boyle*, 342 U.S. 1 (1951). See generally Alan R. Sachs, Indigent Court Costs and Bail: Charge Them to Equal Protection, 27 *Md. L. Rev.* 154 (1967).

[39] 351 U.S. 12 (1956).

indigent is denied equal protection of the laws, if he is denied his freedom on equal terms with other non-indigent person accused of an offence solely on the basis of his indigence.[40]

2.15 The grant or refusal of bail on economic conditions i.e. monetary surety, violates Articles 14 and 15 of the Constitution of India and runs contrary to the constitutional ethos. Further, it has no correlation with the objective sought i.e. assurance of appearing at every stage of the trial along with the presumption of innocence until proven guilty.[41] However, it must be remembered that in every case where the indigent is unable to afford bail the indigent is not being discriminated against, but the state only demands some security that such accused person will appear at the trial.[42] The threat of forfeiture of one's goods may be an effective deterrent to the temptation to break the conditions of one's release.[43]. Thus, persons of different financial status would find the motivation to appear before trial at varying amounts of bail, it only seems logical that an effective system of bail considers the individual's ability when setting such amount.[44] The current system of bail based on financial control and objective assessment would lead to suspect classification and discrimination. Moreover, it would also impinge on the fundamental right to fair trial.

C. Right to Liberty, Security and freedom from arbitrary detention

2.16 The UDHR[45] along with ICCPR in Article 9(1) echoes the fundamental rights to liberty, security and protection against arbitrary detention. By virtue of this fundamental right the state is placed under an

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[40] *Bandy* v. *United States*, 81 S. Ct. 197 (1960)
[41] *Supra* note 32
[42] 4 Crim. Proc. § 12.2(b) (3d ed.) citing *Pannell v. United States*, 320 F.2d 698 (D.C.Cir.1963) (Bazelon, C.J., concurring in part and dissenting in part).
[43] *Supra* note 40
[44] A. Hellmann, "The Right to a Pauper's Bail" Bench and Bar, Kentucky Bar Association (2016).
[45] Article 3 reads: "Everyone has the right to life, liberty and security of person…" ; Article 9 reads : "No one shall be subjected to arbitrary arrest, detention or exile.".

obligation to protect and preserve the liberty and the security of the citizens against arbitrary arrest and detention. In order for the detention to be lawful and not arbitrary, it must be consistent with the substantive rules of national and international laws as well as the principles and guidelines preserving fundamental rights.

2.17 The Human Rights Committee (*hereinafter* HRC) in *Albert Womah Mukong* v. *Cameroon*[46], held that custody pursuant to lawful arrest must always be lawful, reasonable and non-arbitrary. Further it must be necessary in all the circumstances e.g. to prevent flight, interference with the evidence or the recurrence of crime. Pre-trial detention has been found to be arbitrary, *inter alia*, where no charges have been laid, when the duration of detention is indefinite or becomes excessive, detention is applied automatically or there is no possibility of bail and if the pre-trial detention is set according to the length of the potential sentence.[47] Similarly, the ECHR uses a balancing test to review the detention or remand of individuals. Continued detention can be justified only if there are *specific indications of a genuine requirement of public interest* which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty.[48]

2.18 The Courts have also found that detention will be found to be justified only if it was necessary in pursuit of a legitimate grounds such as, failure to attend trial; interference with evidence or witnesses, obstruction of justice; risk of committing an offence while on bail; be at harm or risk to oneself or others; preventing the disruption of public order; reasonable suspicion of the committal of the crime alleged against the

[46] *Communication No. 458/1991, UN Doc. ICCPR/C/51/D/458/1991 of 10 August 1994*
[47] HR Committee (2006) Concluding Observations: Italy (CCPR/C/ITA/CO/5), at para. 14.
[48] *W.* v. *Switzerland*, 254 Eur. Ct. H.R. (ser. A) at 15 (1993).

accused; and gravity of the offence. The U.S Supreme Court in *Salerno (supra)* has upheld that pre-trial detention places a high threshold for the provision to come into effect and is asserted on the presumption that the government has already met the burden of confirming the "dangerousness" with conclusive and unambiguous evidence.

2.19 The right to liberty and right against arbitrary detention is found in UN Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, particularly in principle nos. 9, 12, 13 and 36 (2) and in rule 3 of United Nations Standard Minimum Rule for Non-custodial measures (The Tokyo Rules).

2.20 In *Maneka Gandhi* v. *Union of India,*[49] it was held that the procedure under Article 21 must be just, fair and equitable. Before a person is deprived of his life and personal liberty, the procedure established by law must be strictly followed, and must not be departed from to the disadvantage of the person affected.[50] In the case of *Joginder Kumar* v. *State of Uttar Pradesh*,[51] the Supreme Court has given directions on the rights of the arrested persons in the light of Articles 21 and 22. Similarly, in *Gudikanti Narasimhulu* v. *Public Prosecutor, High Court of Andhra Pradesh*,[52] Justice V.R. Krishna Iyer observed that refusing bail deprives a person of 'personal liberty' guaranteed under Article 21. Granting bail is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. In *Rajesh Ranjan Yadav* v. *C.B.I.*[53] court remarked that while Article 21 is of great importance, a balance must be struck between the right of liberty of the

[49] AIR 1978 SC 597.
[50] *Bashira* v. *State of Uttar Pradesh*, AIR 1968 SC 1313; See also *Narendra Purshotam Umrao* v. *B.B. Gujral*, AIR 1979 SC 420.
[51] AIR 1994 SC 1349.
[52] *Supra* note 30.
[53] AIR 2007 SC 451.

person accused of an offence and the interest of the society.[54] No right can be absolute and reasonable restrictions can be placed on the exercise of the rights. The grant of bail due to prolonged incarceration cannot be said to be an absolute rule because the grounds of bail must depend upon the contextual facts and circumstances.

2.21 The Supreme Court has clarified in *Kartar Singh* v. *State of Punjab*[55], that when the designated court under TADA refuses bail, it would not take away the power of the High Courts to consider an application for bail under Article 226 of the constitution. It further held that:

> Section 20 (7) of the TADA Act excluding the application of Section 438 of the Code of Criminal Procedure in relation to any case under the Act and the rules made thereunder cannot be said to have deprived the personal liberty of a person as enshrined in article 21 of the constitution.

D. Right to speedy and fair trial

2.22 The right to a speedy trial can be said to be an extension of right to liberty, security and protection against arbitrary detention and a precursor to the right to be presumed innocent until proven guilty. This right is ubiquitous and is not conditioned on any request or invocation of such right by the accused person. Such accused is entitled to be produced before the Court without undue delay in order to enable the court to determine whether the initial detention is justified and whether the accused must be released on bail. Both the ICCPR and the ECHR provide that, releasing the accused on reasonable bail is the remedy for failure to decide upon charges in an expeditious manner.[56] In addition, Article 9 (3) of the ICCPR states that a detained person shall be brought before the

[54] M.R. Mallick, "Bail: Law and Practice" 8 (Eastern Law House, Kolkata, 2009).
[55] (1994) 3 SCC 569.
[56] *Supra* note 1.

authorities promptly, and that the general rule is not detention. The US Supreme Court has considered right to speedy trial within strict scrutiny, as it has prescribed for the dismissal of the charges with prejudice as the ordinary remedy for the violation of this right.[57]

2.23 In *Hussainara Khatoon* v. *Home Secretary, State of Bihar*[58], the Supreme Court ordered the release of under trial prisoners whose period of incarceration had exceeded the maximum period of imprisonment for their offences pointing towards the failure of Magistrates to respect section 167 (2) Cr.P.C. which mandates for the release of the under trial prisoners on the expiry of 60- 90 days respectively. Justice Bhagwati on the issue of right of speedy trial observed that the under-trial prisoners languish in jail because they were downtrodden and poor, and not because they are guilty. In *Abdul Rehman Antulay* v. *R.S. Nayak*[59], the Supreme Court laid down guidelines for speedy trial for all the courts in the country:

- Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in favor the accused to be tried speedily. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in such circumstances;
- Right to speedy trial flowing from Article 21 encompasses all the stages namely the investigation, inquiry, trial, appeal, revision and re-trial;
- The accused should not be subjected to undue or unnecessary detention prior to his conviction;

[57] *Strunk* v. *United States*, 412 U.S. 434, 439–40 (1973) (contemplating alternative remedies, but concluding that dismissal must remain ―the only possible remedy).
[58] AIR 1979 SC 1360.
[59] AIR 1992 SC 1701.

- The worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal;
- Undue delay may result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise; and
- However, it cannot be ignored that it is usually the accused who is interested in delaying proceedings. Delay is a known defense tactic. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Moreover, non-availability of witnesses, disappearances of evidence by lapse of time, work against the interests of prosecution.

2.24 Thus, in relation to bail, the guarantee of speedy trial serves many objectives- provides protection against oppressive pre-trial detention; relieves the person accused of an offence of the anxiety and public suspicion due to unresolved criminal charges, protects against the risk of loss of evidence, and enables such accused to defend himself.[60]A bail inquiry is a judicial process that has to be conducted impartially and judicially and in accordance with statutory and constitutional prescripts.[61]Paucity of funds or resources is no defence to denial of right to justice emanating from Articles 21, 19 and 14 and the Directive Principles of State Policy— Article 39A.[62] The basic objectives traditionally ascribed to the institution of bail, is to ensure the presence of the person accused of an offence at trial while maximising personal liberty in

[60] *Ranjan Dwivedi* v. *CBI, Through the Director General*, AIR 2012 SC 3217.
[61] *Majali* v. *S* (41210/2010) [2011] ZAGPJHC 74 para 33.
[62] *P. Ramachandra Rao* v. *State of Karnataka*, AIR 2002 SC 1856.

accordance with the principles of the constitution.[63]The Cr.P.C. and other legislations must be amended to reflect these constitutional mandates while ensuring that justice and initiatives to prevent crime are not diluted.

[63] *S* v *Dlamini & Ors*.; *S* v. *Joubert*; *S* v. *Schietekat* [1999] ZACC 8; 1999 (7) BCLR 771 (CC).

CHAPTER – III
Definition of Bail

3.1 The term bail has not been defined in the Cr.P.C.[64], nevertheless, the word 'Bail' has been used in the Cr.P.C. several times and remains one of the vital concepts of criminal justice system in consonance with the fundamental principles enshrined in Parts III and IV of the Constitution along with the protection of human rights as prescribed under International treaties/ covenants.

3.2 Wharton's Lexicon and Stroud's Judicial Dictionary defines bail as "the setting free of the defendant by releasing him from the custody of law and entrusting him to the custody of his sureties who are liable to produce him to appear for his trial at a specific date and time."

3.3 According to Halsbury's Laws of England:[65]

> ..the effect of granting bail is not to set the defendant (accused) free, but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of the law and he will then be imprisoned.

3.4 The literal meaning of the word "bail" is surety[66].Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance—either one's own assurance (also called personal bond / recognizance) or through third party sureties. The Supreme Court has also reiterated this definition in the *Moti Ram Case.*[67]

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[64] See *Vaman Narain Ghiya v. State of Rajasthan*, (2009) 2 SCC 281.
[65] Halsbury's Laws of England, , Vol II para 166 (4th Edn., 1998)
[66] *Sunil Fulchand Shah v. Union of India*, AIR 2000 SC 1023
[67] *Supra* note 3.

3.5 'Bail' essentially means the judicial interim release of a person suspected of a crime held in custody, on entering into a recognisance, with or without sureties, that the suspect would appear to answer the charges at a later date; and includes grant of bail to a person accused of an offence by any competent authority under the law.

3.6 The system of bail poses a conflict in any criminal justice system because it attempts to reconcile the conflicting interests of the accused person who desires to remain free and the State that has an obligation to ensure that such accused appears promptly at the trial.[68] The current scenario on bail is a paradox in the criminal justice system, as it was created to facilitate the release of accused person but is now operating to deny them the release. However, the provisions of the bail contained in the various sections of the Cr.P.C indicate that context in which it is used is to set a person free by taking security for his appearance.

3.7 According to the Supreme Court of India, bail is devised as a technique for effecting a synthesis of two basic concepts of human values, namely the right of the accused person to enjoy his personal freedom and the public interest; subject to which, the release is conditioned on the surety to produce the accused person in court to stand the trial.[69] For instance, in *Public Prosecutor* v. *George Williams alias Victor*[70], the Madras High Court explaining the concept of 'bail' has observed that bail or main prize, meant, bailment or delivery of the accused person to their sureties, to be in their custody as opposed to jail. The rationale is that, they being jailors of choice, would have dominion and control over such accused. If

[68] *Supra* note 32 at 290.
[69] *Kamalapati Trivedi* v. *State of West Bengal,* AIR 1979 SC 777.
[70] AIR 1951 Mad 1042.

the sureties cannot control the accused person during the period of bail, naturally, the Court would intervene to shift the custody over to the State.

CHAPTER – IV
Legal Provisions and Bail Mechanism in India

4.1 The concept of bail emerges from the conflict between the police power to restrict the liberty of a man who is alleged to have committed a crime, and presumption of innocence in favour of the person accused of an offence. Bail is regarded as a mechanism whereby the State imposes 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.[71] The provisions relating to the grant of bail are enshrined in Chapter XXXIII, under sections 436-450 of Cr.P.C. Offences have been classified into bailable and non bailable and "cognizable" and "non-cognizable". Cognizable offences are the offences which can be investigated by police without any permission from a Magistrate. In contrast, non-cognizable offence means that police has no authority to investigate such an offence without the authority obtained from the Magistrate. Officer-in-charge of police station, Magistrate, Sessions Court and High Court are empowered under Cr.P.C. to deal with bail, imposing conditions on bail, cancellation of bail or anticipatory bail.

A. Arrest

4.2 Arrest or detention or apprehension of a person is pre-requisite for an application for bail before the appropriate court. However, in cases of Anticipatory Bail application, such arrest or detention is not a pre-requisite. Therefore, the law of bail must take into account laws regarding arrest and detention contained in Chapter V of Cr.P.C. The law relating to arrest with or without warrant and the right of persons who are arrested are contained in sections 41 to 60 of Cr.P.C. The most important and

[71] See *Vaman Narian Ghiya* v. *State of Rajasthan*, AIR 2009 SC 1362 and *Sanjay Chandra* v. *CBI,* (2012) 1 SCC 40.

frequently used provision is the power to arrest any person who is connected to any cognizable offence, or against whom a reasonable complaint has been made, or credible information has been received, or if reasonable suspicion exists.[72]

4.3 In its 154th Report, the Law Commission of India reviewed the law on arrest,[73] and supported the conclusion reached in the 3rd Report of the National Police Commission that "a major portion of the arrests were connected with very minor prosecutions and cannot, therefore, be regarded as necessary from the point of view of crime prevention".[74] Finding that over 60 percent of arrest was un-necessary and such arrests accounted for 42.3 per cent of jail expenditure,[75] the National Police Commission recommended that an arrest during investigation of a cognizable offence would be justified only when:[76]

i. The case involves a grave offence like murder, dacoity, robbery, rape, etc. and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror-stricken victims;
ii. The accused is likely to abscond and evade the process of law;
iii. The accused shows violent behaviour and is likely to commit further offences unless his movements are brought under restraint; and
iv. The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

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[72]Sections 41(1 & 2), Cr.P.C.
[73] 154th Report by Fourteenth Law Commission of India, *The Code of Criminal Procedure, 1973 (1996), Vol. I & II.*
[74]Third Report of the National Police Commission 31 (1980).
[75] *Id.*
[76] *Supra* note 74 at 32

4.4 The Supreme Court of India has observed in the case of *Joginder Kumar* v. *State of Uttar Pradesh,*[77] that the power of arrest should not be exercised in a routine manner. The Supreme Court also held that no arrest should be made without conducting an investigation as to the *bona fides* of a complaint, reasonable belief of a person's complicity, and the need to arrest.

4.5 The guidelines given in the *Joginder Kumar's case (Supra)* have acquired statutory shape upon the enactment of the Cr.P.C. (Amendment) Act, 2008 (5 of 2009). The Section 41 of Cr.P.C., 1973 was amended to limit the power of arrest for cognizable offences for which punishment is seven years or less. The amendment further postulates that the police officer shall record in writing his reasons for making or not making the arrest. The lawfulness of the arrest without warrant, in turn, must be based upon 'probable cause'. It depends upon the facts and circumstances within the officer's knowledge, and information which must be reasonable as well as trustworthy.[78]

4.6 The Supreme Court reviewed the power of arrest in *Arnesh Kumar v. State of Bihar*[79] and laid down following guidelines:

- Arrests must not be automatic, but the police officer must satisfy himself about the necessity for arrest by asking— why arrest? Is it really required? What purpose it will serve? What objective it will achieve?;

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[77]AIR 1994 SC 1349.
[78] *Kerr* v. *California*, 374 U.S. 23 (1963). See also *Brinegar* v. *United States,*338 U. S. 160, 338 U. S. 175-176 (1949), quoting from *Carroll* v. *United States,* 267 U. S. 132, 267 U. S. 162 (1925).
[79](2014) 8 SCC 273.

- The police officer must be equipped with a check list contained in specified sub-clauses under s. 41 (1) (b) (ii). This checklist must be forwarded to the Magistrate along with reasons and material that necessitated arrest when the accused is produced before the Magistrate for further detention. The Magistrate while authorizing the detention shall peruse the report furnished by the police officer and only after recording its satisfaction the Magistrate may authorize detention;
- The decision not to arrest the accused must be forwarded to the Magistrate within two weeks from the date of institution of the case with a copy to the Magistrate which may be extended by the Superintendent of Police of the district for reasons to be recorded in writing;
- Authorizing detention without recording reasons as aforesaid by the judicial Magistrate concerned shall be liable for departmental action;
- The Magistrate must apply his mind when authorizing detention beyond twenty-four hours as provided under s. 167 of Cr.PC. The detention must not be ordered in a callous manner, the Magistrate shall record his own satisfaction that the terms of section 41 (1) (b) of Cr.PC have been complied with.

4.7 Further, to ensure that a person who is not arrested is available for investigation, s.41A was inserted in the Code by the aforementioned amendment which provides that where a police officer who decided that he must not arrest a person, may require the person to appear before him at a specified place by issuing a notice. If the person does not comply with the terms or is unwilling to identify himself, the police officer may arrest him for the offence mentioned in the notice.[80]

[80] Section 41A (4), Cr.P.C.

4.8 It is desirable as well as necessary to meet the requirement of existing legal provisions under the criminal law justice as well as the Constitution of India that whenever the police officer arrests a person accused of non-bailable offense he must inform such accused that he is entitled to access free legal aid and may also apply for being released on bail. The officer shall also inform him about the procedure, as far as possible in the language that the accused person so understands.

4.9 The Courts have often made observations that the provisions of the Code particularly beneficial to the accused are not complied with by the Police and the Courts do not take serious note of such default, in view of the above it is necessary that in case the Police does not observe the norms contained in section 41 and the judicial officer also overlooks it, the State may initiate disciplinary proceedings against them. To enable the State or High Court to initiate proceedings against the police officers or judicial officers respectively, it is necessary that the High Courts shall amend the existing rules accordingly.

4.10 There is undeniably, a deeply entrenched practice in criminal law to cloak preventive detention as criminal justice bypassing the logical restrictions on criminal justice[81]. Such arbitrary practices not only fail to protect the community efficiently but also fail to deal with the accused person in just manner. Yet, real world problems commonly present us with conflicting interests that cannot be reconciled but only be compromised[82]. Sanctioning arbitrary arrests and irrational bail provisions will have the same effect as the laws appear in works of fiction such as 'Clockwork Orange' or 'Alice in Wonderland', where punishment precedes an offence

[81] Paul H. Robinson, "Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice) *Faculty Scholarship* 38 (2001).
[82] *Ibid.*

and introduces a “police state” which fosters tyranny[83]. Such measures must be used with extreme caution.

