Experiences of Undertrial Prisoners Released on Bail:

Accessing Bail and Post-Bail Situation

PRAYAS – A Field Action Project 2023 Tata Institute of Social Sciences (TISS)

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Prayas

A Field Action Project of the Centre for Criminology and Justice

School of Social Work

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(Transcribing and translating interviews from Marathi to English)

Abbreviations

ACLU	American Civil Liberties Union
ADGP	Additional Director General of Police
CJS	Criminal Justice System
COMPAS	Correctional Offender Management Profiling for Alternative Sanctions
CPAT-R	Colorado Pre-trial Assessment Tool
Cr.P.C.	Code of Criminal Procedure
CST	Community Supervision Tool
DLSA	District Legal Service Authority
FASTER	Fast and Secured Transmission of Electronic Records
FTA	Failure To Appear
IG	Inspector General (of Police)
IPC	Indian Penal Code
JMFC	Judicial Magistrate First Class
LADC	Legal Aid Defence Counsel
GPS	Global Positioning System
NALSA	National Legal Service Authority
NCRB	National Crime Records Bureau
NDPS	Narcotic-Drugs and Psychotropic Substances
NGO	Non-Governmental Organisation
PR Bond	Personal Recognizance Bond
POSCO Act	Protection of Children from Sexual Offences Act
PCA	Police Complaints Authority
PRRS-II	Pretrial Release Risk Scale
SLSA	State Legal Service Authority
TLSC	Taluka Legal Service Committee
NCA	New Criminal Activity
NVCA	New Violent Criminal Activity
ORAS-PAT	Ohio Risk Assessment Tool
PARS	Pre-trial Assessment and Supervision
PSA Test	Public Safety Assessment Test
TISS	Tata Institute of Social Sciences
UAPA	Unlawful Activities (Prevention) Act
UTP	Undertrial Prisoner
UTRC	Under Trial Review Committee
VPRAI	Virginia Pre-trial Risk Assessment Instrument

Chapter 1: Background of the Study

About Prayas

Prayas is a pioneering social work demonstration project of the Centre for Criminology and Justice, School of Social Work, Tata Institute of Social Sciences, established as a Field Action Project in 1990. Prayas' focus is on service delivery, networking, training, research and documentation, and policy change with respect to the custodial/institutional rights and rehabilitation of socio-economically vulnerable individuals and groups who come into direct contact with the Criminal Justice System (CJS) in India. To this end, permission to visit criminal justice or custodial institutions and interact with persons detained or confined in police stations, prisons and government residential institutions in Maharashtra and Gujarat has been obtained from the Departments of Prisons and Women and Child Development.

Vision

Assert and include into the broader welfare agenda, the rights of persons and groups affected by the criminal justice system towards their enhanced access to information, education, training, health, opportunities for livelihood and leading life in a safe and healthy environment; thereby channelizing significant human resource to contribute to a developing economy.

Mission

To enhance knowledge and influence policy and process of criminal justice and allied systems in India, with specific reference to custodial and institutionalised individuals and groups who are socio-economically vulnerable, are excluded from mainstream public facilities and welfare, and those who are at greater risk of being criminalised, or exposed to trafficking for sexual exploitation.

Rationale

Persons are referred to penal or protective institutions as a consequence of detention or arrest for alleged commission or after conviction of an offence, unstable shelter and/or support systems, neglect, destitution, mental disturbance, or vulnerability to mental, physical or sexual danger and exploitation. The status could be of an (alleged) offender or one in distress requiring support.