4.11 As India is a signatory to ICCPR, the provisions on arrest and bail are made to manifest the letter and spirit of Article 9 (3) and (4) of the ICCPR that provide that pre-trail detention must be the exception and that any person whose liberty is curtailed due to arrest or detention must be brought before a court without delay to review the lawfulness of his detention and order his release, if so required. The gap between theory and practice of law can be bridged- by implementing rules that will maximize the liberty of citizens generally, while ensuring their safety[84]. This task cannot be properly accomplished if we assume that "law enforcement is forever at odds with civil liberty”.[85]

B. Remand

4.12 Sections 56, 57, 167 and 309 of Cr.P.C. deal with the procedure related to the grant of remand. The difference between judicial and police custody is not simply the custodian, but under police custody, interrogation by the police is permitted, whereas under judicial custody interrogation is not permitted except in exceptional circumstances. Law is a zealous protector of the liberties of the subjects and generally does not permit detention unless there is a legal sanction for it[86]. Section 56 Cr.P.C. requires the police officer making the arrest without warrant to forthwith produce the person accused of an offence before a Magistrate, while s. 57 prohibits the police officer from detaining the arrested person for a period

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[83] *Supra* note 81 at 1445
[84]Edward L. Barrett Jr., “Police Practices and the Law--From Arrest to Release or Charge” 50 *Cal. L. Rev.* 11 (1962).
[85] A. Barth A., *The Price of Liberty*, 19 (Viking Press,1961).
[86] Rai, Janak Raj, Bail: Law and Procedures, Universal Law Publishing, 4th edn, 2009 p. 175

exceeding 24 hours. Section 167 Cr.P.C provides for custody of a person by the police for a period of 15 days on the orders of a Magistrate.

4.13 The detaining authority may change during the pendency of the detention, provided that the total time period does not exceed 15 days.[87] To extend the custody up to 60-90 days, a magistrate must be certain that exceptional circumstances exists. Remand must be requested when the investigation cannot be completed within the stipulated 24 hours under s. 57 of Cr.PC and there are reasonable grounds to believe that there is a prima facie case or the accusation is well founded. The magistrate must ensure that there are rational and credible grounds to grant custody.[88] While granting custody to the police, the Magistrate must believe that the granting custody will assist the police in some discovery of evidence and for such a discovery the presence of the accused person is indispensable. Explanation I to s. 167 (2) (c) of Cr.PC allows such accused to remain in custody until he is able to furnish bail. However, it was observed by Delhi High Court in *Laxmi Narain Gupta* v. *State*[89] that where the accused person is in judicial custody, and is poor, direction must be passed for admitting him to bail.

4.14 The Supreme Court has frowned upon a mechanical attitude towards detention, and has clearly stated that if public justice is to be promoted, mechanical detention should be demoted, [90] yet, casual approach to remand remains the norm. Bail hearings happen only when the person accused of an offence moves a bail application. If the accused

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[87] B. Kumar , "Laws of Custody in India: An Analysis of Section 167 of the Code of Criminal Procedure", Academike, *Lawoctopus' Law Journal* (2014).
[88] *Raj Pal Singh* v. *State of U.P.*, 1983 Cr.LJ 1009
[89] 2002 Cr.LJ 2907
[90] *Babu Singh* v. *State of U.P.*, AIR 1978 SC 527.

does not have legal representation,[91] or the lawyer does not move for bail, the person continues to remain in custody and is denied liberty without cause. Similarly, post-cognizance, the Court is empowered to remand the accused for periods not exceeding 15 days at a time.[92] Normally, the trial should take place on a day-to-day basis, but since this is rarely the case, Courts grant adjournments and postponements to the next date of hearing and remand the accused person in the meantime.[93] The section does require the court to record reasons for postponement or adjournment however, in cases where the court does record reasons, it is rather superficial and perfunctory.

4.15 Legislative authority for the detention of persons in prison for a suspected offence is provided under section 167 and 309(2) Cr.P.C. The Code, however, makes a clear distinction between detention in custody before and after taking cognizance. The former is covered by s. 167 of the Cr.PC, and the latter by s. 309 Cr.P.C.[94] The two are mutually exclusive. Judicial elucidation of these provisions can be found in the case *Dinesh Dalmia* v. *CBI.*[95] In *State through C.B.I* v. *Dawood Ibrahim Kaskar*[96], the court further elaborated upon the scope and extent of remand under sections 167 and 309 of Cr.PC:

> "If Section 309(2) is to be interpreted… to mean that after the court takes cognizance of an offence it cannot exercise its power of detention in police custody under Section 167 of the Code, the investigating agency would be deprived of an

[91] While the Magistrate is required to extend legal aid to the accused on first production (*see Mohammed Ajmal Mohammad Amir Kasab @ Abu Mujahid Kasab* v. *State of Maharashtra* (2012) 9 SCC 1) as a matter or practice, legal aid is generally provided only at the time of cognizance of the case.
[92] Section 309 (2) proviso, Cr.P.C.
[93] Section 309 (1) and (2), Cr.P.C.
[94] Arun Shokeen, Trials (http://documents.mx/documents/trials.html) (last Visited on May 16, 2016)
[95] AIR 2008 SC 78.
[96] (2000) 10 SCC 438.

> opportunity to interrogate a person arrested during further investigation, even if it can on production of sufficient materials, convince the court that his detention in its (police) custody was essential for that purpose."

4.16 Remand under sections s. 167 and s. 309 of Cr.PC was also discussed in *Dinesh Dalmia*[97] and *C.B.I.* v. *Rathin Dandapath*.[98]In *Dinesh Dalmia* the Court held that High Court is not justified in upholding refusal of remand in police custody by the Magistrate, on the ground that person accused stood in custody after his arrest under s. 309 Cr.P.C. Since arrest, remand and bail constitute vital parts of investigation, application for bail by the accused has to be decided in light of settled principles after giving reasonable opportunity to the prosecution[99].

[97] *Supra* note 95
[98] AIR 2015 SC 3285.
[99] Maharashtra Judicial Academy, "Summary of Papers Written by Judicial Officers on The Subject: Law Relating to Arrest, Remand and Bail" *available at* : http://mja.gov.in/Site/Upload/GR/Summary%20of%20Criminal%20group.pdf (last visited on Jan. 25, 2017).

CHAPTER – V
Bailable and Non-Bailable Offences

5.1 The Law Commission of India, in its 78th Report[100], in bailable has stated that the law on bail is broadly established on the following norms (i) in bailable offences, bail is a matter of right; (ii) bail is discretionary if the offence is non-bailable; (iii) bail shall not be granted by the Magistrate if the alleged offence punishable by death or imprisonment for life and (iv) Court of Sessions and High Courts have wider discretion in granting bail even when the alleged offence is one that is punishable by death or imprisonment for life.

A. Bailable Offences

5.2 The sections pertaining to bailable offences has to be read harmoniously with other provisions of the Code especially ss. 50, 56, and 57 of Cr.PC. When read conjointly, they undoubtedly give effect to the constitutional mandate in Article 22 of the Constitution, wherein the arrested person has right to be informed of the nature of the offence and the ground of his arrest.[101] In addition the discretion of granting bail is not mechanical and must be based on a preliminary inquiry. Further, a reasonable period is justified for conducting interrogation and concluding other procedural requirements such as recording of statements, recording fingerprints and photographs, etc.[102] Moreover, s. 167 Cr.P.C. is not available for bailable offences to obtain the remand of the arrested person.[103]

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[100] 78th Report by *Eighth* of Law Commission of India, Congestion of Under Trial Persons in Jail, 1979.
[101] *Pravin Kumar Chandrakant Vyas* v. *State*, 2001 (3) GLR 2755.
[102] *Id.*
[103] *Supra* note 101 and 96.

5.3 Section 436 of Cr.PC is mandatory in nature and the court or the police has no discretion in the matter. Any accused person arrested for a bailable offence willing to provide bail must be released.[104] The only discretion available with the police is to release the accused either on a personal bond or with sureties. In cases where the accused is unable to provide bail, the police officer must produce the accused person before the Magistrate within 24 hours of arrest as specified under s. 57 of Cr.P.C. Subsequently, when the person accused of an offense is produced before a Magistrate and is willing to furnish bail, then the Magistrate must release the accused person and the only discretion available is to release either on personal bond or a bond with sureties. The Magistrate cannot authorize detention of a person who is willing to furnish bail with or without sureties even for the purposes of aiding the investigation. Further, the Magistrate cannot issue an order exacting a person so released to appear before the police to aid in the process of investigation of the alleged offence.

5.4 In *Rasiklal* v. *Kishore s/o Khanchand Wadhwani* [105] the Supreme Court held that the right to bail for bailable offences is an absolute and in-defeasible right and no discretion can be exercised as the words of s. 436 Cr.P.C are imperative and the person accused of an offence is bound to be released as soon as the bail is furnished.[106] It further observed that there is no need for the complainant or the public prosecutor to be heard in cases where a person is charged with a bailable offence. Moreover, the court has no discretion to impose any conditions except to demand security. [107] Thus any condition to surrender passport, [108] directing the person accused of an offence to appear before police[109] or the

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[104] *Santh Prakash* v. *Bhagwandas Sahni,* 1969 MLW (Cri) 88.
[105] AIR 2009 SC 1341
[106] *Id*
[107] *Supra* note 64.
[108] *Azeez v. State of Kerala,* 1984 (2) Crimes 413 (Ker).
[109] *Mir Hasim Ali* v. *Emperor*, AIR 1918 Bom 254.

police commissioner[110], or even directing such accused person not to take part in public demonstration or make any public speech[111] cannot be imposed.

5.5 Upon reading s. 436 Cr.P.C it is clear that the section is applicable to *all persons other than those accused of a non-bailable offence.* For instance, where on receiving a complaint a Magistrate summons a person as a witness and not as a person accused of an offence to ascertain the veracity of the complaint, and upon directing police to conduct an inquiry under s. 202 (of the old Code), orders such a person to provide bail, the Magistrate is said to be acting well within his powers under s. 496 of the old Code.[112] The powers under s.496 of the old Code correspond to the new s.436 of the Cr.P.C. This section applies to proceedings under Chapter VIII of Cr.P.C. except section 116 (3) and 446A of Cr.P.C as stated in the section itself. Thus, in security proceedings where a show cause notice has been issued against a person, the Magistrate has the power to demand interim security from such a person and he must furnish an interim bond pending inquiry.[113] In such a security proceedings, where such an interim security is not furnished by a person, there is no question of releasing him on bail. He may be detained when he fails to furnish the bond. However, when the person appears on receiving a notice and no interim bond is demanded, no bail bond is required to be furnished.[114] Thus, the provisions of s. 436 of the Cr.P.C would not be attracted. Nevertheless, when a person is brought under arrest and the police prays for the commencement of security proceedings, the detainee has to be released without delay upon security either through personal bond or

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[110] *T.N. Jayadeesh Devidas* v. *State Of Kerala*: 1980 Cr.LJ 906
[111] *Public Prosecutor* v. *Raghuramaiah* (1957) 2 Andh. W. R. 383
[112] *Waryam Singh* v. *Emperor*, AIR 1923 Lah 663.
[113] *Supra* note 54.
[114] *Id.*

surety under s. 436 Cr.P.C. unless the Magistrate demands interim bond from him under s. 116 (3) Cr.P.C.[115] Sub-section 2 of s. 436 Cr.P.C empowers the Magistrate to cancel the bail of an accused person enlarged under s. 436 (1) of Cr.P.C who contravenes any of the conditions of bail. Apart from this provision, s. 439 (2) of Cr.P.C empowers the High Court and the Court of Sessions to cancel any bail granted under Chapter XXXIII, irrespective of the type of offence if the person accused of an offence by his conduct has forfeited the concessions granted through bail[116].

B. Default Bail or Statutory Bail

5.6 The object of this provision manifests the legislative anxiety that once a person's liberty has been interfered with, the arrest made without a warrant or a court order, the investigation must be conducted with utmost urgency.[117] Persons who are detained for committing an offence and undergoing investigation are statutorily eligible for bail under Section 167(2) of Code after ninety days where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for not less than ten years; and sixty days where the investigation is relating to any other offence, if the investigating authorities fail to complete their investigation and file a charge-sheet within this period.

5.7 In the case of *Suresh Jain* v. *State of Maharashtra*,[118] the Supreme Court clarified that a person accused of an offence acquires an "*indefeasible right*" to be granted bail on meeting the bail conditions if investigation is not completed within the periods mentioned in s. 167(2) of Cr.PC, and the Magistrate is mandatorily required to release the accused

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[115] Pondicherry Police Manual, "Security for Keeping the Peace and for Good Behaviour" (Chap XLIX).
[116] *Dayanidhi Sherangi* v. *State of Orissa*, 1978 Cr.LJ (NOC) 104.
[117] *Aslam Babalal Desai v. State of Maharashtra,* AIR 1993 SC 1.
[118] (2013) 3 SCC 77.

person. Any detention beyond the prescribed period would be illegal. In *Sanjay Dutt* v. *State, Through CBI* ,[119] Supreme Court held that this *indefeasible right* of the person accused of an offence to be released on bail under s. 167(2) of Cr.PC would not apply if the accused person does not file an application to "avail" the right before filing of charge-sheet. The Court held that if the charge-sheet is filed after the period specified in s. 167 (2) of Cr.PC but before the application for bail is considered, then the right to bail under s. 167(2) of Cr.P.C would not be available and the application for bail will then be considered only on merits.[120] Although the right to avail bail for failure to complete investigation is 'indefeasible', it is not automatic. The person accused of an offence should avail the right at an appropriate stage and enforce it prior to the filing of the *challan*.[121] Further, such accused person continues to remain in custody until he furnishes bail.

5.8 On day to day basis it has been recorded that inspite granting bail the person accused of an offence is not able to furnish security and thus the bail order remains inoperative. In such cases, if the accused person is not able to furnish security because his indigence and moves an application for varying th terms of bail, the Court may consider it and pass an appropriate order after giving due notice to the prosecutor.

C. Non-bailable Offence

5.9 Bail is not a matter of right for a person accused of a non-bailable offence. Section 437 of the Cr.PC enlists the powers of the magistrate to grant bail in non-bailable matters subject to restrictions. It provides that Magistrates have the discretion to release such persons on bail, subject to certain restrictions. However, in certain cases, where the

[119](1994) 5 SCC 410.
[120]*Id;* See also, *Pragya Singh Thakur* v. *State of Maharashtra*, (2011) 10 SCC 445.
[121] *Supra* note 119.

nature and the gravity of the crime is significant, pre-trial detention does not offend principles of natural justice which are so rooted in the traditions and the conscience of the people as to be ranked as fundamental to the jurisprudence of law.[122]

5.10 The case of *Rao Harnarain Singh Sheoji Singh* v. *The State*[123] provides an early commentary on the standards to be used for determining grant or denial of bail. The court observes that subject to the restrictions in s. 437 (1) of Cr.P.C., the Magistrate's discretion must be exercised judicially. The Court listed the following as non-exhaustive but relevant factors in making bail decisions (1) the enormity of the charge; (2) the nature of the accusation; (3) the severity of the punishment which the conviction will entail; (4) the nature of the evidence in support of the accusation; (5) the danger of the applicant absconding if he is released on bail; (6) the danger of witnesses being tampered with; (7) the protracted nature of the trial; (8) opportunity to the applicant for preparation of his defence and access to his counsel and; (9) the health, age and sex of the person accused of an offence.

5.11 The exercise of power by the court in the matter of granting or refusing bail is a judicial act and not a ministerial one[124]. In *Gudikanti Narasimhulu* [125], the Supreme Court has held that *public justice* is central to the whole bail law and a developed jurisprudence on bail is integral to a socially constituted judicial process wherein sound judicial discretion guided by laws plays a special role. Such judicial discretion must be

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[122] *United States* v. *Salerno*, 481 U.S. 739 (1987).
[123] AIR 1958 P&H 123; See also, *Ngangom Iboton Singh* v. *Union Territory of Manipur*, AIR 1969 Mani 6
[124] *Govind Prasad* v. *State*, 1975 Cr.LJ 1249 (Cal).
[125] *Supra* note 30.

governed by law and not by caprice and it cannot be arbitrary, vague and fanciful.

5.12 In *State* v. *Captain Jagjit Singh,* [126] the Supreme Court enumerated relevant factors that belies the decision on bail such as the nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the person accused of an offence, a reasonable possibility of the presence of the accused person not being secured at the trial, reasonable apprehension of witnesses tampering, the larger interests of the public or the State etc., which arise when a court decides on bail for a non-bailable offence." Further, in *Gurcharan Singh* v. *State (Delhi Administration)* [127] , the Supreme Court reiterated the observations in *Jagjit Singh's case (supra)* and held that the overriding considerations in granting bail which are common both in the case of sections 437(1) and 439(1) Cr.P.C. are the nature and gravity of the circumstances in which the offence is committed; the position and the status of the accused person with reference to the victim and the witnesses; the likelihood of the person accused of an offence fleeing from justice; the likelihood of repetition of the offence; the likelihood of jeopardizing one's own life; the likelihood of tampering with witnesses; the history of the case as well as of its investigation etc. which cannot be exhaustively set out.

5.13 In *Rajesh Ranjan @ Pappu Yadav v. Central Bureau of Investigation,*[128] it was held by the Supreme Court that the grant of bail depends upon factual matrix of the case and no straight-jacket formula can be laid down for grant of bail. However, it was in the case of *State of*

[126] AIR 1962 SC 253.
[127] AIR 1978 SC 179.
[128] AIR 2007 SC 451; *Supra* note 64.

Rajasthan v. *Balchand,*[129] that the Supreme Court in its aphoristic opinion declared, that the rule is "Bail not jail". It further stated that denial of bail is therefore an exception, to be exercised only when there are circumstances indicating absconding from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner who seeks enlargement on bail. Whereas, in *Gudikanti Narasimhulu case (supra)* the court deemed it necessary to consider the likelihood of the applicant tampering with prosecution witnesses or otherwise polluting the process of justice must be considered. It is traditional and rational to enquire into the antecedents and criminal records of a man who is seeking bail, particularly any record that suggests that he is likely to commit serious offences while on bail. In *State of U.P.* v. *Amarmani Tripathi* [130] it was held by the Supreme Court that a vague allegation that person accused of an offence may tamper with evidence or witnesses, may not be a ground to refuse bail, if the accused person is of such character that the mere presence at large would intimidate the witnesses or if there is evidence to show that the liberty would be used to subvert the justice or tamper with the evidence then bail will be refused. Further, in *Kalyan Chandra Sarkar* v. *Rajesh Ranjan alias Pappu Yadav,*[131] the Supreme Court restated the relevant factors to be considered in exercise of discretion in a bail decision. It cautioned courts to exercise such discretion in a judicious manner and *not as a matter of course*.

5.14 Although the Supreme Court in *Pappu Yadav's case (supra)* made it mandatory to justify its decision for granting bail, however, it placed no such requirement for the denial of bail. The Commission believes that the justification must be made mandatory even when bail is denied,

[129]AIR 1977 SC 2447. See also, *State* v. *Anil Sharma* AIR 1997 SC 3806.
[130] (2005) 8 SCC 21.
[131]AIR 2005 SC 921.

as it leads to loss of liberty. In the exercise of the discretion in granting bail the Magistrate can call upon the prosecution to satisfy that there is a genuine case against the person accused of an offence and eventually produce *prima facie* evidence in support of such charge. It refers to the strength of the case against the defendant rather than the ultimate guilt or innocence.[132] In the Code the fourth proviso to s. 437 allows the Public Prosecutor to be consulted when the offence punishable with seven years or more. At such stage, the prosecution has no obligation to lead the evidence to establish the guilt of the person accused of an offence beyond all reasonable doubt.[133] Section 437 (1) (ii) of the Cr.PC provides that no accused person who is suspected to have committed a cognizable and non-bailable offence shall be released on bail if such a person has been convicted of offences punishable with death or offences punishable with imprisonment for life or offences punishable with imprisonment for seven years or more or has two prior convictions of three or more, but less than seven years. It has come to notice of the Law Commission that an inadvertent error has crept in clause (ii) of sub-section (1) of section 437 of Cr.P.C, where it is stated that, "…a cognizable offense punishable with imprisonment for three years or more but **not** less than seven years." (emphasis added), the use of word "not" is not in consonance with the scheme of the provsion. Thus, a corresponding amendment is recommended in s. 437 of Cr.P.C. to delete the word "not".

5.15 However, second proviso to s. 437 (1) Cr.P.C states that if the court is satisfied that it is just and proper to grant bail in such cases, then bail may be granted for any other special reason. Ordinarily, when an person accused of an offence punishable with life imprisonment or death is brought before a court, bail must be denied. Only when the Magistrate

[132]Ariana Lindermayer, "What the Right Hand Gives: Prohibitive Interpretations of the State Constitutional Right to Bail" 78 *Fordham L. Rev* 267 (2009).
[133] 36 Cr.LJ 711

may entertain a belief on reasonable grounds that the accused person is not guilty of such offence, bail can be granted-if it is a case of 'exceptional circumstances'. Arrest often is effected on the basis of convincing and cogent material, which would have led to the accusation of a strong and serious charge. Therefore, when an accused is charged with crimes that carry severe punishments, the practice must be to detain the person accused of an offence *in the absence* of "exceptional reasons". It may even be stated that the accused person must show why their detention would be inappropriate in 'exceptional circumstances' (exceptional circumstances may be described as unique combination of circumstances that are out of the ordinary).[134] In the case of *Babu Singh* v. *State of U.P.*[135]the Supreme Court held that 'personal liberty', deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable. Personal liberty of an accused or convict is fundamental, suffering lawful eclipse, only in terms of 'procedure established by law' is acceptable. The doctrine of Police Power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally.

5.16 Law also empowers courts to impose "any other condition that is reasonably necessary" to ensure appearance and protect the community.[136] It is reasonable for the courts to impose the least restrictive condition, or combination thereof that will reasonably assure the appearance of the person as required as well as the safety of any other person and the community at large.[137] According to s. 437 (3) of Cr.PC, when an person is suspected of commission of an offence under Chapter

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[134] 18 U.S.C.§ 3145(c); *United States* v. *Di Somma*, 951 F.2d 494, 497 (2d Cir. 1991).
[135] AIR 1978 SC 527.
[136] United States Bail law § 3142(c)(1)(B).
[137] § 3142(c)(1)(B); See also, D.N. Adair, *The Bail Reform Act of 1984* (Federal Judicial Center, 2006).

VI, XVI or XVII of IPC punishable with seven years or more, the Court has the duty to impose conditions upon such person accused of an offence as follows:

- that such a person shall attend in accordance with the conditions of the bond executed under Chapter XXXIII of Cr.P.C.
- that such person shall not commit any offence similar to the offence of which he is accused or suspected of the commission.
- that such a person shall not directly or indirectly make any inducement, threat or promise to any person acquainted of the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with the evidence.

5.17 In addition to the conditions above, the court may impose any other conditions it deems necessary in the 'interest of justice'. In some cases defendants may be detained because of the risk or danger to the community upon showing that they are likely to engage in physical violence or in acts that are detrimental to the interests of the society. However, to authorize the detention, the court must find that no conditions will reasonably ensure the safety of any other person or the community and this must be supported by clear and convincing evidence.

5.18 Release conditions must be relevant to the purpose of ensuring appearance and safety.[138] In the United States the conditions that courts have imposed include drug testing, house arrest, submission to

[138] *United States* v. *Goosens*, 84 F.3d 697, 702 (4th Cir. 1996); *United States* v. *Vargas*, 925 F.2d 1260, 1265 (10th Cir. 1991); *United States* v. *French*, 900 F.2d 1300, 1302 (8th Cir. 1990); *United States* v. *Brown*, 870 F.2d 1354, 1358 n.5 (7th Cir. 1989); *United States* v. *Rose*, 791 F.2d 1477, 1480 (11th Cir. 1986) *United States v. Frazier*, 772 F.2d 1451, 1452– 53 (9th Cir. 1985) (per curiam).

warrantless searches[139], telephone monitoring, residence in a halfway home, electronic bracelet monitoring, freezing of defendant's assets[140], limiting access to internet and computers[141] and submission to random unannounced visits by pre-trial services officers. However, the courts are prohibited from imposing a financial condition that results in the pretrial detention of the person.[142] Bail may not be set at a figure that the defendant can readily post, but courts cannot intentionally detain the defendant by setting unaffordable standards of bail. It may set bail at a level it deems reasonably necessary to secure the appearance. Further, if the defendant cannot afford that amount, the defendant is detained not because he or she "cannot raise the money, but because without the money, the risk of flight is too great."[143]

5.19 The present practice on bail in India show that pre-trial detention does not diminish the importance of the defendant's liberty and interest prior to the trial. The proper inquiry, is whether these practices constitute punishment.[144] The primary object of bail is to attain the appearance of the person accused of an offence for the trial, however, many courts reserve the right to adjust or deny bail if it appears that the

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[139] *United States* v. *Kills Enemy*, 3 F.3d 1201, 1203 (8th Cir. 1993), *cert. denied,* 510 U.S. 1138 (1994) (search of defendant awaiting sentencing valid pursuant to warrantless search condition); *Cf. United States* v. *Scott*, 450 F.3d 863 (9th Cir. 2006) (drug test pursuant to warrantless search condition must be supported by probable cause, though court cautioned that it does not intend to establish categorical prohibition on drug-testing bail conditions).

[140] *United States* v. *Welsand*, 993 F.2d 1366 (8th Cir. 1993).

[141] *United States* v. *Johnson*, 446 F.3d 272 (2d Cir. 2006) (upholding supervised release condition restricting computer use).

[142] § 3142(c)(2).

[143] *United States* v. *Jessup*, 757 F.2d 378, 388–89 (1st Cir. 1985); See *generally*, Adair, D. N., & Federal Judicial Center. (2006). The Bail Reform Act of 1984. Washington, D.C.: Federal Judicial Center.

[144] *Supra* note 24 ("To determine whether a restriction on liberty constitutes impermissible punishment or permissible regulation, we first look to legislative intent.... We conclude that the detention imposed by the Act falls on the regulatory side of the dichotomy.");

accused person may threaten the public safety or interests or the integrity of the judicial process. Therefore if the court denies bail altogether, this detention would be civil and not criminal, as it is prospective and preventive.[145]

[145]*Id.; Bell* v. *Wolfish*, 441 U.S. 520, 536-37 (1979); *L.O.W.* v. *Dist. Court of Arapahoe*, 623 P.2d 1253, 1256 (Colo. 1981); see also *Supra* note 27.

CHAPTER – VI
Anticipatory Bail

6.1 The expression "anticipatory bail" is also not defined in Cr.P.C. However, the Supreme Court in *Balchand Jain* v. *State of M.P.*[146] has characterized anticipatory bail to mean 'a bail in anticipation of arrest'. The expression is a misnomer as it represents a futility that bail may be granted by the court in apprehension of an arrest. When a competent court grants "anticipatory bail", it issues an order that in case of an arrest, the person shall be released on bail. The Supreme Court in *Siddharam Satlingappa Mhetre* v. *State of Maharashtra*,[147] observed that the law of bail dovetails two conflicting interests namely, the obligation to shield the society from the hazards of those committing and repeating crimes and on the other hand absolute adherence to the fundamental principle of criminal jurisprudence - presumption of innocence and the sanctity of individual liberty.

6.2 The Supreme Court emphasized that anticipatory bail is a device to secure the individual's liberty, and neither a passport for the commission of crimes nor a shield against any and all kinds of accusations likely or unlikely. History and object of introducing the provision of anticipatory bail can be traced back to judgment of the Supreme Court in *Balchand Jain* v. *State of M.P*[148] and *Gurbaksh Singh Sibbia* v. *State of Punjab.*[149] It has been held in the *Gurbaksh Singh Sibbia's case* that s. 438 of Cr.PC was enacted to protect those people who are implicated by their

[146] *Supra* note 129.
[147] AIR 2011 SC 312.
[148] *Supra* note 129.
[149] AIR 1980 SC 1632.

rivals in false cases for the purpose of disgracing them or for other purposes by detaining them in jail.[150]

6.3 The 48th Report of the Law Commission[151] cautioned that the power of anticipatory bail is a power that must be exercised in 'very exceptional cases'. Although the legislature in its wisdom was keen to protect personal liberty and presumption of innocence[152], it has led to the rampant misuse of the provision. Thus it further, recommended that to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners, the final order should be made only after a notice to the public prosecutor. The initial order should only be made interim. It was also suggested that the directions may be issued only for the reasons recorded, if the Court is satisfied that such a direction is necessary in the interest of justice.

6.4 The Supreme Court of India in *Balchand case*[153] observed that s. 438 of Cr.P.C. is an extraordinary remedy and should be adopted in special or exceptional cases. However, in *Gurbaksh Singh Sibbia case*[154] the Supreme Court further clarified that although s. 438 of Cr.PC is extraordinary in nature, such power should be wielded wisely with due vigilance and the wise exercise of judicial power protects s. 438 of the Cr.PC against intemperate use.

6.5 Thus in *Balchand Jain*[155] decision where it was observed that the power of granting anticipatory bail is extraordinary in character and it

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[150] Law Commission of India, "Forty-first Report on the Code of Criminal Procedure, 1898" Vol. I (1969) at para 39.9.
[151] 48th Report of the Law Commission of India, Some questions under the code of criminal procedure Bill, 1970.
[152] *Supra* note 29
[153] *Supra* note 129.
[154] *Supra* note 149.
[155] *Supra* note 129.

is only in exceptional case where it appears that a person might be falsely implicated, or frivolous cases might be launched against him, or there are reasonable grounds for holding that a person accused of an offence is not likely to abscond or otherwise misuse his liberty while on bail, then such power has to be exercised. The court further went on to observe that apart from the conditions mentioned in s. 437 Cr.P.C., a special case must be made out by the petitioner for obtaining anticipatory bail. While the Supreme Court later adopted the *Gurbaksh Singh*[156] *view*, various High Courts still rely upon the *Balchand Case.*[157] It must be borne in mind that s. 438 of the Cr.PC *does not* form a part of Article 21 of the Constitution of India and it provides discretionary power to the High Courts and the Court of Sessions, in appropriate cases.[158]

6.6 In *Sumit Mehta* v. *State of N.C.T. of Delhi*[159], the court observed that there must be a balance between the individual's right to freedom and personal liberty and the duty of investigation by police. Thus, any appropriate conditions may be imposed under s. 438 (2) of Cr.PC to ensure uninterrupted investigation. The conditions may be imposed only insofar as they are necessary to avoid the possibility of the person obstructing the course of justice. In *Gurbaksh Singh Sibbia's case*[160] the court explored whether anticipatory bail be granted in relation to offences punishable with life imprisonment or death. It held that if the intention was to let the exceptions under s 437(2) of Cr.PC govern the relief under s. 438 of Cr.P.C, then there would have be an express provision to that effect.

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[156] *Supra* note 149.
[157] *Sheonandan Mondal* v. *State of Bihar*, 1980 BLJ 258; *Sankaranarayanan* v. *S.I. of Police* 1983 MLJ (Cri) 13; *T. Nadar* v. *State* 1982 MLJ (Cri) 250.
[158] *State of M.P.* v. *Ram Krishna Balothia*, AIR 1995 SC 1198.
[159] (2013) 15 SCC 570.
[160] *Supra* note 149.

6.7 Section 438 of Cr.PC must not be applied mechanically and anticipatory bail should not be granted in every case upon request. The discretion to grant anticipatory bail cannot be said to be totally untrammelled and unfettered. Further, judicial precedence can provide guideline or limitation to the discretion vested in the courts to grant anticipatory bail.[161] The Supreme Court has cautioned in the case of *Pokar Ram v. State of Rajasthan*[162] that since anticipatory bail intrudes the sphere of investigation of crime some very compelling circumstances have to be made out for granting anticipatory bail in serious offences.

6.8 The Supreme Court has recommended the following factors and parameters to be considered while dealing with the anticipatory bail:

i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;
iii. The possibility of the applicant to flee from justice;
iv. The possibility of the accused's likelihood to repeat similar or other offences.
v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arrest.
vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting large number of people.

[161] *Suresh Chand* v. *State of Rajasthan* 1985 Cr.LJ 1750 (Raj)
[162] AIR 1985 SC 969.

vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of Sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and on the other hand harassment, humiliation and unjustified detention of the accused be avoided;

ix. The court to consider apprehension of tampering of the witness or apprehension of threat to the complainant and;

x. Frivolity in prosecution should always be considered vis-à-vis the element of genuineness in the matter. In the event of there being some doubt as to the genuineness of the prosecution, the accused should be considered entitled to an order of bail.

6.9 While on the question of considering the duration of anticipatory bail, the law on this point remains highly divergent and ambiguous. It is pertinent to note that the Parliament has not prescribed any duration for an anticipatory bail. It is vague, as it does not mention whether the order should be limited in time or if it is transient in nature until regular bail is obtained. With regards to the determination of the operational period of the anticipatory bail, some courts follow the *Gurbaksh Singh Sibbia*[163]

[163] *Supra* note 149.

stance where it was held that the court may limit the operation of the order if there are cogent reasons, keeping it operational for a short period after filing of FIR (First Information Report). In such an eventuality the applicant must move the court under s. 437 of Cr.P.C within a reasonable time after filing of FIR. However, the court has stated that there cannot be an absolute rule to limit the operation of the order and make it time bound.

6.10 After the precedent in *Gurbaksh Singh Sibbia*[164] and prior to 1996, there was no practice of limiting the duration of anticipatory bail (with an exception of the Gujarat High Court). However, this was changed by the Supreme Court judgment in *Salauddin Abdulsamad Shaikh* v. *State of Maharashtra.*[165] Before *Salauddin*, the Gujarat High Court in the case of *Somabhai Chaturbhai Patel* v. *State*[166] held that since anticipatory bail cannot be permitted to interrupt a comprehensive investigation, relief under s. 438 of Cr.P.C would exhaust itself or will remain operative only till the expiry of a brief period of time from the date of arrest and the person accused of an offence will have to obtain a regular bail in its usual course. The Gujarat High Court held that the order may also provide that it would become inoperative even if no arrest is made within 90 days of the order. However, it can be deduced that the Supreme Court has indeed consistently held that anticipatory bail should be for a limited period and it should come to an end on the expiry of the duration or extended duration fixed by the court granting anticipatory bail. It is for the regular court to deal with the matter after appreciating the evidence filed before the court, once the investigation has made substantial progress or the charge-sheet has been submitted.

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[164] *Id.*
[165] AIR 1996 SC 1042.
[166] 1977 Cr.LJ 1523. *See also Parvinderjit Singh and Anr v. State (U.T. Chandigarh) and Anr*, AIR 2009 SC 502

6.11 The Karnataka High Court in the case of *I.Y. Chanda Earappa* v. *State of Karnataka*[167] has also expressed the need to limit the duration of anticipatory bail. The Court held that while it is not obligatory for Court to limit an order of anticipatory bail in point of time, there is no prohibition in s.438 Cr.P.C., on imposing such conditions. Therefore, the duration must be considered by the Court in each case with due regard to personal freedom of the individual, the duty towards the public and, the duty of the Police to investigate into an offence which is in the interest of the public and such interest is no less important. The Supreme Court has also held in *K.L. Varma* v. *State*[168] that the order of anticipatory bail does not endure till the end of the trial and must be limited in its duration. The duration of anticipatory bail may extend up to the day on which the regular bail application is disposed or for a brief period thereafter to enable the accused persons to appeal to a higher court. The Supreme Court reiterated this position in *Adri Dharan Das* v. *State of West Bengal*,[169]and in *Sunita Devi* v. *State of Bihar*,[170]where it held that extending the protective umbrella of s. 438 Cr.P.C. for unlimited time would result in circumventing s. 439 of Cr.P.C.

6.12 It is needless to add that blanket order of anticipatory bail cannot be passed to protect every kind of unlawful activity or any eventuality because it adversely affects the full and fair investigation. The State of Tripura has amended the law by inserting a new section 439A of Cr.P.C which provides that in respect of grave offences specified in the clause (a) of s. 439A, of Cr.P.C a person apprehending arrest under IPC or the Arms Act or the Explosive Substances Act would not be released on bail unless the court is satisfied that the petitioner is not guilty of the offence or that there were exceptional and sufficient grounds to grant bail

[167] 1989 Cr.LJ 2405.
[168] (1998) 9 SCC 348.
[169] AIR 2005 SC 1057.
[170] AIR 2005 SC 498.

to the petitioner. The Commission is of the opinion that, apart from making the anticipatory bail operational for a limited time, there is need to grant anticipatory bail in certain offences with caution.

CHAPTER – VII
Cancellation of Bail

7.1 Sections 437 (5) and 439 (2) of Cr.P.C. are related to cancellation of bail. The object underlying the cancellation of bail is to ensure fair trial and secure justice for the society by preventing the person accused of an offence who is set at liberty by bail from tampering with the evidence (especially in heinous crimes) or committing further crime; and any delay in cancelling bail would lose all its purpose and significance to the greatest prejudice of the prosecution.[171]

7.2 There are judgments to the effect that bail once granted, cannot be cancelled in a mechanical manner without considering whether there are any compelling circumstances that have rendered it no longer expedient to allow the accused person to retain his freedom by enjoying concession of bail during trial.[172]As cancellation of bail deprives the liberty of the person accused of an offence, the court must assign reasons for the cancellation. If the High court fails to indicate any reason for directing the cancellation of the bail, the order cannot be maintained and must be set aside. [173] The Supreme Court in *Abdul Basit* v. *Mohd. Abdul Kadir Chaudhary*[174], summarized grounds for cancellation of bail as (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 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)

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[171] *Panchanan Mishra* v. *Digambar Mishra*, AIR 2005 SC 1299.
[172] *Dolat Ram* v. *State of Haryana* (1995) 1 SCC 349; *Kashmira Singh* v. *Duman Singh* AIR 1996 SC 2176.
[173] *Manjit Prakash* v. *Shobha Devi*, AIR 2008 SC 3032.
[174] (2014) 10 SCC 754.

attempts to be beyond the reach of the surety, etc. These grounds are illustrative and not exhaustive".[175]

7.3 Over the years various factors have been listed in various judgments that justify an order cancelling bail[176]:

- While on bail the accused commits the very same offence for which he is being tried or has been convicted;
- Accused hampers the investigation of the case;
- Accused tampers with the evidence and threatens the witnesses;
- Accused runs away to a foreign country or goes underground or beyond the control of his sureties;
- Accused commits acts of violence, in revenge, against the police and the prosecution witness;
- It is discovered by fresh evidence that the accused is guilty of an offence punishable with death or imprisonment for life;
- Where it seems imminent that the accused will jump bail;
- When the charge is amended or there is a change of circumstances;
- When the accused in contravention of the bail-bond fails to appear before the court on the date fixed for such purpose;
- If the bail was obtained upon concealment of material facts; and/or

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[175] The Supreme Court has cited and relied on *Gurcharan Singh v. State (Delhi Admn.), Supra* note 149 in para 16, which states,*"succinctly explained the provision regarding cancellation of bail under the Code, culled out the differences from the Code of Criminal Procedure, 1898 (the old Code) and elucidated the position of law vis-à-vis powers of the courts granting and cancelling the bail"*

[176] *Public Prosecutor* v. *George Williams*, 1952 Cr.LJ 213; *Subodh Kumar Yadav* v. *State of Bihar*, AIR 2010 SC 802; *Paras Ram* v. *State* AIR 1951 HP 13; *Emperor* v. *Rautmal Kanumal*, AIR 1940 Bom 40; *Emperor* v. *B.B. Singh*, AIR 1943 Oudh 419; *Narendralal Khan* v. *Emperor*, ILR 36 Cal 166; *Shyamlal* v. *State of U.P.*, 1983 (2) Crimes 407; *State* v. *Laxman,* AIR 1959 Mani 47; *Osman Piroo* v. *Emperor*, AIR 1936 Sind 187; *Bomanji Wookerji* v. *State,* AIR 1955 Mys 96; *Ashok Kumar Banerjee* v. *State,* 1982 Kash LJ 363; *Birendra Singh* v. *State*, 1984 ALJ 1111.

- The superior court finds that the court granting bail acted on irrelevant facts or materials or if there was no application of mind or that there has been manifest impropriety.