Prayas' Work

Prayas attempts to facilitate legal and rehabilitation justice within the CJS, by helping people processed by the system to reconstruct their lives. This is done by distancing them from exploitation, crime and other vulnerabilities such as addictions, homelessness, and destitution. Thus, focus of Prayas' services is on provision of a range of socio-legal services, such as: legal guidance and aid, legal awareness, individual and family counselling, family support, emergency assistance, medical relief, sponsorship of education of children, vocational training, information about government schemes and services, guidance and assistance to obtain citizenship documents, and networking with civil society organisations to strengthen the social re-entry of criminal justice clients. To secure the social reintegration of its clients, Prayas initiated a placement programme in 2003 which is modelled on an apprenticeship programme in the non-governmental organisation (NGO) sector. Additionally, Prayas offers emergency support, temporary and stable shelter, vocational training and education, and support through mentoring and monitoring processes to its constituencies, upon their release from custodial institutions.

Issues in relation with socio-legal services and rehabilitation of custodial and institutionalised populations are represented in various fora, towards facilitating systemic change. Research studies and field explorations by Prayas contribute to knowledge creation in the field of social work in criminal justice, rehabilitation processes, and for advocating systemic change. Prayas' research has covered subjects of legal aid, implementation of correctional laws, children separated from imprisoned mothers, rescue and rehabilitation of women engaged in prostitution, socio-economic needs of women working in dance bars, and women discharged from institutions.

About the Study

This qualitative study focusses on the conditions of undertrial prisoners, specifically referring to the form, procedure and conditions related to bail. Prayas has used an empirical approach to this study by conducting a series of interviews and analysing this primary data in the context of recent judicial developments.

The Philosophy behind Bail

There are various compelling reasons, which call for avoiding detention in custody pending trial. For instance, presumption of innocence in favour of the accused, higher incidence of

guilty pleas, adverse effects of detention on individual's life, boosting morale of the accused, overcrowding of the prisons . Moreover, pre-trial detention makes the chances of acquittal bleak, whereas chances of imprisonment are enhanced.[1] The Hon'ble Supreme Court further stated:

> *"The society has a vital interest in grant or refusal of bail because every criminal offence is the offence against the State. The order granting or refusing bail must reflect a perfect balance between the conflicting interests, namely, the sanctity of individual liberty and the interest of the society."*[2]

The Word of Law as per the Cr.P.C.

Chapter XXXIII of Code of Criminal Procedure (Cr.P.C.) consists of Sections 436 to 450. Sections 436, 437 and 439 provide for granting bail to accused arrested persons as under trial prisoners. For the purposes of bail, offences are classified into two categories: (i) bailable, (ii) non-bailable. How a person accused of a crime can avail the benefits viz. provisions of bail is explained as under:

When a person is accused of committing a bailable offence; the implications are that a person so accused has to be released forthwith in keeping with the provisions of section 436 of the Cr.P.C. Both the officer in-charge of the concerned police station arresting the accused person or the court before which he or she is produced have the power to either discharge the accused person on the execution of sureties or to release him or her on the taking of bail for the purpose of securing his or her presence for further proceedings. Bail is a matter of right when an accused person is charged with a bailable offence hence the merits of case that is the nature of evidence against the abused or gravity of the offence and other allied factors are not looked into prior to granting of bail.

When a person is accused of committing a non bailable offence; the implications are that such a person has to be produced before a court for the purpose of seeking bail. If the case is triable by a Judicial Magistrate and not by a Sessions Court then an application is moved before the Judicial Magistrate seeking his or her bail in the manner as is provided under Section 437 of the Cr.P.C. The merits of the case are looked into by the Magistrate prior the exercising the power of granting of bail. If the accused person is found to be entitled to bail;

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[1] *Rasiklal v.. Kishore*, AIR (2009) SCC (Criminal) 338.
[2] *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others,* CRIMINAL APPEAL NO. 2271 2010. (Arising out of SLP (Crl.) No.7615 of 2009)

then the Magistrate usually imposes conditions upon the accused person to secure his presence for the purpose of trial and he or she is released accordingly. However, if the accused person is a child, a woman or is found to be infirm then the Magistrate has the power to release such an accused person on bail notwithstanding the fact that the case is not triable by a Sessions Court.