7.4 The consideration for cancellation of bail under s. 439(2) Cr.P.C., differ from the consideration applicable for the grant or refusal of bail. However, in a case for cancellation, the Court may delve into assessing considerations behind the grant of bail in the first instance, if it finds the reasons for granting bail to be insufficient[177]. A bail, granted in a case of private complaint can be cancelled at the instance of the complainant. But when the police has taken cognizance of the offence and the charge-sheet has been submitted in relation to the same, and the public prosecutor is conducting the prosecution on behalf of the State, then the *de facto* complainant may apply for cancellation of bail[178]. Even in a murder trial a private party has *locus standi* to move for cancellation of bail when the trial court grants bail.[179] The power to take back in custody an person accused of an offence who is enlarged on bail has to be exercised with care and circumspection. But the refusal to exercise that wholesome power, will reduce it to a dead letter and will render the courts to be silent spectators to the subversion of the judicial process.[180]

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[177] *Ram Govind Upadhyay* v. *Sudarshan Singh,* AIR 2002 SC 1475.
[178] *Goenka (Smt.)* v. *Rajesh Goenka*, 1986 (1) Crimes 325.
[179] *Sant Ram* v. *Kalicharan*, 1977 Cr.LJ 486.
[180] *State* v. *Sanjay Gandhi*, AIR 1978 SC 961

CHAPTER – VIII
Bail in Special Laws

8.1 A total of 48,57,230 persons were arrested for crimes under Special and Local Laws (*hereinafter* SLL) during the year 2015. Out of 46,46,419 cases under investigation by the police under different SLL crimes: (1) Police could file charge-sheets against 47,27,419 persons (97.3 per cent of total arrestees under SLL crimes). (2) Out of the total persons who were under arrest, 1.5 per cent persons (74,139 out of 48,57,230 persons) remained under custody and; (3) 6.6 per cent persons (3,20,392 out of 48,57,230 persons) were out on bail.[181]

A. Bail and Narcotics drugs and Psychotropic Substances Act, 1985

8.2 Under the Narcotics Drugs and Psychotropic Substances Act, 1985 (*hereinafter* NDPS Act), bail is granted based on the seriousness of the offence, quantity of substance abuse, the widespread cases of substance abuse in the country, and the quantum of punishment provided under the Act. (see Table 4 below). In *State of Madhya Pradesh* v. *Kajad*[182] the court observed that the object with which the NDPS Act was enacted was to curtail the menace of drug trafficking. A perusal of s. 37 of NDPS Act, 1985 leaves no doubt to the court that a person accused of an offence punishable with imprisonment for five years or more, shall not generally be released on bail. Negation of bail is the rule and its grant is an exception under s. 37 (1) (b) (ii) of the NDPS Act. In serious cases under NDPS Act, the person accused of an offence should not be released on bail, as they are potential threats to the society, and if released, may continue their

[181] National Crime Records Bureau (NCRB), Ministry of Home Affairs, Crime in India, 2016.
[182] AIR 2001 SC 3317.

activity of trafficking intoxicating drugs.[183] Law should be interpreted in a manner such that it provides protection to the society from nefarious activities and anti-social elements.[184]

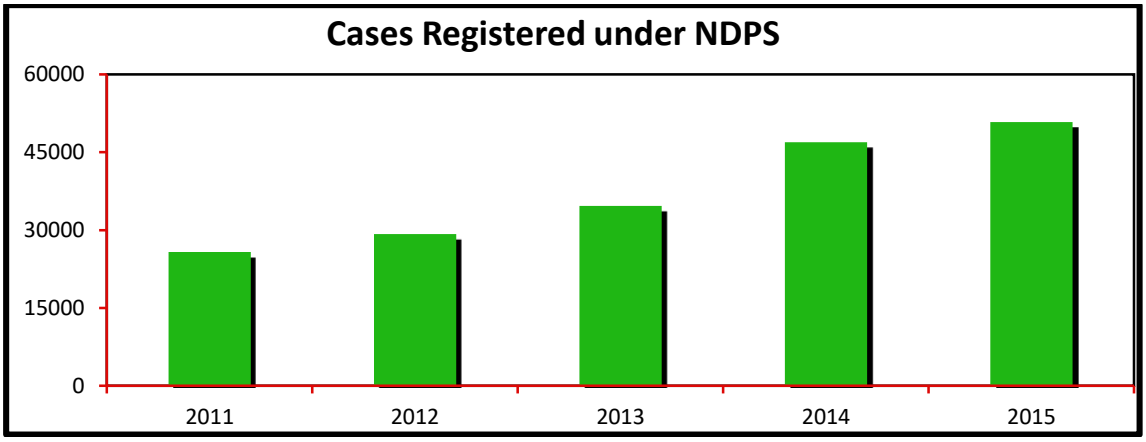

Table 4: No of Cases Registered under NDPS Act in The Last Five Years
Source: National Crimes Records Bureau, 2015

8.3 While granting bail under s. 37 (1) (b) (ii), of the NDPS Act the court must be satisfied that there are reasonable grounds to believe that the accused person is not guilty *and* that he is not likely to commit any offence when released on bail. For bail to be granted, both the above conditions must be satisfied. The provisions in NDPS Act are undoubtedly stringent. The Act lays down stricter restrictions on awarding bail to people charged with offences involving commercial quantity and for certain other offences.[185] Such special laws require a higher degree of assurance as to the innocence of the person accused of an offence, for the Judge to grant him bail. In *Narcotics Control Bureau* v. *Dilip Pralhad Namade,*[186] the Supreme Court held that the expression "reasonable grounds" means something more than just the *prima facie* grounds… The 'reasonable belief' contemplated in the provision requires existence of such facts and

[183] *Abdul Hamid khan* v. *State of Gujarat*, 1989 Cr.LJ 468.
[184] *Id.*
[185] Ss. 19, 24 and 27A, The Narcotics Drugs and Psychotropic Substances Act 1985.
[186] (2004) 3 SCC 619.

circumstances as are sufficient in themselves to justify satisfaction that the accused person is not guilty of the alleged offence and he is not likely to commit any offence while on bail.

8.4 In the NDPS Act, the pre-trial detention period for offences involving commercial quantity, and certain other offences[187] is one hundred and eighty days. If it is not possible to complete the investigation within such time period, the Special Court may extend the said period up to one year based on the report of the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the person accused of an offence beyond the said period of one hundred and eighty days.[188] It was observed by the Supreme Court in the case of Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India that bail under such special legislations remains inconsistent and unpredictable and therefore, raises concerns regarding the violation of Article 21 of the constitution of India with regards to the rights of the accused person.[189] A law that forbids the courts from granting bail to an offender but does not prescribe any time limit for conclusion of the trial, is antithetic to the principles of justice and liberty.[190] Supreme Court has repeatedly warned that such cases should be decided expeditiously.[191] However, there is little evidence that such cases are disposed of faster than the others. Examples include cases such as *Achint Navinbhai Patel alias Mahesh Shah* v. *State of Gujarat*[192] and *Thana Singh* v. *Central Bureau of Narcotics*[193] where the High Court refused to release the person accused of an offence on bail under s. 37 of NDPS Act even though the trial had been going on for eight years and twelve years

[187]Ss. 19, 24 and 27A, The Narcotics Drugs and Psychotropic Substances Act 1985.
[188]Section 36A(4), The Narcotics Drugs and Psychotropic Substances Act 1985.
[189] (1994) 6 SCC 731.
[190] Chapter V: Release on Bail: Law and Practice.
[191]*Supra* note 189; and *Shaheen Welfare Association* v. *Union of India*, AIR 1996 SC 2957.
[192]AIR 2003 SC 2172.
[193](2013) 2 SCC 590.

respectively. Detention for a period of 180 days may appear excessive, even after bearing in mind the special circumstances and complexities that surround a drug related cases. It may be pertinent to refer to terrorism related laws *(discussed below)*, where the legislations lay down that the time period necessary to detain a person without bail is 90 days longer than the said period of 60 days under 167 of Cr.P.C. It may be argued that when terrorism laws that govern crimes that are more hazardous to the society than drugs related crimes, can provide only 90 days of detention, consequently, detention in drug related cases must also be comparable.. However, serious offences related to drug trafficking cannot be allowed to bypass the justice system, as this will set a wrong precedent and would not sufficiently deter such crimes. [194]

B. Terrorism and Bail

8.5 Under the 'social contract' theory, the most important role of any State is to secure its borders and protect its subjects and their property.[195]The crime of terrorism has peculiarities, as it raises issues of national security, peace and unity. Terrorist and Disruptive Activities Act, 1985 (TADA) and Prevention of Terrorism Act, 2002 (POTA) were enacted in order to prevent terrorism and other such disruptive activities. Section 20 (7) of TADA has prohibited the designated court or any other court from granting anticipatory bail. Further, it has been held by the Supreme Court in the case of *Usman Bhai Dawood Bhai Menon* v. *State of Gujarat*[196] that, where a person accused of an offence under sections 4 and 5 of TADA is taken into custody, the High Court has no jurisdiction to entertain a bail petition either under section 439 or s. 482 of Cr.P.C.

[194] The Australian (Editorial) November 5, 1985
[195] Rousseau Jean-Jacques, *The Social Contract* (Cole G translator, Reprint, Cosimo Inc 2008) p. 3
[196] AIR 1988 SC 922.

8.6 However, it has been clarified that the High Court may entertain a petition under Article 227 of the Constitution against the order rejecting bail by the designated court on being satisfied that there is no material to show that the petitioner is involved in any offence under TADA and is eligible to set aside the order rejecting bail.[197]

8.7 In the case of *State of Maharashtra* v. *Abdul Hamid*[198], the High Court quashed the proceedings and granted bail, but the Supreme Court set aside the order of the High Court observing that *only in extreme cases*, if *ex facie* the person accused of an offence cannot commit an offence under TADA, only then the High Court is justified in using its powers under Article 226 of the Constitution, and held that the case at hand was not of such extreme nature and hence the bail was revoked.

8.8 Under TADA, the designated court has the power to grant bail under section 20 (4) of TADA by default when the investigation is not completed within 180 days of the arrest. Bail cannot be objected on the ground that the nature of the offence alleged under TADA is grave and serious. Any request for further remand was to be made under s. 20 (4)(bb) of TADA, which would be granted if the conditions therein are satisfied. While considering an application of bail for an offence alleged under TADA, the court must apply its mind to decide whether the allegations of guilt were made on reasonable grounds.

8.9 TADA under trials are divided into four classes, as a result severe cases of terrorism could be dealt with more stringently compared to other cases. The Review Committee appointed, was directed by the Supreme Court to examine the cases against the accused person bearing in mind the direction issued by the court regarding the grant of bail.[199] For

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[197] *D. Veerashekmaran* v. *State*, 1992 Cr.LJ 2168 (Mad).
[198] 1994 (1) SCALE 673.
[199] *Supra* note 191.

the purposes of granting bail, TADA detainees may be divided into the following classes, namely— (i) hardened under-trials whose release would be prejudicial to the case of the prosecution and whose liberty would prove a menace to the society and the complainant or prosecution witness in particular; (ii) other under-trials whose overt cause or involvement directly attracts sections 3 and 4 of TADA; (iii) under-trials who are roped in, exclusively by virtue of sections 120B or 149 IPC, and (iv) those under-trials who were found possessing incriminating articles in notified areas and are booked under s. 5 of TADA. In 1996 the Supreme Court found that, out of 9,203 cases reviewed by Review Committee under the Act, 7,968 persons had been wrongly accused of TADA offences.[200]

8.10 Section 34 of POTA provides that the person accused of an offence may apply for bail before the special court and if the bail is refused, then an appeal may be filed before the High Court for the grant of bail invoking s. 439 Cr.P.C. In order to grant bail under POTA a *prima facie* case has to be established by the Court on the basis of cogent material. The Supreme Court in the case of *State of T.N.* v. *R.R. Gopal alias Nakkeeran Gopal*[201], set aside the bail granted by the High Court. It held that when there was a mere discrepancy in the description of firearms in the records during the recovery of arms and ammunition from the accused person or if there exist allegations that such accused was forced to make confession, it would not establish sufficient grounds for bail. However, the Supreme Court has held that even in respect of offences under POTA, after the period of one year of detention, the person accused of an offence would be eligible to seek bail under both the Cr.P.C and sections 49 (6) and (7) of POTA.[202]

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[200] *Id.*
[201] (2003) 12 SCC 237.
[202] *People's Union of Civil Liberties* v. *Union of India*, AIR 2004 SC 456

8.11 In the case of *Moulvi Hussain Ibrahim Umarji* v. *State of Gujarat* [203], the petitioner was arrested in connection with the offence related to the Godhra incident which resulted in the death of 59 people and injuries to a significant number of people. The petitioner-accused was charged under various sections of IPC, POTA and the Prevention of Damage to Public Property Act, 1984, the bail was denied by the Special Judge of High Court and also the Supreme Court.

8.12 Since POTA was repealed, the Unlawful Activities (Prevention) Act, 1967 (*hereinafter* UAPA) was amended to include offences on terrorism. The law provides that in a bail application the public prosecutor shall have a right to be heard, and the person accused of an offence shall not be released on bail if the records show that there are reasonable grounds to believe that the accusations are prima facie true.[204] In *Jayanta Kumar Ghosh* v. *State of Assam*,[205] the Guwahati High Court discussed what '*prima facie* true' means. It held that the Court should determine whether the accusations were 'inherently improbable or wholly unbelievable'. Only in such circumstances the person can be released on bail. The approach to bail under UAPA is liberal than what was under POTA and TADA. Under POTA and TADA there was a virtual prohibition on bail for offences under these legislations. These laws provided enormous power to the police, as by registering a case under these legislations, they could ensure that a person would remain in jail at least for the period of the trial.[206] In light of the rampant misuse of these legislations, they were repealed by Parliament.

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[203] AIR 2004 SC 4899.
[204]Section 43D(5), The Unlawful Activities (Prevention) Act 1967.
[205]2010 SCC OnLineGau 586.
[206]The Supreme Court itself recognized this possibility in *Kartar Singh* v. *State of Punjab*, *Supra* note 55, when it stated that "we have come across cases wherein the prosecution unjustifiably invokes the provisions of the TADA Act with an oblique motive of depriving the accused persons from getting bail and in some occasions when the courts are inclined to grant bail in cases registered under ordinary criminal law, the investigating officers in

8.13 In cases under special legislations, the period on expiry of which the right to statutory bail becomes available, is generally extended. For example, s. 20(4) TADA provided investigating authorities hundred and eighty days to file a charge-sheet before statutory bail became available. The section further stated that if the investigation is not completed, the Special Court *shall* extend the period up to one year on the basis of a report submitted by the public prosecutor indicating the progress of the investigation and the specific reasons for detention of the person accused of an offence beyond the said period of one hundred and eighty days.[207] Similarly s. 49(2) of POTA permitted detention up to ninety days for all cases under POTA. It also stated that if the investigation is not complete, the Special Court shall extend the period up to one hundred and eighty days on the basis of a report submitted by the public prosecutor indicating the progress of the investigation and the specific reasons for detention of such accused beyond the said ninety days.[208] Similarly, under UAPA the period of detention without bail is ninety days. It likewise provides that the Special Court may extend the said period up to one hundred and eighty days based on the report submitted by the public prosecutor indicating the progress of the investigation and the specific reasons for the detention of the person accused of an offence beyond the said period of ninety days.[209] The global outlook on terrorism has radically changed to reflect the need to ensure that there is a comprehensive legislative framework that takes into consideration the more dangerous era of international

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order to circumvent the authority of the courts invoke the provisions of the TADA Act. This kind of invocation of the provisions of TADA in cases, the facts of which do not warrant, is nothing but sheer misuse and abuse of the Act by the police."

[207]Section 49(2), The Prevention of Terrorism Act 2002.

[208]*Id.*

[209]Section 43D(2), The Unlawful Activities (Prevention) Act 1967.

terrorism.[210] A contextual construction of the provisions in the laws and the Constitution of India shows that the sovereign function of maintenance of national security vested with the State is its paramount function[211]. However, mere classification of an act as an act of terrorism should not result in the automatic denial of bail or reversal of the burden of proof. Denial of bail should not be used as a potential tool of manipulation to legitimizing actions of the State.

C. Organised Crime and Bail

8.14 Organised crime around the world branches out into smuggling of drugs and arms, human trafficking, labour racketeering, extortion and other illegal activities. The activities of a criminal organization do not cease with the arrest of perpetrators of crime or their release even on most stringent bail conditions. The court must recognize that such businesses have a strong incentive to continue. The danger such persons / businesses pose to the community is self-evident as it involves murder, violence and threats. Hence stringent bail provisions are provided for in the Maharashtra Control of Organized Crime Act, 1999 ('MCOCA'). MCOCA is also applicable in the State of Delhi, and is the model for similar laws in various other States. The restrictions on bail under MCOCA are verbatim to those under TADA.[212] MCOCA also provides for pre-trial detention up to ninety days. If the investigation is not complete within this time period, the Special Court shall extend the period up to one hundred and eighty days based on a report submitted by the public prosecutor indicating the

[210] A.Conte, *Human Rights in the Prevention and Punishment of Terrorism:Commonwealth Approaches: The United Kingdom, Canada, Australia and New Zealand* 487-88 (Springer, 2010).
[211] *Id.*
[212] Section 21(4), Maharashtra Control of Organized Crime Act 1999.

progress of the investigation and the specific reasons for the detention beyond the said period of ninety days.[213]

8.15 In the case of *Chenna Boyanna Krishna Yadav* v. *State of Maharashtra*[214], it was held that the power to grant bail under MCOCA is subject to conditions laid down in s. 21 (4) of the Act, which are over and above the conditions laid down in s. 439 of Cr.P.C. Section 21(4) of MCOCA provides the prosecution a chance to be heard, and the court must be satisfied that there exists a reasonable ground to believe that the person accused of an offence is not guilty of the alleged offence and such person is not likely to commit any offence while on bail, only then bail may be granted. These conditions are cumulative and not alternative. In deciding on bail under MCOCA, the Supreme Court in *Dattatray Krishnaji Ghule* v. *State of Maharashtra*[215] has stated that it is not necessary to weigh the evidence meticulously to find positively if the appellant has committed the offences alleged. In setting the standard for bail under MCOCA the Supreme Court in *Ranjit Singh Brahmajeet Singh Sharma* v. *State of Maharashtra*,[216] held that unless the Judge is satisfied that a conviction is not likely, which is a very high threshold, bail would not be granted. Thus, there must be higher standards for the bail to be granted under such special laws.[217]

D. Bail in Economic Offences

8.16 Several scams post 1992, were reported resulting in losses amounting to *lakhs* of *crores* of rupees to the economy. These include the 2G scam, Satyam Scandal, UTI Scam, Fodder scam, Harshad Mehta

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[213] Section 21(2), Maharashtra Control of Organized Crime Act 1999.
[214]2006 AIR SCW 6384.
[215] AIR 2007 SC 1133
[216]AIR 2005 SC 2277.
[217] Donald W. Price, “Crime and "Regulation": United States v. Salerno” 48(3) La. L. Rev. 743 (1988).

scam[218]. Approximately 73 *lakh crore* rupees have been lost due to economic scams since 1992. In 2012 alone, Indian economy lost almost Rs.6,600 *crore*[219]. Economic crimes inflict damage on the economy of the country in general and affect the growth, development and the global competitiveness of the nation. It also erodes confidence, financial credibility and stability of the nation internationally. It can be further seen from Table 5 below that in the last four years alone scams worth Rs. 4,000 *crores* have been registered.

Value of Property Lost or Defrauded*	2012		2013		2014		2015	
	CBT	**Cheating**	**CBT**	**Cheating**	**CBT**	**Cheating**	**CBT**	**Cheating**
1-10	103	332	103	445	279	757	363	1166
10-25	14	64	11	68	17	20	21	42
25-50	7	31	5	39	6	11	6	10
50-100	0	15	1	13	0	5	1	11
Above 100	8	15	3	14	3	4	5	4
TOTAL	**132**	**457**	**123**	**579**	**305**	**797**	**396**	**1233**

*In *crores*

Table 5: Economic Offences Registered in The Last Four Years.
Source: National Crimes Bureau, 2015

8.17 Marking the distinction for bail in economic crimes the Supreme Court in *State of Gujarat* v. *Mohanlal Jitamalji Porwal & Anr.*[220] remarked that the entire society is aggrieved if the economic offenders are not brought to books as they affect the entire economy.

[218] N. Gurnani , Economic Scams in India, Academic, Apr 2015.
[219] *Id.*
[220] AIR 1987 SC 1321.

8.18 Gujarat High Court, while considering a bail application in the case of *Champakbhai Amirbhai Vasava* v. *State of Gujarat* [221], involving misappropriation of Rs.6 *lakhs* by a bank employee, the court rejected the bail application and observed that if the bank employees commit such serious offence, the customer whose amount has been lying in the bank would not be safe and secure. Offences that shake the faith of public in institutions such as banks and affect the society at large cannot be said to be cases fit for bail. While dealing with a bail application under the Customs Act, 1962 in *Lalit Goel* v. *Commissioner of Central Excise*[222], the Supreme Court observed that the economic offences constitute a class apart and have to be approached differently while deciding on bail. Further, in *Suresh Chandra Ramanlal* v. *State of Gujarat* [223], a case involving cheating and forgery in relation to funds in a bank, the Supreme Court while granting bail on verified medical grounds, imposed a rigorous condition that petitioner would deposit a sum of Rs.40 *lakhs* with the bank in four monthly instalments.

8.19 In *Y.S. Jagan Mohan Reddy* v. *CBI* [224] the Supreme Court held that while granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment the offence may entail, the character of the person accused of an offence, circumstances which are peculiar to such accused, reasonable possibility of securing the presence of the accused person at the trial, reasonable apprehension of the witnesses tampering, the larger interests of the public/state and other similar considerations. The Supreme Court rejected the application for bail as it felt that it may hamper the

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[221] 2001 Cr.LJ. 4475.
[222] (2007) 3 SCC 2282.
[223] (2008) 7 SCC 591.
[224](2013) 7 SCC 439; See also J. Gogoi , "Socio-economic Offences" *Annual survey of Law* Vol. XLIX 1002 (Indian Law Institute, New Delhi).

investigation. Unfortunately in the last few years, the country has seen an alarming rise in white-collar crimes, which has affected the very fibre of the country's economic structure[225]. Such crimes for personal financial gains are an anathema to the basic tenet of democracy, for it erodes the faith of the people in the system[226]. Therefore there is a necessity to impose stringent conditions while granting bail.

[225] *Ram Narayan Popli* v. *CBI*, AIR 2003 SC 2748.
[226] *Niranjan Narayan Hemchandra Sashittal* v. *State of Maharashtra*, (2013) 4 SCC 642.

CHAPTER – IX
Bail Pending Appeal

9.1 The power to award bail post-conviction is not very wide. When an order under s. 389 of Cr.P.C. is passed the sentence is not set aside, but merely suspended or kept in abeyance and for all intents and purposes the appellant remains a convict. This provision was inserted because when an appeal is filed, the conviction needs to be re-judged and pending such decision, if it so happens that the appellant has undergone some part of the sentence, and ultimately is adjudged as innocent, his suffering becomes irreversible. In case of *Kashmira Singh* v. *State of Punjab*[227] the Supreme Court stated that it would be unfair to keep the convict locked up for years due to the inability to dispose off the appeal in time, especially when the conviction is reversed as it contrives an irreparable harm to the individual. Therefore, suspension of the sentence must be accompanied by reasons recorded by the court, this requirement for justifying the suspension of sentence indicate that there must be a careful consideration of the relevant factors and the order directing the suspension of sentence must not be cursory in nature.[228] Further, the Supreme Court in *Rama Narang* v. *Ramesh Narang*[229] held that the sub-section (1) of s. 389 Cr.P.C. confers power not only to suspend the operation of sentence appealed against but also grant bail with or without sureties if the person accused of an offence is in confinement

9.2 This view has been reiterated by the Supreme court in various other cases[230], all these decisions have also cautioned and clarified that

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[227] (1977) 4 SCC 291
[228] *Masood Ali Khan* v. *State of U.P.*, AIR 2009 SC 1465.
[229] (1995) 2 SCC 513.
[230] *Ravi Kant S. Patil* v. *Sara Bouma S. Bagali*, 2006 (1) JT (SC) 578; *State of Tamil Nadu* v. *A. Jaganathan*, AIR 1996 SC 2449; *K.C. Sareen* v. *C.B.I. Chandigarh*, AIR 2001 SC 3320; and *B.R. Kapur* v. *State of T.N.*, AIR 2001 SC 3435.

such power should be exercised only in exceptional circumstances where the failure to stay the sentence, would lead to injustice and irreversible consequences[231]. It must be remembered that bail pending appeal is not a right and is dependent on the discretionary powers of the Court[232] as the right of the convict to bail is subordinate to the public peace and the well-being of the society. The situation of a post-conviction bail is different than the bail at the time of trial. Thus, it is up to the convict to point out glaring infirmities in the case of prosecution, which would take out the vital aspects, touching the very substratum of the case of the prosecution[233]. Thus, in appeal against conviction the appellate court must decide if the appellant-convict stands a fair chance of acquittal in light of the case presented by the appellant. Further, as required by s. 389 of the Cr.P.C, the public prosecutor must be provided with both the notice of the bail application and also an opportunity to oppose bail in writing when the punishment is more than ten years of imprisonment. Although there is no provision that allows any opportunity to be given to any person other than the Public Prosecutor in deciding an application under s. 389 of the Cr.P.C, the High Court has the power to allow the complainant or the victim of the crime to intervene and oppose the bail pending appeal in exercise of its power under s. 482 Cr.P.C.

9.3 It is required to be noted that the bail granted under this section pending an appeal can be cancelled under s. 439 (2) Cr.P.C. The court also has the power to impose necessary conditions on the appellant-convict to ensure his presence in the proceedings of the appellate court, otherwise it would frustrate the process of justice. An Explanation must be added under s. 389 (3) of Cr.P.C to the effect that the court must ascertain to itself of the fact that the appellant-accused is not filing an appeal with the

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[231] *State of Maharashtra* v. *Gajanan*, AIR 2004 SC 1188.
[232] *Corpus Juris Secundum*, Vol 8, p.85
[233] *Keshwananda Harinarayan Swami* v. *State*, 1997 Cr.LJ 3173.

intention to delay and there is a substantial likelihood that the judgment would be reversed on appeal in favor of the appellant-convict. Conversely, another critical provision on bail is s. 437A Cr.P.C which seeks to secure the attendance of a person accused of an offence before the higher appellate court when such accused is *acquitted* and the decision may be appealed.[234] The section provides that before conclusion of the trial and disposal of the appeal, the court trying the offence or the appellate court, as the case may be, shall require the accused person to execute bail bonds with sureties, to appear before the higher court as and when such court issues notice in respect of any appeal or petition filed against the judgment of the respective court and such bond shall be in force for six months.

9.4 This provision poses a problem because the person accused of an offence is not entitled to release even after an acquittal by a trial court, unless and until he furnishes a bail bond, with sureties. It is important to note that the Supreme Court has stated time and again that once a person is acquitted of an offence the presumption of innocence is strengthened and makes a strong case to be released from confinement. However, under s. 437A of Cr.P.C, where the person is found innocent but is not able to furnish sureties, the section requires that the person should not be released. Public Interest Litigations and Writ Petitions have been filed against the validity of this provision in Delhi High Court, Bombay High Court and Allahabad High Court, which are currently pending before these courts.[235]

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[234] *Praveen Agarwal* v. *CBI*, 2014 SCC OnLine Del 4873.

[235]Aneesha Mathur, "PIL Challenges Law that Keeps Accused in Jail after Acquittal", *Indian Express* (Aug. 21, 2014); "Steps taken to repeal a provision on bail, Centre tells HC", *Business Standard* (Nov. 19, 2010).

9.5 A Division Bench of Gujarat High Court in *State of Gujarat v Harish Laxman Solanki*,[236] expressed its anguish on inaction on the part of the Central Government as well as the state authorities that where the appeal is preferred against the order of acquittal, the acquitted accused remains untraceable and it is a difficult task for the police to search such a person. Therefore, the Court directed as under:

> "Under the circumstances, to balance the interests of the accused on the one hand and the society on the other, it would be quite reasonable if we direct the sub-ordinate Courts that while accepting the bail and bail-bonds for securing attendance of the accused before the appellate Court, the same should be taken for a further period of 12 months from the date of order of acquittal…
>
> …we deem it proper to direct the Office to immediately forward a copy of this judgment to [i] Chairman, Law Commission, New Delhi and [ii] The Secretary, Ministry of Law, Justice & Company Affairs, Government of India, New Delhi for urgent consideration and necessary action."

9.6 In pursuance of the said reference, the matter was considered by the Law Commission of India in its 154th Report [237] , wherein recommendations made are as under:

> "The proposed section 437A may be on the following lines:
>
> (1) Before conclusion of the trial and before disposal of the appeal, the trial court or the appellate court; as the case may be, require the accused to execute bail bonds with sureties, which shall be in force for twelve months, undertaking to appear before the higher court as and when such court issues notice in respect of any appeal or petition filed against the judgement of those respective courts;
> (2) If such accused fails to appear, the bond stands forfeited and the procedure under section 446 shall be applicable.
>
> On the same lines Form 45 has to be amended."

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[236] (1994) 35(1) GLR 581
[237] *Supra* note 73

9.7 The report makes it clear that the only reason for the recommendation had been that it becomes difficult to serve the notice of appeal in case the appellate court wants to examine the judgment of acquittal and the appeal remains pending after admission, as the presence of the person so acquitted is not secured inspite the issuance of non-bailable warrant.

9.8 This recommendation of the Law Commission was accepted and the Cr.P.C was amended vide Act No. 5 of 2009 w.e.f. 31.12.2009. The said amendment had been made without taking note of the Full Bench judgment of the Gujarat High Court in *Omprakash Tekchand Batra & Anr. v. State Of Gujarat*,[238] wherein the Full Bench, after taking note of various provisions contained in the Cr.P.C. and the Constitution of India held that:

> "….In the same way there is another important provision contained in Sub-section (7) of Section 437, which provides that if, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance "to hear judgment delivered. Thus, when the law has provided in these provisions for a statutory release of an accused tried by a Magistrate if the trial is not over in six months and even for release without surety in case where the trial is concluded but the judgment is not yet delivered and when the Court is of the opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, *it would be a travesty of justice to insist on release of the person who has been found to be not guilty and acquitted, on his furnishing a bail bond.* In our opinion therefore the mandatory provisions of Section 354(1)(d) must govern the field in all cases of acquittal and the accused who is acquitted is entitled to be set at liberty without any fetter of being asked

[238] 1998 (3) GLR 2031

> to furnish a bail or bail-bond for his release and any contrary direction would be ex-facie without jurisdiction and void.... ....We therefore hold that no directions as were issued by a Division Bench in State of Gujarat v. H.L. Solanki reported in (1994) 35(1) Guj LR 581, could have been issued under Section 482 of the Code by the High Court to the subordinate Courts to the effect that when the acquittal orders were made, the accused should be required to furnish bail and bail bonds for securing their attendance before the appellate Court for a period of 12 months from the date of the order of acquittal or for any period whatsoever. In this view of the matter, we are constained to overrule the ratio of the decision in H.L. Solanki's case (supra). The necessary corollary of this decision would be that *the conditions which have been imposed on in these three matters by the trial Courts requiring the acquitted petitioners be released only on their furnishing bail, are unconstitutional, illegal and void ab-initio and cannot therefore be sustained. No such conditions or fetters could have been imposed by the trial Court.*"
>
> (emphasis added)

9.9 In these cases the trial court after passing the judgment and order of acquittal had taken the personal bond and sureties as had been directed by the Division Bench in *Harish Solanki (supra).*

9.10 A Division Bench of Allahabad High court in *Nannu and others v. State of U.P.*[239] in CRIMINAL APPEAL U/S 374 CR.P.C. No. - 5201 of 2007 decided on 13.02.2012 considered both the judgments of the Gujarat High Court as well as the 154th Report of the Law Commission *(supra)* and without going into the question of Constitutional validity of s. 437A Cr.P.C. made the following suggestion:

> "96. Generally, bail is granted during pendency of trial though in some cases it is refused. Similar is the case in appeal against the conviction. Perhaps, a better workable procedure would be that whenever bail is granted during investigation or at the trial or appellate stage, a clause may be added in the bail bonds incorporating terms and

[239] 2012 (2) ACR 1261

> condition of section 437-A. This will obviate the execution of fresh bail bonds for the second time and unnecessary duplication of paper would be saved…
>
> 101. Section 437-A CrPC also requires some clarification. Take a case, where bail was not granted or granted but the accused/ convict could not be released on bail as he could not furnish sureties, or a case where accused/ convict is in jail and in pursuance of requiring bail bonds to be furnished under section 437-A CrPC states that he can not furnish sureties. Does it mean that the trial will not be conducted or appeal will not be heard, or in case he is acquitted then would not be released for six months? Perhaps, in such situation personal bond should suffice. But the existing language of section 437-A CrPC does not permit it…"

9.11 The Court erred in analysing the judgment of the Full Bench of the Gujarat High court observing that the Full Bench held that the conditions so imposed might be unconstitutional, though the Full Bench had declared them unconstitutional, illegal and void *ab-initio*.

9.12 In our deliberations a large number of organizations, advocates have urged for the deletion of this provision in toto in light of the Full Bench judgment of the Gujarat High Court (referred to *hereinabove*). However, to facilitate securing the presence of the person so acquitted his personal bond may be sufficient. It has been argued that in such an eventuality the other sureties should not be fastened with any kind of liability. In view thereof, the Commission is of the opinion that the section 437A Cr.P.C. be amended accordingly. In accordance with the aforementioned recommendations, Form. 45A shall be inserted in the second schedule of Cr.P.C. Further Form 45 shall not be used for the purposes of this section.

CHAPTER – X
Monetary Bail, Indigents and Under-trails

10.1 One of the most frequently voiced criticism on the system of bail is that it is based on money as surety even after various reforms in criminal law is that it discriminates against the poor. The financially well-established can easily afford to purchase their freedom, while the victims of the financial bail system- the poor, are jailed because they cannot raise the money.[240] In effect, the ability to pay often becomes the sole factor deciding who goes free and who languishes in jail[241]. The inherent unfairness of this practice raises question whether such practice is indeed pragmatic.

10.2 The judgment of the Supreme Court in *Rudal Shah* v. *State of Bihar*[242], is an eye opener on being the worst example of apathy of the State executives towards the plight of indigent persons. In spite acquittal of all charges by the competent criminal court on 3.6.1968, he was released from jail only after 14 years, i.e., on 16.10.1982.

10.3 The Supreme Court in *Moti Ram* v. *State of M.P.*[243], has observed that the primary method through which bail conditions are imposed, including the condition to appear before the court, is by placing the person accused of an offence under financial obligations and monetary risk regardless of the economic condition of the accused person. This model is prevalent in many parts of the world. The problem arises when more than 21 per cent[244] of the population is living below poverty line. This affects

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[240] See Harry I. Subin, Book Review of R. Goldfarb, *Ransom—A Critique of the American Bail System* 114(4) University of Pennsylvania Law Review 630-36 (1966).
[241] Warren L. Miller, "Bail Reform Act of 1966: Need for Reform in 1969" 19 Cath. U. L. Rev. 24 (1970).
[242] AIR 1983 SC 1086
[243] *Supra* note 3
[244] Planning Commission, "Press Note on Poverty Estimates, 2011-12" Government of India (July 22 2013).

the indigent population and their access to justice. Sections 440 to 450 Cr.P.C. set out conditions for releasing someone who is otherwise determined to be eligible for bail. The notion behind these provisions is that it requires the person accused of an offence to provide monetary assurance that he will appear before the court as and when required and observe other bail conditions, or forfeit the assurance amount. Thus, before being released, a person who is granted bail would be required to execute a bond agreeing to adhere to the conditions of bail.[245] This bond is for a certain sum of money as set by the Court, if the person defaults on a bail condition, the Court will forfeit the bond and require the person to pay the money as penalty.[246] On failure to do so, the penalty will be recovered in a similar manner as a fine imposed by the Court. If the penalty amount cannot be recovered then the person shall be liable for a civil imprisonment upto 6 months.[247] At this stage, it is required to be noted that failure to appear, without sufficient cause, before the court on the date designated as part of the bail condition, is an offence under section 229A, IPC.

10.4 In addition to the requirement of the execution of a bond by the person accused of an offence, the Court may require such accused to provide one or more sureties to stand guarantee that the person will abide by the bail conditions. If the person accused of an offence fails to do so, the surety amount will be forfeited. Section 440 of Cr.P.C provides that the bail amount should be fixed "with due regard to the circumstances of the case and shall not be excessive."[248] The High Court or the Court of Session may reduce the amount fixed by the police or the Magistrate.[249] In the case

[245] Section 441 Cr.P.C.
[246] Section 446 Cr.P.C.
[247] *Id.*
[248] Section 440 (1), Cr.P.C.
[249] Section 440 (2), Cr.P.C.

of *Shankara* v. *State (Delhi Administration),*[250] the High Court of Delhi placed an obligation upon the State to take into consideration all the factors pertaining to the person accused of an offence. The judgment made the conditions attached to the bail lenient in this case. Any accused charged with minor offences were asked to be released on personal bonds and those charged with major offences were to be released on personal bond along with one surety to the amount of rupees one thousand only.

10.5 In this regard, the 'Report of the Legal Aid Committee' chaired by Justice P.N. Bhagwati appointed by the Government of Gujarat in 1971[251], and the report 'Processual Justice to the People' by the Expert Committee on Legal Aid[252] headed by Justice Krishna Iyer in 1973 are worth being noted. Justice Bhagwati observed in his report that the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their financial inability while the wealthier persons, would be able to secure their freedom because they can afford to furnish bail[253]. The report categorically stated that the evil of the bail system is that either the impoverished have to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. On one hand they are fleeced by touts and professional sureties and sometimes even have to incur debts to make payments to them for securing their release; on the other hand they are deprived of their liberty without trial and conviction; all this leads to grave consequences.

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[250]1996 Cr.LJ 43

[251]Government of Gujarat, *Report of the Legal Aid Committee* (1971)(Chairperson: PN Bhagwati, the then Chief of Justice of the Gujarat High Court); Government of India, Ministry of Law Justice and Company Affairs.

[252] *Report of the Expert Committee on Legal Aid: Processual Justice to the People (1973)* (Chairperson: Justice VR Krishna Iyer), Government of India, Ministry of Law Justice and Company Affairs.

[253] *Supra* note 73

10.6 The Expert Committee on legal aid headed by Justice Krishna Iyer, in 1973 in its Report titled 'Processual Justice To The People',[254] provides alternatives to the money bail system. It is stated that a liberal policy of conditions for release without monetary sureties or financial security and release on one's own recognizance with punishment provided for violation will go a long way to reform the bail system and help the weaker and poorer sections of the community to get equal justice under the law. Conditional release may take the form of entrusting the person accused of an offence to the care of their relatives or in supervision. The court or the authority granting bail may have to use the discretion judiciously. When the accused person is unable to find sureties, there will be no point in insisting on bail with sureties, as it will only compel them to be in custody with the consequent handicaps in providing their defence.[255]

10.7 The Expert Committee Report also made recommendations, such as enlarging the category of bailable offences as classified in Cr.P.C., and insisting on expeditious completion of pre-trial procedures that might lead to minimizing the period of confinement. It has also noted that a person accused of an offence would need access to a lawyer to make an application for bail.[256]As per law, it is required to ensure that legal aid is provided but, in practice, this occurs only after the charge-sheet is filed. Therefore, access to lawyers in the crucial pre-charging stages is often limited for those who cannot afford a lawyer, and who are likely therefore to also not be able to afford bail.

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[254] *Supra* note 252
[255] *Supra* note 251
[256] *Id.* at 77 – 78

10.8 The Supreme Court has taken note of the concerns highlighted above. In *Hussainara Khatoon*,[257] the Court commented on the property based nature of the bail system and stated that it is based upon the erroneous assumption that the risk of monetary loss is the only deterrent against fleeing from justice. The Court highlighted that even where an person accused of an offence is to be released on personal bond, the law requires the person to be placed under financial obligation to appear in court through the execution of a bond to that effect.[258] Moreover, the courts mechanically insist that the accused person should produce sureties who would furnish bail for him and, these sureties must again establish their solvency to be able to pay the amount of bail in case such accused fails to appear to answer the charge. The issue of bail for people who do not have access to sureties locally, was at the centre of the controversy in *Moti Ram*[259]. Here, the Magistrate had refused to consider the surety given by the cousin of the accused person on the ground that he was not from the same geographical location as the accused. The Supreme Court reversed the order and held that courts cannot reject a surety merely because the surety or the surety's estates are situated in a different district or state. The requirement of local sureties is difficult to attain for out of state under-trial prisoners.

10.9 The Court should impose reasonable conditions for bail as the order must be judicious. The Court should not insist for local sureties because if the accused person is not in a position to meet such requirement even if the order has been passed it may not be possible for the accused person to ensure compliance of such conditions. The court may modify its order to enable him to give surety who need not be a local

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[257] *Supra* note 58.
[258] Section 441, Cr.P.C.
[259] *Supra* note 3

person. By no means, the order should be so onerous that the purpose of granting the bail would stand defeated as it would not be possible for the person accused of an offence to fulfil those conditions[260].

10.10 With regards to under-trial prisoners, in the case of *Supreme Court Legal Aid Committee Representing Undertrial Prisoners* ,[261] the Supreme Court held that unduly long periods of under-trial incarceration violates Articles 14 and 21 of the Constitution. For this reason, the Court directed that if the accused person has served half the maximum sentence specified for the offence for which he has been charged, he should be released on bail, subject to fulfilling the conditions of bail imposed on him.