If the case is triable by a Sessions Court or if the Judicial Magistrate fails to grant bail to the accused then one has to approach the Sessions Court or the High Court seeking the grant of the same under Section 439 of Cr.P.C. The merits of the case are looked into and the accused persons may be released by the court concerned as is discussed above. The High Court under usual circumstances exercises its appellate jurisdiction over orders passed by the Judicial Magistrate or Sessions Court or both as the case may be.

One can approach the Supreme Court of India by filing a special leave petition under Article 136 of The Constitution of India if an accused person is aggrieved by the orders of bail passed by the concerned High Court.

In *Niranjan Singh v. Prabhakar Rajaram Kharote and others,*[3] Justice VR Krishna Iyer stated: *"Custody, in the context of Section 439, is physical control or, at the very least, the physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court."* Furthermore, it was noted that no person accused of an offence may apply to the Court for bail under Section 439 unless the person is in custody. By surrendering to the court and submitting to its orders, the accused is declared to be in judicial custody and, as a result, is eligible for bail.

In *Sundeep Kumar Bafna v. the State of Maharashtra,*[4] the Supreme Court held that an accused in custody can approach the Sessions Court or the High Court directly for regular bail under Section 439 even if he has not approached the magistrate in the first instance. In *Kanwar Singh Meena v. the State of Rajasthan and Others*[5], the Court noted that even though Section 439 of the Code gives the Court of Session and the High Court more power in granting and cancelling bail, these courts also follow the same principles, including;

- The gravity of the crime,
- The character, evidence, position and status of the accused,

[3] *Niranjan Singh v. Prabhakar Rajaram Kharote and others* (1980) AIR 785
[4] *Sundeep Kumar Bafna v. the State of Maharashtra* (2014),(16SCC623)
[5] *Kanwar Singh Meena v. the State of Rajasthan and Others* (2013) AIR SC296,

- The likelihood of the accused fleeing from justice,
- The likelihood of tampering with evidence and influencing witnesses, and so on.

The Court also stated that each criminal case presents its own unique factual situation, which influences the court's decision on bail.

Methodology

The objectives of the study were:

a) To understand the issues and problems faced by undertrial prisoners in accessing bail (including the grant of bail and release on bail)

b) To understand the problems relating to sustaining the release on bail in terms of attending court dates, payment of lawyers' fees, relations with the police, etc.

The study followed a qualitative approach, where primary data was collected through multiple in-depth semi-structured interviews with a total of 52 respondents. This included of 37 respondents, out of which two respondents were family of the undertrial prisoners, and remaining 35 respondents were released prisoners. Along with these interviews, data was collected through in-depth semi-structured interviews with 14 of Prayas Legal and Social Work Fellows who had assisted in multiple cases related to bail. For the purposes of this research, the time-frame for selection of respondents was between the period of 2018 and 2021. Since a substantial part of the study was conducted during the testing times of the pandemic, we conducted interviews with the respondents through various modes: face–to-face, telephonic, or online video conferencing methods, based on the convenience and location of the respondents. The respondents were from Mumbai, Thane, Navi Mumbai and Latur; they were housed in prisons in these locations when they were imprisoned. Prayas acknowledges the support of NGOs who helped in releasing some of the undertrial prisoners on cash bail by providing with the cash amount at the request of Prayas. However, names of respondents and such organisations are not mentioned in the report, in accordance with ethical research standards.

The Interview Process

For the released undertrial prisoners, the interview began with rapport-building efforts to make them comfortable to talk about their experiences that led them to this conversation. As per research ethics, respondents were made aware of the purpose and the objectives of the study, and oral informed consent of the respondents was taken prior to the start of each

interview. By doing so, we suggested the respondents that they may share their perspectives and experiences on pertinent areas of their interface with the CJS, and recommend changes therein. Wherever possible, we tried to ensure that the Legal and/or Social Work Fellow would be present to ensure a space safe for dialogue.