10.11 This standard was incorporated in the Cr.P.C., through an amendment in 2005, by which s. 436A was added to the Code. This section provides that if the accused person has undergone detention for half the maximum period of imprisonment specified for the offence that he has been charged with, such an accused shall be released by the court on personal bond with or without sureties. Persons charged with offences punishable with death do not get the benefit of this provision. The proviso to the section states that the court, upon hearing the public prosecutor, may order the continued detention of the accused person for a term longer than half of the said period, or release the person accused of an offence on bail instead of personal bond with or without sureties. The court shall record reasons for this in writing. The second proviso to the section states that no accused person shall be detained for a period longer than the maximum period of imprisonment for the offence. For effective

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[260] See: *Moti Ram, supra note 3*; *Keshab Narayan Banerjee* v. *State of Bihar* AIR 1985 SC 1666; *Sandeep Jain* v. *NCT of Delhi,* AIR 2000 SC 714; *M Sreenivasulu Reddy* v. *State of Tamil Nadu*(2002) 10 SCC 653; and *Amarjeet Singh* v. *Government of NCT of Delhi,* JT 2002 (1) SC 291

[261] *Supra* note 189.

implementation of this provision, the Supreme Court of India laid down guidelines in *Bhim Singh* v. *Union of India*.[262] It directed the jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge to hold one sitting per week in each jail/prison for two months from October 1, 2014 to identify under-trials eligible for bail under s. 436-A of Cr.P.C and to pass an appropriate order with respect to s. 436-A of Cr.P.C in the jail itself. It directed the Jail Superintendent of each jail/prison to facilitate the process.

10.12 In this context it is pertinent to note that in an earlier case, *R. D. Upadhyay* v. *State of Andhra Pradesh*,[263] the Supreme Court had held that under-trials charged with attempt to murder should be released on bail if their case has been pending for 2 years or more; and that persons charged with comparatively minor offences like theft, cheating, etc., should be released if they have been in prison for more than a year. The Court added two important instructions: (1) the trial courts were obligated to consider such persons for bail. The court clarified that it was not necessary for under-trials to move an application for bail. (2) The Court directed that where an under-trial is not in a position to furnish sureties, the court should examine whether the person can be released on furnishing a personal bond. In the current system of money bail and release under s. 436A Cr.P.C., after serving half of the maximum sentence, it must be considered whether, given the duration of maximum imprisonment in many offences, release after serving half the duration serves the cause of justice.

10.13 In order to ensure the compliance of this provision, it is necessary to make some statutory authority responsible for its

[262](2015) 13 SCC 603.
[263]1996 (4) SCALE 11.

compliance. Under the Legal Services Authority Act, 1987, the Secretary to District Legal Services Authority are judicial officers, thus, they must be made responsible for making these provisions effective and ensure that benefits reach to the under trials. The said Secretary is also competent to approach the jail authorities and seek information regarding the detention served by any particular under trial prisoner. Thus, the Commission recommends that the Secretary may be made responsible as a Nodal Officer seeking enforcement of the provisions of this section.

10.14 In Criminal Appeal No .509 of 2017, in *Hussain and Anr v. Union of India*, the Supreme Court has directed the High Courts to issue directions to the subordinate courts inter alia that bail applications be disposed of within one week. The Court further held that as a supplement to s. 436A of Cr.P.C., consistent with the spirit thereof, if an under trial has completed a period of custody in excess of sentence likely to be awarded if the conviction is to be recorded, such an under-trial must be released on personal bond.

CHAPTER – XI
Recommendations

11.1 Arbitrary incarceration of a person accused of an offence is inimical to every notion of fair administration, therefore, by encouraging practices that avoid unnecessary and excessive incarceration, the Law Commission through the following set of recommendations strives to promote constitutionally fair practices of Bail. Any bail practice that result in the incarceration of the accused person without meaningful consideration to ability to pay, alternative methods of ensuring appearance at a trial and the nature of the crime is violative of the rights of the accused.

11.2 Mere suspicion cannot be a valid ground for the arrest unless the suspicion is well founded. Right to bail of a person accused of an offence which primarily rests on the presumption of innocence in favour of the accused person in a pre-trial stage, has to be weighed against the competing interest of society and public justice. The benefits of the current system of bail provision are clear: the person accused of an offence should not be deprived of their liberty, even for a short duration, the liberty and freedom are precious component of right to human dignity. A note of caution must be exercised in so far as the overtly euphemistic characterization of those accused of heinous crimes may disguise the ground reality. By granting bail to an accused person who poses threat to the justice system and the community at large in an indiscriminate manner and for extraneous consideration amounts to putting the society at a significant risk. It must be noted that 78 per cent of the convicts are in prison for offences punishable with imprisonment of 7 years and above; whereas 57 per cent of the undertrials are in prison on an average for 3-6 months[264]. Given the time needed to complete a thorough investigation of

[264] *Supra* note 7.

serious offences, it must be considered whether granting bail without restraint and conditions furthers the State's interest in protecting its citizens, when the premise of citizen protection is at the core of any acceptable version of the social contract. Under such circumstances, why is the right to bail absolute, while the right not to be victimized by an accused gets no weight in the bail policy calculation?[265] Surely these two fundamental rights have to be balanced against one another, unless one believes that the State has no duty to protect its innocent citizens from those likely to cause harm[266].

A. Arrest

11.3 The Supreme Court has laid down several guidelines in various cases on arrest. In *Arnesh Kumar*[267] the court has said that arrests should not be made as a matter of course. Although, it may be difficult to enforce the guidelines in every single case, in order to safeguard against the arbitrary exercise of power to arrest under s. 41 Cr.P.C., it is desirable that an addition be made to the effect that, *reasons shall be recorded by the Investigating Officer prior to making the arrest in the Case Diary as well as the Daily Diary Register and shall also require written approval by the Officer in Charge of the Police Station*. Further, the police officer must provide information as to what is the nature of offence and whether the offence is bailable or non-bailable.

11.4 Section 50, Cr.P.C. mandatorily requires the arresting authority to inform the arrestee of full particulars of the offence for which he is arrested or other grounds if any for such arrest. Such a mandatory provision cannot be meaningful unless the arrestee is informed of the

[265] Larry Laudan & Ronald J. Allen, Deadly Dilemmas II: Bail and Crime, 85 Chicago-Kent. L. Rev. 23 (2010)
[266] *Id.*
[267] *Supra* note 79.

above in writing, in the language he understands. Thus, it is recommended that s.50 Cr.P.C. be amended accordingly.

B. Default or Statutory Bail and Remand

11.5 The non-completion of the investigation shall not, in the absence of a special order of a Magistrate, be deemed to be a sufficient cause for the detention of an accused person. A remand to police custody may be granted for compelling reasons when it is shown in the application that there is good reason to believe that the person accused of the offence can point out properly or otherwise assist the police in elucidating the case.[268] A general statement by the officer applying for the remand that, 'the accused may be able to give further information', should not be accepted. The Courts should strictly enforce the rule that supplementary charge-sheet cannot be filed to fill up the gaps, but only to add information that becomes available subsequently. Thus, the courts must ensure that the supplementary charge-sheet is not filed with the intention to delay the trial but to provide substantial ancillary evidence that was not available before despite the due diligence exercised by the investigating authorities.

11.6 With regard to remands, it has come to the notice that, in practice, Magistrates authorize detention in a routine and casual manner. The Magistrate must examine and verify the Case Diary which is placed before him at the time of Remand. Some High Courts have framed rules regarding remand of accused persons to custody, which ought to gain wider acceptance for the sake of uniformity and consistency. Reference may be had to the Delhi High Court Rules, Vol. III, Chapter 11, Part B; more specifically Rules 3,4,5,6,7,8,10. Another concern is that there is inadequate priority given to the grant of bail despite guidelines framed as

[268] *State* v. *Mehar Singh &Ors.*, 1974 Cr.LJ 970

also some rules made by some High Courts. Reference may be made to Volume III Chapter 10, of the Delhi High Court Rules where the relevant Rules 1,2, 3, 4, 5, 7, 9, 15,16 must be included in the provisions of the Code. The relevant part of the aforesaid is annexed herewith as Annexure A.

11.7 Exacerbating the problem of undertrials in the country is inordinate time taken in disposing of trials. While s. 309 (1) of Cr.P.C. directs that *"in every inquiry or trial, the proceedings shall be held as expeditiously as possible, and in particular, when* the *examination of witnesses has once begun, the same shall be continued from day-to-day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded",* in reality, the Trial Courts in the country are overburdened and cannot expeditiously dispose of trials by holding them on a day-to-day basis.

11.8 Further with regard to s.309 (2) of Cr.P.C., this provision deals with remand of an person accused of an offence after cognizance of the offence has been taken by the court. Where the trail is postponed or adjourned, the Court may remand such accused if he is in custody. The provision does not mention that the Magistrate may also release the person from custody. As a result, the section appears to suggest that remand under the provision is the only outcome. To ensure that remand does not take place in a mechanical manner the Court should consider both the continuing need, if any, for the person to remain in custody, as well as the length of undertrial incarceration undergone by him, in determining whether the person should be released or remanded. Amendment to this effect should be provided in s. 309 (2) of Cr.P.C explaining that upon postponement or adjournment of the trial the Court shall, if the person accused of an offence is in custody, release such accused person on bail,

or for reasons to be recorded in writing, remand such accused to further custody. In special laws, investigating agencies should continually update the court as to the status of the investigation at every remand hearing. Recognizing the complex nature of some of the offences, investigating agencies may require more time for investigation, and therefore, it is necessary that discretion may be vested in the courts. However, if the court comes to the conclusion that the delay in investigation is caused not by the nature of the case under investigation, but is attributable to the investigating agencies, the court should consider releasing the accused person on bail.

11.9 Further with regards to s. 167 of Cr.P.C. the following factors may be considered in the context of remand:

a) The non-completion of the investigation shall not, in the absence of a special order of a Magistrate be deemed to be a sufficient cause for the continued detention of an accused person.
b) A remand to Police custody be granted only in cases of real necessity and when it is shown in the application that there is a good reason to believe that the person accused of an offence can point out properly or otherwise assist the Police in elucidating the case.[269] A general statement by the officer applying for the remand that the accused may be able to give further information and aid the investigation cannot be deemed as sufficient reason for requesting remand.
c) The Magistrate shall examine in a thorough manner the Case Diary, which is placed before him at the time of application for remand.
d) The period for which the person accused of an offence is not in actual/physical custody (e.g. admitted in hospital) of the police, be

[269] *Id.*

excluded from the time prescribed.

C. Conditions That May be Imposed in Bail

11.10 A bail condition must not unreasonably violate the rights guaranteed by the Constitution. If the prosecution cannot show through evidence that the person accused of an offence is at the risk of absconding, or is likely to interfere with the judicial process, or is likely to commit the same offence, the accused person should be considered eligible for release, without or with such financial obligations that are not excessive or onerous. The court should consider the unique circumstances of each accused person and develop a method to ensure that bail conditions are effective. For example, if the accused person is a driver by profession, then, even though the offence he is accused of is not related to his work, the Court may require him to deposit his driving license, as a pre-condition for release. Requirement of financial obligations, either through the execution of a personal monetary bond, or through sureties should be the last resort, when no other method is likely to work. If the court seeks the deposit of identity cards, driving license or other documents, it should make available an attested copy of the document to the accused person, certifying that the original has been deposited with the court. Such attested copies should be permitted as proof of identity for availing State benefits, etc.

11.11 In determining whether the person is likely to abscond, the court should look at factors other than monetary considerations that may keep the person accused of an offence within the jurisdiction of the court, such as the presence of family, job, other roots in the community etc. However, an accused person should not be denied bail only because he is a migrant in the city of arrest and does not have ties with the local community. The appearance of such a person may be enforced through other means, as for example through informing the police of the place of

ordinary residence of the person accused of an offence that such accused is on bail and if he is seen in his home district, it should be checked whether he is in compliance with his bail conditions.

11.12 If the Magistrate is of the opinion that the person accused of an offence is at risk of absconding, sureties may be imposed. Surety may be personal surety or a third person surety and should be according to the paying capacity of the accused person. In determining the conditions of bail, the Court should take into account the financial status of the person accused of an offence, and shall ensure that the conditions of bail are not excessive or unduly onerous. Sureties should not be rejected solely on the ground that they are not locally situated. To alleviate concerns regarding the availability of the surety in case of forfeiture, courts should be allowed to direct, that the surety papers be deposited with the court which has jurisdiction where the surety is located, and that such court can proceed against the surety in case of forfeiture.

11.13 Some conditions that may be imposed are:

- abide by specified restrictions on personal associations, place of abode, or travel;
- avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offence;
- report on a regular basis to a designated law enforcement agency;
- refrain from possessing and surrender if in possession of any firearm, ammunition, destructive device, or other dangerous weapon;
- undergo available medical, psychological, or psychiatric treatment, and remain in a specified institution if required for that purpose;
- satisfy any other condition that is reasonably necessary to secure the appearance of the person as required, and to ensure the safety of any other person and the community;

- surrender of passport or travel document in the possession of the accused, in case, the accused does not have one, he may be prohibited from obtaining one;
- accused may be mandated to seek or maintain employment or enter into any educational programme;
- refrain from attending such premises or any other place as the court may specify;
- abides by any restriction on his travel or movement; or
- abides by specific restrictions on his speech and expression.

11.14 This list is not exhaustive, any of the above conditions or a combination thereof may be imposed by the court. The bail must be granted subject to the least restrictive conditions to ensure the appearance of the person accused of an offence and the safety of the community.

11.15 In evaluating the validity of conditions or restrictions of pre-trial detention that implicates only the protection against deprivation of liberty without due process of law, the proper inquiry in cases must be made, whether those conditions or restrictions amount to punishment for the detainee[270]. Ensuring the maintenance of law and order, peace and public safety are valid objectives of the State that may at times justify imposition of restrictions on freedom granted to the accused person enlarged on bail.

D. Modifying the Classification in Schedule I

11.16 The IPC provides punishment for offences but it is the Cr.P.C. which categorizes offences as 'Cognizable' and 'Non-Cognizable', 'Bailable' and 'Non-Bailable' as well as determines which Court will try the offence. Thus

[270] *Bell* v. *Wolfish*, 441 U.S. 520 (1979)

far, there is no apparent correlation between classifying certain offences as Bailable/Non-Bailable with the maximum punishment that may be imposed for committing them. For example, subjecting a married woman to cruelty is punishable with three years imprisonment (s 498-A IPC) and is Non-Bailable, whereas committing the offence of Adultery (s 497 IPC) is punishable with imprisonment upto five years and is Bailable. The seriousness of the offence ought to be reflected in both, the maximum term by which it is punishable, as well as the classification of the offence as Bailable / Non-Bailable. The Law Commission recommends that there should be consistency between the term of imprisonment for offences and their classification as Bailable or Non-Bailable.

E. Anticipatory bail

11.17 The issue of liberty vis-à-vis custody has been settled in the context of States where the provision of Section 438 Cr.P.C. has no application. In *Kumari Hema Mishra* v. *State of UP*[271], upholding the power to stay arrest under Article 226 of the Constitution the Supreme Court stated that police custody must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the State objective of maintenance of law and order. Likewise, in *Manubhai Ratilal Patel* v. *State of Gujarat*[272], the question as to whether a writ of Habeas Corpus could be entertained by the High Court where a person is committed to judicial custody or police custody by the competent court by an order which *prima facie* does not appear to be mechanical, illegal or without jurisdiction fell for consideration. In such cases the court is required to scrutinize the legality of detention. Unless

[271] (2014) 4 SCC 453.
[272] (2013) 1 SCC 314.

the order suffers from the vice of lack of jurisdiction or absolute illegality, a writ of habeas corpus cannot be granted.

11.18 The proviso to s. 438 of Cr.P.C must be retained; this is contrary to the suggestions made in the 203rd Report of the Law Commission.[273] The proviso needs to be retained because where the offence is grave and non-bailable, it enables the immediate arrest of the accused person between the time such accused moves an application till the time the court has not passed any interim order or rejected the application. Anticipatory bail is an extraordinary privilege and it must be granted bearing in mind the guidelines laid down by the Supreme Court. The courts must exercise extreme caution in bestowing this privilege and not grant anticipatory bail in a mechanical or perfunctory manner. Over the years, anticipatory bail has been misused by person accused of any offence to disrupt the investigation and obstruct the course of justice. Given that the provision is increasingly misused, it is at such times important to remember that the intention of the legislation was to protect the innocent from being unnecessarily subjected to harassment.

11.19 The Law Commission is of the opinion that anticipatory bail must not only be granted with caution but must also be made operative for a limited period of time. Further, given the special position that s. 438 of Cr.P.C enjoys in the Code and the potential for misuse, any order passed under this section must be accompanied with reasons for rejecting or granting anticipatory bail.

F. Bail in Economic Offences

[273] 203rd Report by the *Eighteenth* Law Commission of India, Section 438 of the Code of Criminal Procedure, 1973, as amended by the Code of Criminal Procedure (Amendment) Act, 2005 (Anticipatory Bail).

11.20 In a country where there is a high incidence of economic crimes, the government and bureaucracy are also viewed as being corrupt and weak[274]. India is no exception to such phenomena. Economic offences, such as counterfeiting of currency, financial scams, fraud, money laundering, etc. are crimes which imperil the nation's security and governance. Further, the diversion and investment of the black-money acquired by committing such crimes generates another set of crimes and the hegemony of the criminal syndicates rule. Thus, it forms a vicious circle which poses threats to public security and eventually national security which would appear imminent as an ultimate consequence[275]., In the light of various scams like circulation of counterfeit currencies, black-money etc., such economic offences have necessitated a change in approach towards grant or denial of bail in such offences to tackle the menace effectively. All forms of economic offences which include tax evasion, customs offences or bank fraud should be dealt with strictly and provision for restricted bail in such offences should be incorporated in the Criminal Procedure code or appropriate special statutes for the purpose of granting or refusing bail. There is no classification of offences in IPC, s. 437(1) Cr.P.C. provides that when bail may be taken in case of non-bailable offence. Similarly, in economic offences, on the question of grant of bail, the nature and gravity of the offence, the adverse impact of scam and the extent of money involved would be the decisive factors. The Law Commission has therefore suggested that bail in economic offences be treated differently.

G. Special Laws

[274] V.K. Singh, "Economic Crimes and Their Impact on Indian Economy" The Organizer (2017).
[275] *Id.*

11.21 Bail provisions in special laws are stringent because the offences dealt with under these legislations are grave, and considering the nature and impact of such offences on the public, the law must provide strict scrutiny for bail under these laws. For example, all the major offences under the NDPS Act are non-bailable, yet the offenders are often granted bail by the courts on technical grounds. [276] To deal with the menace, unconditional bails must not be granted under the NDPS Act specially in cases involving commercial quantities. In relation to terrorism related cases, a higher standard of scrutiny must be exercised. This higher scrutiny is prescribed by the law in the form of exception to bail where the accused person may endanger the safety of the society. The degree of violence towards others is implicit in such a charge against the accused. The frequency of that particular type of offence must also be considered where such offences are alleged. It must be noted that the Australian authority enacted the Anti- Terrorism Act 2004 and the Bail Amendment (Terrorism) Act 2004 which had the effect of reversing the presumption in favour of bail in terrorism cases[277]. The amendment provides that, where a person is charged with certain terrorism offences, bail must not be granted unless the bail authority is satisfied that exceptional circumstances exist to justify granting bail[278].

H. Need for modification of sections 436 and 436A of Cr.P.C.

11.22 The language of the section must be made unambiguous in communicating that the bail under this section is a matter of right, which

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[276] Statement of Objects and Reasons, The Narcotic Druqs and Psychotropic Substances (Amendment) Bill, 1988, seeking to amend the NDPS Act, 1985, acknowledged that : "Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail".

[277] S. Omondi, "Balancing the Constitutional Right to Bail and State Security in the Context of Terrorism Threats and Attacks In Kenya" 3(2) Journal of Research in Humanities and Social Science 23-44 (2015).

[278] *Id.*

cannot be trounced by imposing or demanding unreasonable or excessive sureties. Since the code does not provide for any standards to decide sureties other than the surety mentioned in s. 440 of the Cr.P.C which states that the sureties would be prescribed with due regard to the circumstances of the case not being excessive. Sections 436 and 437 of the Cr.P.C must be read in consonance with this provision.

11.23 Condoning delays either by the judiciary or the investigating authorities cannot be at the expense of the rights of the person accused of an offence. The delays and the difficulties that judges face currently were some reasons for which the law was amended, yet the high bar set in the section defeats the purpose. Recently, the Supreme Court in *Bhim Singh*[279] while considering the scope of s. 436A of Cr.P.C, directed judicial officers to identify undertrial prisoners who have completed half the term, they may be sentenced with, if found guilty. It was further directed that an appropriate order may be passed in jail "itself, for release of such under trial prisoners who fulfil the requirement of s. 436A of Cr.P.C, for their release immediately[280]". Directions in *Bhim Singh*[281] may be implemented by amending the section to make the criteria for release of undertrials. For offences upto seven years under trial who have completed one third period of the maximum sentence imposed may be released; while for offences with punishment more than seven years, under trials who have completed one half period of the maximum sentence imposed may be released. Further provision *be made to have the undergone part, considered with remissions*. The Supreme Court has observed in many cases that putting under trials in prison for long with hardened criminals may influence or induce criminal tendencies in the person accused of an offence.

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[279] *Supra* note 262.
[280] *Ms. Divya Iyer* v. Tihar Jail (http://www.rti.india.gov.in/cic_decisions/CIC_SA_A_2015_000375_M_161809.pdf) (Last Visited on May 16, 2016)
[281] *Supra* note 262.

I. The need for a central intelligence database and electronic tagging

11.24 The criminal justice system in India is on the path to scale up its criminal data gathering, data analytics and data-sharing capabilities. Although criminal antecedents can be discovered through a record of FIR and judgements, both of which can be found online, however, the information is piecemeal and not easily accessible. For instance, the Court, prosecutors and the police should be able to triangulate information about an person accused of an offence, in order to enable them to proceed expeditiously and efficiently.

11.25 The technical architecture of the Crime and Criminal Tracking Network and Systems (CCTNS) scheme may be adapted and utilized to ensure that the person accused of an offence does mark his appearance, by taking a picture and/or his fingerprints, name, father's name, mother's name, spouse's name, address, date of birth, mobile number, contact number, driving license, voter ID, Aadhaar number and criminal history, if any. The Delhi High Court, in the past has directed the Central Bureau of Investigation to start a cell on criminal records of abductors and kidnappers. Such kind of extra judicial developments may be used as a catalyst to set up national criminal databases, link various investigating agencies and judiciary. These links may call for the active involvement of the Ministry of Home Affairs, facilitated by various state and national authorities[282]. In such manner, decision making of the Courts, public prosecutors, the investigation agencies and various other authorities that perform key functions in upholding the law and deliver justice would aid in their functioning.

[282] Nair and Sen, Trafficking in Women and Children, Orient Blackswan, 2005, p 308.

11.26 Electronic tagging has the potential to reduce both fugitive rates (by allowing the defendant to be easily located) and government expenditures (by reducing the number of defendants detained at state expense)[283]. Electronic tagging or monitoring is defined in legislation of New Zealand. It states that, "*Electronically monitored bail (EM bail) is a restrictive form of bail. A person on EM bail must remain at a specified residence at all times unless special permission to leave is granted for an approved purpose (such as work). Compliance is monitored via an electronically monitored anklet that must be worn 24 hours a day… EM Bail is available in New Zealand for suitable defendants and young people (12-17 years of age) who would otherwise continue to be held in custody, in prison, or in the instance of a young person in a youth residence, while they wait for a court hearing. The defendant and young person are considered innocent until found guilty at a trial.*"[284]

11.27 The Law Commission the grave and significant impact on constitutional rights of electronic monitoring system and it is of the opinion that such system, if used, must be implemented with highest degree of caution. Such monitoring must be used only in grave and heinous crimes, where the accused person has a prior conviction in similar offences. This may be done by amending the appropriate legislations to restrict the application of electronic tagging to hardened criminals, and any Court order under the specified legislation must contain reasons for the same.

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[283] Wiseman, Pre-trial Detention and the Right to be Monitored, Yale Law Journal, 2014,Vol. 123, Issue no. 5

[284] 'Courts And Pre-Sentencing' (http://www.corrections.govt.nz, 2017) <http://www.corrections.govt.nz/ /courts_and_pre-sentencing/em_bail.html> accessed 15 March 2017. Various States like Bahamas, United Kingdom have embarked upon electronic monitoring system.

J. Public Prosecutor and the Victim

11.28 In the Indian Criminal Justice System Public Prosecutor is given an opportunity to be heard through the fourth proviso to s. 437 Cr.P.C. Similarly, the victim in certain cases where the offence is punishable with seven years or more must be given an opportunity of being heard. The provisions may be made for intimating the victim of the outcome of the bail proceedings and in particular, if any condition imposed to protect the victim from the alleged offender.[285] One of the principles that should govern bail is 'the treatment of victims' especially where a victim who is known to have expressed concern about the need for protection from an offender should be told about the offender's impending release from custody[286]. Thus, it is suggested that in certain heinous and grave offences the Prosecutor may be required, after consulting the victim, submit a 'Victim Impact Assessment' report wherein any concerns of the victim along with the information on physical, mental, social impact of the crime and the impact bail may have on the victim may be briefly stated.

11. 29 Further, the checklist model followed in the UK should be adopted by the Indian Prosecutorial Department. The system provides categorically, all the relevant details necessary for exercising prosecutorial discretion in granting bail. It enlists distinct data such as the history of the arrestee, intention, evidence of violence and other relevant factors. The system would not only prove efficient in the proceeding itself but also would enhance the performance of duties promoting the intention of balancing the interests of the person accused of an offence and the State.

K. Risk Assessment

[285] Australian Law Reform Commission, "Report on Bail and Family Violence" 114.
[286] *Id.*

11.30 Pre-trial risk assessment is the determination of qualitative value of risk related to a pretrial defendant and his specific circumstances[287]. Risk management means balancing the constitutional rights of the defendant with the risk the defendant poses, using effective supervision and strategic interventions[288]. In the risk assessment process the arrested accused is brought to the station where, after identification, booking, search, questioning, and fingerprinting, community ties are investigated along with a set of pre-determined factors. If the defendant is found to be a good risk, the officer is authorized to release him with on a personal bond with or without sureties. Additionally, this procedure saves substantial police, investigating authorities and Court time and economises the operation of detention facilities.

11.31 In 1961, the Vera Institute of Justice launched the Manhattan Bail Project in New York City. Various scholars [289] observed that defendants with strong ties with the community were likely to return to court if released on personal recognizance. The project targeted accused that were in jail though ordered to be released on bonds which they could not afford. The report recommended for non-financial release of those who had strong ties. The results showed that these defendants were just as likely to come back to court as those who executed a money bond to be released. Moreover, the project found that when judges were given verified information about defendants, including assessments about their likelihood of appearing in court, these defendants were three times more

[287]C. Macmalian C., *State of The Science of Pretrial Risk Assessment* (Pretrial Justice Institute, 2011).

[288]*Id.*

[289] See generally, Charles E. Ares, Ann Rankin, and Herbert Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pre-Trial Bail," 38(2) New York University Law Review 67-95 (1963); Rational and Transparent Bail Decision Making: Moving from a Cash-based to a Risk-based Process (Pretrial Justice Institute, 2012).

likely to be released on personal recognizance than comparison group of defendants who had no risk assessments .The Manhattan Bail Project was also referred to by the Supreme Court in the *Moti Ram* case[290].

11.32 Factors that could be considered when making a risk assessment are:

- Whether there are reasonable grounds for believing that he has committed the offence;
- Nature and gravity of the offence charged;
- Severity of the potential punishment if the trial results in conviction;
- Preponderance of evidence;
- The danger of absconding;
- The character, means and standing of the accused;
- Danger of the alleged offence continuing or being repeated if granted bail;
- Danger of witnesses or evidence being tampered with;
- Community ties;
- Opportunity for the accused to prepare his defence;
- Whether there is any possibility of the trial being delayed;
- Prior convictions and other criminal antecedents; and
- The health, age and sex of the accused.

11.33 Thus risk assessment will help to balance the presumption of innocence, assign of the least restrictive intervention for person accused of an offence, with the need to ensure community safety while minimizing any misconduct or failure to appear on part of the accused.

[290] *Supra* note 3

L. Exceptions

11.34 Absolute restriction on granting of bail would undermine the right to liberty of the person accused of an offence. Therefore, when certain supervening and inexorable circumstances exist, bail must be allowed. If the person accused of an offence is suffering from serious life-threatening ailment and requires medical help which may not be available in jail hospitals, then the bail shall be granted.

M. Prison infrastructure

11.35 There are currently, 1,401 jails in the country which are classified as central jails, district jails, sub-jails, women jails, open jails, borstal schools, special jails and other jails. The total number of inmates consisting convicts, detenues and under-trials are 4,19,623 which means that prisons are buckling under the weight of inmate population. This is a kind of population explosion in the existing jail infrastructure. According to the Prison Statistics of India[291] the prison occupancy stands at 114 percent. The prisons have a staff strength of 53,009 jail officials to take care of 4,19,623 inmates which amounts to 1 jail official per 8 inmates. Many prison institutions struggle to meet minimal health, hygiene and safety standards, with basic amenities and even structural systems like plumbing and ventilation susceptible to breakdowns. With little finance and human resources earmarked for maintenance, it is hard to overcome operational shortfalls. Further, there is no segregation of the under-trial and convicts. The rising crime rates and the over-crowding of prisons mark the need to overhaul the crumbling prison infrastructure and system. Reducing the sheer number of under-trials by releasing them on bail may serve the useful purpose. Any such release of under-trial prisoners must

[291] *Supra* note 7

be subject to the facts and circumstances of the case (especially in heinous offences), stage of trial, investigation report, socio-economic conditions of the accused person and ability to secure bail.

CHAPTER – XII
Conclusion

12.1 The existing system of bail in India is inadequate and inefficient to accomplish its purpose. Grotesque crime involving extreme violence is on the rise throughout the country. Murder has increased by 250 percent, rape by 873 percent and kidnapping and abduction by 749 percent since 1953. In the backdrop of increasing crime rates, insufficient infrastructure, lack of modernization of investigative machinery and various other challenges, bail system cannot be fashioned into a panacea to ensure a responsive criminal justice system in India. It is indeed a small step in the direction to re-calibrate the bail provisions in the Cr.P.C to make them more be-fitting the times and situations the Society face today and are likely to face in near future.

12.2 The present report is a modest attempt to highlight the varied inconsistencies in the standards of bail by providing principles and suggesting amendments in exercising the powers to grant or deny bail. It is possible to find agreement on a few core principles relevant to bail practices, namely:

- The practices must be fair and evidence based. Decisions about custody or release should not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, financial conditions or social status.
- The practices should address two key goals: (1) protecting against the risk that the accused fails to appear on the scheduled date; and (2) protecting against risks to the safety of specific person/s or the community.
- Unnecessary pre-trial confinement should be minimized. Confinement is detrimental to the person accused of an offence who

is kept in custody, imposes unproductive burden on the State, and can have an adverse impact on future criminal behaviour, and its reformative perspectives will stand diminished.

12.3 The principles discussed in Report are articulated in the Code of Criminal Procedure (Amendment) Bill, attached herewith as **'Annexure-A'**. The list of relevant rules from the Delhi High Court is at **Annexure-B.** The summary of the consultations with various stakeholders is attached as **'Annexure-C'**.

[Justice Dr. B.S. Chauhan]
Chairman

[Justice Ravi R. Tripathi]
Member

[Prof. (Dr.) S. Sivakumar]
Member

[Dr. Sanjay Singh]
Member-Secretary

[Suresh Chandra]
Ex-officio Member

[Dr. G. Narayana Raju]
Ex-officio Member

Annexure A

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) BILL, 2017

A

BILL

further to amend the Code of Criminal Procedure, 1973.

BE it enacted by Parliament in the Sixty-eighth year of the Republic of India as follows:

1. ***Short title, and application.***- (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 2017.

ii. The provisions of this Act shall apply to all persons arrested on or before the date of commencement of this Act.

2. ***Amendment of section 2.***- In the Code of Criminal Procedure, 1973 (2 of 1974) (hereinafter referred to as the Code of Criminal Procedure), in section 2,-

(i) for clause (a), the following clause shall be substituted, namely:-

'(a)"bail" primarily means the judicial interim release of a person suspected of a crime or any person accused of an offence held in custody, upon a guarantee that the suspect or the accused, as the case may be, will appear to answer the charges at some later date; and includes grant of bail to a person suspected of a crime or any accused person by a court/police officer/ officer authorised by law for the time being in force; and the guarantee may include release without any condition, release on condition of furnishing security in the nature of a bond, with or without sureties, or release on condition of furnishing other forms of security, or release based on any other condition, as deemed sufficient by the court/police officer/ officer authorised by law for the time being in force;

(ii) after clause (u), the following clause shall be inserted, namely:-

'(ua) "security" for the purposes of bail includes a monetary bond, with or without sureties, or any other form of security to the satisfaction of court/police officer/ officer authorised by law for the

time being in force, to secure compliance with the conditions of bail.'.

3. ***Amendment of section 41.***- In section 41 of the Code of Criminal Procedure,—

(i) in sub-section (1), in clause (b), sub-clause (ii), after item (e), the following item shall be inserted, namely:-

"(f) when it is evident that the offence committed was related to or in furtherance of criminal activities of an organized gang or motivated by membership or allegiance of the accused person to an organized gang";

(ii) after sub-section (1) the following sub-section shall be inserted, namely:—

"(1A) The police officer making the arrest shall furnish to the Magistrate, the facts, circumstances and reasons for the arrest and it shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of this sub-section have been complied with in respect of the arrested person and shall record his satisfaction in writing as to the compliance of this sub-section; and in case the Magistrate is not satisfied that the requirements of this sub-section have been complied with, the Magistrate may release the arrested person on furnishing bond with or without sureties:

Provided further that non-compliance of the provisions of this sub-section shall expose the police officer or judicial officer, as the case may be, to the risk of disciplinary proceedings. The High Court may amend the rules in this regard.".

4. ***Amendment of section 41B.***- In section 41B of the Code of Criminal Procedure, after clause (c), the following clause shall be inserted, namely:—

"(d) Where a police officer arrests without warrant, any person accused of a non-bailable offence, he shall inform the person arrested orally as well as in writing that he is legally entitled to access free legal aid, apply for release on bail, and the procedure to be followed thereon, as far as possible in the language such accused person understands.".

5. ***Substitution of new section for section 58.***- For section 58 of the Code of Criminal Procedure, the following section shall be substituted, namely:-

"58. *Police to report apprehensions.*- The officers in charge of police station shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant along with reasons for making such arrest in accordance with section 41 (1) (b), within the limits of his station, even if such persons have been admitted to bail.".

6. *Amendments of section 59.*- In section 59 of the Code of Criminal Procedure, for the words "his own bond, or on bail" the word "bail" shall be substituted.

7. *Amendment of section 81.*-In section 81 of the Code of Criminal Procedure, in sub-section (1), in the first proviso, for the word "bond", the words "bail or security" shall be substituted.

8. *Substitution of new section for section 88.*- For section 88 of the Code of Criminal Procedure, the following section shall be substituted, namely:-

"**88. Power to take bond for appearance.-** When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue summons or warrant, is present in the Court, such officer may require such person for his appearance in the Court, or any other Court to which the case may be transferred for trial, and for this purpose may require the person to furnish security for such appearance:

Provided that if the person furnishes non-monetary security mentioning therein members of his family, if any, their age(s) and address(es) with particulars of Aadhar Card or PAN Card, or any other document recognised by law, the Court may, on being satisfied, dispense with filing of sureties till the need arises:

Provided further that the method of release contained in this sub-section shall not be applicable to a person who has been previously convicted of cognizable and non-bailable offence.".

9. *Amendment of section 167.*- In section 167 of the Code of Criminal Procedure, in sub-section (2),—

(i) for the words "for a term not exceeding fifteen days in the whole", the words "for a term not exceeding fifteen days in the whole excluding the period for which the person accused of an offence is not available for investigation due to hospitalization or otherwise" shall be substituted;

(ii) in proviso, in Explanation II, for the words “clause” the words “paragraph” shall be substituted;

(iii) the following proviso shall be inserted, namely:—

> “Provided further that the Magistrate on receiving an application and after giving due notice to the Prosecutor shall re-consider the terms of bail, if the person accused of an offence is not able to furnish security within seven days from the date of passing of the order, modify the terms as he deems fit.”;

(iv) in the third proviso, for the word “further”, the word “also” shall be substituted.

10. ***Amendment of section 170.-*** In section 170 of the Code of Criminal Procedure,-

(i) in sub-section (2), for the words “takes security” and “to execute a bond”, the words “admits him to bail” and “to provide security” shall respectively be substituted;

(ii) in sub-section (3), for the word “bond” the word “security” shall be substituted;

(iii) in sub-section (4), for the words “The officer in whose presence the bond is executed” and “who executed”, the words “The officer to whom the security is furnished” and “who furnished” shall respectively be substituted.

11. ***Amendment of section 171.-*** In section 171 of the Code of Criminal Procedure,-

- for the words, “other than his own bond”, the words, “which is excessive” shall be substituted;

(ii) in the proviso, for the words, “to execute a bond”, “furnish security”; and “executes such bond”, the words “to furnish security” and “furnishes such security” shall respectively be substituted.

12. ***Amendment of section 187.-*** In section 187 of the Code of Criminal Procedure, in sub-section (1), for the words, “take a bond with or without sureties for his appearance”, the words, “admit him to bail on the condition that he appear” shall be substituted.

13. ***Amendment of section 262.***- In section 262 of the Code of Criminal Procedure, in sub-section (2), after the word "Chapter", the words "except for the offence under section 229A of the Indian Penal Code" shall be inserted.

14. ***Amendment of section 325.***- In section 325 of the Code of Criminal Procedure, in sub-section (1), for the words "execute a bond", the words "furnish security" shall be substituted.

15. ***Amendment of section 360.***- In section 360 of the Code of Criminal Procedure, in sub-section (1), for the words "on his entering into a bond with or without sureties", the words "furnishing security" shall be substituted.

16. ***Amendment of section 424.***- In section 424 of the Code of Criminal Procedure, in sub-section (1), in paragraph (b), for the words "the execution by the offender of a bond, with or without sureties", the words "furnishing of security" shall be substituted.

17. ***Amendment of section 436.***- In section 436 of the Code of Criminal Procedure, in sub-section (1), —

(i) the "Explanation" shall be numbered as "Explanation I" thereof;

(ii) after the second proviso, the following Explanation shall be inserted, namely:-

"Explanation II: The amount for bail shall be fixed by the Court bearing in mind the financial condition of the person accused of an offence, nature of offense and the safety of victim or any other person".

18. ***Substitution of new section for section 436A.***- For section 436A of the Code of Criminal Procedure, the following section shall be substituted, namely:-

436A. Maximum period for which an under-trial prisoner can be detained.-

"(1) Where a person has, during the period of investigation, inquiry or trial under this Code for which the punishment specified is upto seven years, undergone detention for a period extending up to one-third of the maximum period of punishment specified for that offence under that law; he shall be released by the Court on his personal bond with or without sureties;

(2) Where a person has, during the period of investigation, inquiry or trial under this Code for which the punishment specified is more than seven years (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 punishment specified for that offence under that law; he shall be released by the Court on his personal bond with or without sureties:

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 him on bail.

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.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the person accused of an offence shall be excluded.

(3) The Secretary of District Legal Services Authority designated under sub-section (3) of section 9 of the Legal Services Authority Act, 1987 (Act No. 39 of 1987) shall be responsible for the compliance of this section.".

19. Amendment of section 437.— In section 437 of the Code of Criminal Procedure, —

(i) in sub-section (1), clause (ii),—

(I) for the words, "but not less than" the words "but less than" shall be substituted;

(II) after the fourth proviso, the following proviso shall be inserted, namely:—

"Provided that in cases of economic offences the court shall give due regard to the amount alleged to have been involved and the number of persons cheated.".

(ii) after sub-section (7), the following sub-section shall be inserted namely:—

"(8)The bail application shall be disposed of normally within one week."

20. ***Substitution of new section for section 437A.***- For section 437A of the Code of Criminal Procedure, the following section shall be substituted, namely:-

"**437A. Personal bond to require accused person to appear before next appellate Court.-**

(1) Where the person accused of an offence is acquitted by the trial Court or the appellate Court as the case may be, the person so acquitted shall execute a personal bond for appearance before the higher Court, if so required, which shall remain in force for a period of one hundred and eighty days from the date of the judgment.
(2) If such person fails to appear, the personal bond stand forfeited and the procedure under section 446 shall apply.".

21. ***Amendment of section 438.***- In section 438 of the Code of Criminal Procedure, —

(i) after sub-section (2), the following sub-section shall be inserted namely:-

"(2A) Any order made by the High Court or the Court of Sessions under this section shall be for a limited period of time as the Court may deem fit, or until the charge-sheet is filed, whichever is earlier.";

(ii) after sub-section (3), the following sub-section shall be inserted, namely:-

"(4) On the date indicated in the interim order under sub-section (2), the court shall hear the Public Prosecutor and the complainant and after due consideration of their contentions, it may either confirm, modify or cancel the interim order made under sub-section (1).".

22. ***Insertion of a new section 439A.***- After section 439 of the Code of Criminal Procedure, the following section shall be inserted, namely:-

"439A. Bail Order

(1) Whenever bail is denied, the court shall, briefly record reasons for such refusal and where conditional bail is granted by the court, the conditions imposed shall be reasonable.

(2) When bail is granted to a person who is in custody, a copy of the bail order shall be transmitted to the jail, with directions that the copy be delivered to such person."

23. ***Substitution of new section for section 440.***- In section 440 of the Code of Criminal Procedure, after sub-section (2) the following sub-section shall be inserted, namely:-

"(3) Any person admitted to bail for a non-bailable offence, who for the reasons of indigence is unable to furnish security as directed by the Court for thirty days from the date of the order, may move the Court for reduction of the security amount and the Court after giving sufficient notice to the Prosecutor may consider the application.".

24. ***Substitution of new section for section 441.***- In section 441 of the Code of Criminal Procedure, after sub-section (4) the following sub-sections shall be inserted, namely:-

"(5) If such person is released on bail with non-monetary security on the basis of any document recognized by law, the person shall deposit such security with the officer or Court.

(6) The Court may accept surety of a person not being resident of the area over which the Court has territorial jurisdiction, subject to verification of the surety by the investigating officer or any officer authorized by the officer-in-charge of the police station.".

25. ***Substitution of new section for section 443.***- In section 443 of the Code of Criminal Procedure, for the word "sureties", at both the places, the word "security" shall be substituted.

26. ***Amendment of section 444.***- In section 444 of the Code of Criminal Procedure, in sub-section (3), after the words, "sufficient sureties", the words "or provide other security" shall be inserted.

27. ***Amendment of section 446.***- In section 446 of the Code of Criminal Procedure,-

(i) in sub-section (1), —

(a) after the words, "production of property", and "been transferred" the words, "or for compliance with any other

condition" and "that the person has violated the bond or" shall respectively be inserted;

(b) for the Explanation, the following Explanation shall be substituted, namely:-

"Explanation.—A condition to appear, or produce property, or comply with any other condition before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, or compliance with any other condition before any Court to which the case may subsequently be transferred.";

(ii) in sub-section (5), for the word, "bond" the word, "security" shall be substituted.

28. ***Substitution of new section for section 447.-*** For section 447 of the Code of Criminal Procedure, the following section shall be substituted, namely:-

"447. Procedure in case of insolvency or death of surety or when a bond is forefeited.—

When any surety to a bond or security under this Code becomes insolvent or dies, or when any bond or security is forfeited under provisions of section 446, the Court by whose order such bond or security was taken, or a Magistrate of the first class may order the person from whom such bond or security was demanded to furnish fresh security in accordance with the directions of the original order, and if such bond or security is not furnished, the Court of Magistrate may proceed as if there had been a default in complying with such original order."

29. ***Substitution of new section for section 448.-*** For section 448 of the Code of Criminal Procedure, the following section shall be substituted, namely:-

"**448. Bond required from minor.-**

When the person required by any Court, or officer to furnish a security is a minor, such Court or officer may accept, in lieu thereof, a security furnished by a surety or sureties only."

30. ***Amendment of Second Schedule.-*** In Second Schedule to the Code of Criminal Procedure, —

(i) in Form No. 45, the reference of "section 437A" shall be omitted;

(ii) after Form No. 45, the following Form shall be inserted, namely:—

FORM NO. 45A

[*See* section *437A*]

I .....[name], of .....[place] having been acquitted in case no. ..... / appeal no. ..... by the ..... Court, hereby undertake to appear before the appellate Court, as and when I am required to appear in the Court.

This bond shall remain in force for a period of one hundred and eighty days from the date of judgment.

Dated, this.....day of .....20....

(Signature)

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Annexure – B

Relevant Rules of the Delhi High Court

Volume III Chapter 11 Part B

3. **Non-completion of Police investigation does not justify detention by Police**—

The non-completion of the enquiry or trial justifies the latter, but the former requires something more, as it is expressly provided by Section 167 that the non-completion of the investigation shall not, in the absence of a special order of a Magistrate be deemed to be a sufficient case for the detention of an accused person by the Police. Magistrates should ensure that whenever a person arrested and detained in custody is produced before them by the police for a remand, the police places before them copies of the first information report and the Zimnis and other necessary papers as required by sub-section (1) of Section 167. The Magistrate shall sign and date every page of the case diaries or copies thereof in token of his having seen them.

4. **Remand to be granted in cases of real necessity**—Ordinarily when an investigation is incomplete the proper course is for the accused person to be sent up promptly with such evidence as has been obtained and for the trial to be commenced at once by the Magistrate and proceeded with, as far as possible and then adjourned for further evidence. In the opinion of the High Court a remand to Police custody ought only to be granted in cases of real necessity and when it is shown in the application that there is good reason to believe that the accused can point out properly or otherwise assist the Police in elucidating the case.

5. **Magistrate should discourage tendency of Police to take remand to extort confession**— The Police are too often desirous of retaining the accused in their custody for the longer period than twenty-four hours merely in the hope of extracting some admission of guilt from him. This is contrary to Section 163 and the following section of the Code of Criminal Procedure, and to the spirit of the Code generally; and Magistrates must be careful not to facilitate this object by too great a readiness in granting remands.

6. **Remand cannot be granted for more than 15 days. Procedure when accused is brought before a Magistrate to obtain remand**—It should be further remembered that remands to Police custody cannot be granted under the Code of Criminal Procedure, for a longer period than 15 days altogether, and cannot be granted at all by a Magistrate of the third class,

or by a Magistrate of the second class not specially empowered by the State Government. When an accused is brought before a Magistrate in accordance with Section 167, sub-section (1), Code of Criminal Procedure, the Magistrate must adopt one of the following courses:

(1) If he has jurisdiction to try the case or commit it for trial, either

(a) Discharge the accused at once, on the ground that there is no cause shown for further detention, or
(b) Remand him to Police custody (if empowered to do so) or to magisterial custody as he may think fit, for a term not exceeding 15 days, which term, if less than 15 days, may subsequently be extended up to the limit of 15 days in all, or
(c) Proceed at once to try the accused himself, or hold an inquiry with a view to committing him for trial, or
(d) If for any reason it seems necessary, forward the accused at once to the District or Sub-Divisional Magistrate to whom he is subordinate, or
(e) If himself a District or Sub-Divisional Magistrate, send the accused to a competent subordinate Magistrate for trial of commitment.

(2) If he has not jurisdiction to try the accused or commit him for trial, he must either—

(a) If he thinks there is no ground for further detention, at once send the accused to a Magistrate having jurisdiction, with a view to his trial or discharge, or
(b) If he thinks there is ground for further detention, remand him to Police custody (if empowered to do so) or to magisterial custody as he may think fit for a term not exceeding 15 days, which term, if less than 15 days, may subsequently be extended, up to the limit of 15 days in all.

Note—By Punjab Government Notification No. 11984, dated 16th April, 1924, all stipendiary Magistrates of the 2nd class have been invested with power to authorise the detention of accused persons in the custody of the Police under Section 167 (2) of the Code of Criminal Procedure as amended by Act XVIII of 1923.

7. **Accused must be produced before the Magistrate who should satisfy himself about necessity for remand**—Before making an order of remand to Police custody under Section 167 of the Code of Criminal Procedure the Magistrate should satisfy himself that—

(1) There are grounds for believing that the accusation against the person sent up by the Police is well founded;
(2) There are good and sufficient reasons for remanding the accused to Police custody instead of detaining him in magisterial custody.

In order to form an opinion as to the necessity or otherwise of the remand applied for by the Police, the Magistrate should examine the copies of the diaries submitted under Section 167 and ascertain what previous orders (if any), have been made in the case, and the longer the accused person has been in custody the stronger should be the grounds required for a further remand to police custody.

The accused person must always be produced before the Magistrate when a remand is asked for.

8. **Principles applying remand cases**—The following principles are laid down for the guidance of Magistrates in the matter of granting remands and District Magistrates (or in the districts in which the experiment of separation of the Executive from the Judiciary is being tried the Additional District Magistrates) are required to see that they are carefully applied :

(i) Under no circumstances should an accused person be remanded to Police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the inquiry. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.
(ii) When an accused person is remanded to Police custody the period of the remand should be as short as possible.
(iii) In all ordinary cases in which time is required by the Police to complete the enquiry the accused person should be detained in magisterial custody.
(iv) Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial custody.
(v) An accused person who has made a confession before a Magistrate should be sent to the Judicial lock-up and not made over to the Police after the confession has been recorded. If the Police subsequently require the accused person for the investigation, a written application should be made giving reasons in detail why he is required and an order obtained from the Magistrate for his delivery to them for the specific purpose named in the application. If an accused person, who has been produced for the purpose of making a confession has declined to make a confession or has made a statement which is unsatisfactory from the point of the prosecution, he should be remanded to Police custody.

10. **Procedure when a remand for more than 15 days is required for completion of the case**—If the limit of 15 days has elapsed, and there is

still need for further investigation by the Police, the procedure to be adopted is that laid down in Section 344, Criminal Procedure Code. The case is brought on to the Magistrate's file and the accused, if detention is necessary, will remain in magisterial custody. The case may be postponed or adjourned from time to time for periods of not more than 15 days each, and as each adjournment expires the accused must be produced before the Magistrate, and the order of adjournment must show good reasons for making the order.

Volume III Chapter 10

1. **Principles governing grant of bail**—It must be understood that for every bailable offence bail is a right not a favour. In demanding bail from an accused person, Magistrates should bear in mind the social status of the accused and fix the amount of bail accordingly, care being taken that the amount so fixed is not excessive. The amount of bail and the offence charged, with the section under which it is punishable, should always be stated on the face of an order directing the accused to be detained in the lock-up in default of his furnishing bail.

Bail may be tendered and must be accepted at any time before conviction. Bail may also be tendered and accepted even after conviction in accordance with the provisions of sub-section (2-A) of Section 426 of the Code of Criminal Procedure, [See Section 389(3) of new Code], when a person other than a person convicted of a non-bailable offence satisfies the Court that he intends to file an appeal.

2. **Recognizance**—When any person other than a person accused of a non-bailable offence is brought before a Criminal Court, the Court may, if it thinks fit, instead of taking bail, discharge him on his executing a bond without sureties for his appearance (Section 496 Criminal Procedure Code). [Section 436(1) of new Code].

3. **Bail in non-bailable cases—**Even in the case of non-bailable offence there are circumstances under which the accused may be admitted to bail. These are described in Section 497 of the Code [Section 437 of new Code]. Sub-section (3-A) has been inserted by the Amendment Act No. 26 of 1955 and provides that if the trial has not been concluded within sixty days of the first date fixed for evidence in the case and the accused person has been in custody during the whole of the said period, he shall be released on bail, unless for reasons to be recorded in writing, the Magistrate directs otherwise.

4**. Cash or Government promissory notes may be accepted in lieu of bail**—Under Section 513 of the Code of Criminal Procedure [See Section

445 of new Code], a deposit of cash or Government promissory notes may be made in lieu of bail, except in the case of a bond for good behaviour.

5. **Bail to be granted promptly**—It is a hardship to detain parties under trial in prison an hour longer than the law requires. They are prejudiced in their means of defence; if respectable and innocent, they are exposed to the indignity of imprisonment for which no subsequent order of discharge or acquittal can atone.

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7. **Bail applications on holidays**—Sessions Judges should allow urgent applications for bail to be presented to them at their residence on holidays at a fixed hour, when such applications cannot be presented in Court on a working day owing to unavoidable circumstances.

.....

9. **Inquiry about sufficiency of bonds**—Considerable diversity of practice exists in carrying out the provisions of the law in regard to the taking of bonds from accused persons and their sureties, and the result of the diversity is not only to case Police officers to be employed in needless inquiries, but also to keep the accused person in custody pending the result of the inquiry into the sufficiency or otherwise of the bail offered. Sub-section (3) of Section 499 [Section 499 of new Code] now enables the Court to accept affidavits for the purpose of determining whether the sureties are sufficient or not. At the same time, however, it is the duty of Magistrates to satisfy themselves that the sureties are, in point of substance, persons of whom it may reasonably be presumed that they can, if necessary, satisfy the terms of the bail-bond.

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15. **Bail applications to be treated as urgent**—All applications for bail in criminal cases including appeals should be treated as urgent.

16. It is irregular for Criminal Courts to forward original bail applications presented to the Court and other documents connected therewith to the Prosecuting Agency for report. If and when it is considered desirable to issue notice to the Prosecuting Agency, a definite date should be fixed for the hearing of the bail application, so that all concerned may have due notice.

Annexure - C

Consultations on Bail Project

The Law Commission of India for the study on subject of Bail consulted various stakeholders. It had the opportunity to consult experienced Judicial Officers, Police officers, Prosecution etc.

1. Consultation with Judicial Officers

A consultation was held on 21 January 2017, with judicial officers representing various states across the country on bail related matters at the Indian Law Institute, New Delhi. In the course of consultation, discussions were carried out on identification of relevant criteria for considering bail applications, questions of the appropriateness of particular offences being bailable or non-bailable and the treatment of foreigners applying for bail, apart from a number of points on specific legal provisions in the Cr.P.C. At the event, Hon'ble Mr. Justice A.M. Khanwilkar and Hon'ble Mr. Justice U.U. Lalit of the Supreme Court provided guidance on the subject matter. The discussion was moderated by Hon'ble Justice Ms. Mukta Gupta of the Delhi High Court. The Judges started the discussion by stating that 'bail' is an instrument that must be used to further the cause of justice and protect soceital interests and not sub serve the same. The Judges also discussed the abuse of the anticipatory bail law and its recent precedents. The Panel also pointed out that the provision limiting the custody granted to the investigative authorities for completing the investigation to the first fifteen days runs afoul to the purposes of the justice. Growing number of economic crimes and the ineffective bail provisions to deal with the same was also discussed.

It was identified that Sections 379 and 498A IPC were identified as offences that should be shifted from the category of non-bailable to bailable for offences up to a certain value in organised crime. Sections 279, 324, 325, 363, 374, 417, 419, 435, 436, 489C, 490 and 506 IPC were identified as offences that should be shifted from the bailable category to the non-bailable one. In Section 304A IPC it was suggested that differentiation should be made for bail in matters related to corporate and medical negligence. Differentiation also needs to be made between the two classes of punishment in Section 312 IPC, both of which have been made bailable. All connected offences like Sections 313, 314 and 315 IPC related to miscarriage are non-bailable. The differentiation should be made along the lines of Sections 312 and 316 IPC.

At the discussion a questionnaire was circulated in which a total of 40 responses were collected. Answers pointed out that there is a need for provisions for compensation where there has been wrongful incarceration. A number of the responses to the specific questions were also elaborated

upon with remarks regarding the appropriateness of the investigation period of 60/90 days, proposed power of granting custody beyond this period and a power to cancel bail etc.

2. Consultation with Police Officers

The Law Commission had the opportunity to consult experienced police officers in a round table meeting convened at the **Bureau of Police Research & Development** Headquarters at New Delhi, on 02 November 2016. Various notes were also sent by the agencies and departments to the Commission regarding the problems faced by the police in bail-related matters. The suggestions made are as follows:

i. There should be a mandatory verification of the nationality of the accused at the time of granting bail so as to ensure that courts ascertain his/her credentials through the investigating agency.
ii. Regarding Section 309 of the Cr.P.C., which deals with the power of the court to postpone or adjourn proceedings, it has been suggested that a proviso be added to the effect that bail applications under the Unlawful Activities (Prevention) Act, 1967 (UAP Act) be necessarily heard on a day to day basis and no adjournment be granted by the court. This proviso would go beyond the Supreme Court's present ruling that proceedings are ordinarily to be on a day to day basis and reasons for adjournment are to be recorded in writing.
iii. In view of the decision of the Guwahati High Court, an explanation should be added to Section 43D (5) of the UAP Act stating that no bail is to be granted.
iv. Under the Narcotic Drugs and Psychotropic Substances Act, 1985, a rule should be made that no unconditional bails be granted in cases involving commercial quantities.
v. Section 437 (1) (i) of the CrPC states that if there appear to be reasonable grounds to believe that a person is guilty of an offence punishable with death or life imprisonment, such person shall not be released. Suggestion has been made that the rule should be amended to make it applicable for offences punishable with imprisonment of 7 years or more.
vi. It was similarly suggested that Section 437 Cr.P.C. should be amended to ensure that prosecutors be mandatorily heard for opposing bail applications for offences punishable with imprisonment of three years or more.
vii. Another separate recommendation was made to amend Section 437 (1) (ii) Cr.P.C., so that bail is denied not just to people convicted but also people merely charge-sheeted in an offence punishable with death, life imprisonment or imprisonment for 7 years or more.

viii. Under Section 167 Cr.P.C., the mandatory time limit for the filing of police report should be increased from 60/90 days to 120/180 days.

A suggestion forwarded is that district level committees be set up in prosecution wing with a mandate to look into the circumstances under which bail has been granted and the reasons recorded. So as to ensure uniformity in the grant of bail, the findings of these district level committees should be circulated regularly and its recommendations should be implemented.

3. Summary of suggestions from the Directorate of Police (Prosecution)

The most Directors of Prosecution believe that legal aid should be provided to those who cannot afford to engage an Advocate for the bail proceedings and awareness should be created about the same.

Summary of suggestions made by the different officers is listed below:

1. State of Assam

a. Office of Public Prosecutor, Dibrugarh, suggested that the presiding officer of subordinate courts should be aware of section 440 (i) CrPC and fix the amount of bail only after considering the circumstances of the case.
b. Office of the Public Prosecutor, Karbi Anglong, Diphu, suggested that the bail application should be taken up as early as possible by the Presiding officer, and where the accused is unable to provide sureties or bonds should be subjected to verification regarding the ordinary place of residence.
c. Office of the Public Prosecutor, Morigaon, suggested that legal aid should be provided to the poor to file bail application and awareness should be created about the same.
d. Office of the Public Prosecutor, Nagaon stated that in the present situation, the public prosecutors do not find the time to go through the case diaries before the hearing of bail application and hence the Court should call the case diaries at least two days before the hearing of the bail application. It is also suggested that a separate court may be formed to deal with bail matters under sections 437, 438 and 439 Cr.P.C.
f. Office of Public Prosecutor, Tinsukia, suggested that the Investigating Officers should brief the Public Prosecutor properly.
g. Office of the Public Prosecutor, Sonitpur, suggested that the underprivileged should be given legal aid and awareness should be created about the rights to apply for bail.

h. Office of Additional Public Prosecutor, Udalguri, suggested that the Investigating Officer must send the Case Diary in time and take evidence in a responsible way as prescribed in the Cr.P.C.
i. Office of Additional Public Prosecutor, Sivsagar, suggested that the Investigating Officer must hand over a copy of the Prosecution Report along with the Case Diary prior to the fixing of the date for the hearing for bail.
j. Office of Public Prosecutor, Mangaldai, suggested that the District Legal Services Authority should render some social beneficiary duties like the duties under section 357(A) Cr.P.C.

2. **Director of Prosecution, Jaipur, Rajasthan,** suggested that the Investigation officer be present at the time of the hearing for the bail application as the case diary is often found with incomplete records of the investigation.

3. **Director Prosecution & Litigation and Additional Secretary to Government of Punjab** made a specific suggestion with regard to the offences relating to cheating/misappropriation and at the time of granting anticipatory bail, the source of money should be disclosed.

4. **Director of Public Prosecutions, Bhubneshwar, Odisha,** suggested that for petty offences, accused may be released on a bond with proper ID and address proof and that there should be a permanent mechanism to represent the accused persons for bail.

5. **Director, Prosecution, Dehradun, Uttarakhand,** suggested that the Investigating Officer should give prompt information to the Prosecution so that there is no loss of evidence during the bearing of bail application.

6. **Director of Prosecution, Shimla, Himachal Pradesh** made a proposition to the effect that risk of financial loss is not enough to prevent an accused from fleeing and hence the whole concept of grant of bail should be revisited.

7. **Law Department, Government of Puducherry,** suggested that the Court while deciding the grant of bail should consider the background of the accused and the position of the victim.

8. **Directorate of Prosecution, U.T. Administration of Daman & Diu** suggested that when the offence is triable by Judicial Magistrate then grant of bail should be encouraged.

9. **Director of Prosecution, Chennai, Tamil Nadu,** suggested that a statutory time limit be fixed for the issuance of notice and disposal of the bail application.

10. **Directorate of Prosecution, Mumbai, State of Maharashtra,** suggested that for anticipatory bail, a notice to the Public Prosecutor must be given, even though section 438 Cr.P.C does not provide for it. It was suggested that there should be a special online system to register the information of sureties, as it will prevent people from being sureties in multiple cases.

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