To initiate the interview, we asked the respondents about their living situation to gauge their socio-economic status, education status, occupation (both before and after arrest) and the number of children they have (to understand the possible vulnerabilities in their upbringing with an incarcerated parent). Once the respondent felt comfortable with the interview process, the conversation was steered around:

a) Their experiences related to the imprisonment process

b) Their experiences related to the judicial process

c) Further details of bail terms and conditions

Ideally, every undertrial prisoner is aware of the nature of the offence stated in their charge sheet. However, the harsh reality is that the type of offence with the corresponding law, charged section and punishment for the bailable/ non-bailable, cognizable/ non-cognizable offences is largely unknown to the accused person. Therefore, we requested these details from the Legal/ Social Work Fellows.

The undertrial prisoners are expected to be informed that the DLSA lawyer is supposed to provide free services to them, maintain regular contact with the undertrial prisoners and their family, help them with procuring documents and maintain transparency in their communication. However, in reality, this may not be the case and hence we had to be mindful of this reality.

To make the research more comprehensive, we divided the questions into - problems or challenges faced in accessing bail (including post-bail procedures), issues faced in communication with advocates, and the systemic delay from court staff. These questions were divided into chronological phases as follows:

i. Before arrest

ii. Application for bail

iii. Till bail granted phase

iv. Application for provisional bail compliance (provisional bail, surety, cash bail, documents, insolvency, PR bond, etc.)

v. Post granting of bail

vi. Post release from prison

While answering to the best of their capabilities, respondents often revealed the level of knowledge and awareness about the court's direction or conditions to appear before or report to the police regularly. Compliance to these terms is set out by court orders, which should ideally be with the undertrial and their representative.

Post their release, we discussed with the respondents about their expenses, financial condition, current employment status, and earnings. Through this we were able to understand in what way is an undertrial prisoner able to cope with the shortcomings in the employment sector. Prayas attempts to bridge this gap by providing financial or rehabilitative support, as required.

We observed that ending the interviews with an open-ended question led the respondents to suggest and recommend ideas and changes that would be heard by the concerned authorities.

Triangulation of data

To achieve data triangulation[6], we interviewed the Prayas Legal and Social Work Fellows and the DLSA lawyers. We adopted a different approach to understand the issues and problems they faced during the procedure to procure bail and get their clients justice under procedures established by the law. This procedure is often lengthy but their role demands they follow the most effective and efficient method of executing bail conditions and filing all prerequisites. These conditions differ in the type of bail sought in:

i. Bailable and Non-bailable cases
ii. Cognizable and Non-cognizable
iii. Punishment upto 3 years, 3 to 7 years, more than 7 years
iv. Heinous crimes like those of NDPS, POSCO, murder, rape, human trafficking, etc.

[6] *"Triangulation is a research approach that combines numerous data sources, theories or research methodologies to guarantee that a research study's data, analysis, and findings are as thorough and precise as possible"* (for more details, visit https://link.springer.com/chapter/10.1007/978-3-031-19900-4_9)

To deal with these different types of bail conditions, it is important to link the detailed arguments with the different aspects of an undertrial prisoner's case. For instance, their medical history, previous record, documents from their family, a home visit report and other relevant additional documents can be filed if the prison superintendent wants to bring to light certain conditions or the judge exercises their discretionary power towards achieving a just, free and fair trial.

Further, the Legal and Social Work Fellows and the DLSA lawyers illuminated the reasons for the prisoner spending a considerable amount of time incarcerated despite bail being granted. This could be due to systematic delays from court, while communicating with the representative advocate, or due to failure in obtaining accurate and legitimate documents from immediate or extended family.

It is our experience that with adequate funding, support, and a stable legal representation for the prisoner, one can achieve the ideal outcome of release on bail. In this context, we asked the Fellows and lawyers how they network with NGOs to achieve these objectives throughout the various stages, namely:

- Before arrest
- Till bail granted stage
- Bail compliance (provisional bail, surety, cash bail, documents, insolvency, PR bond etc.)
- Post granting of bail
- Post release from prison

Further, the aspect of modification of bail has to be considered. There is a need to standardise the procedure of bail application across jurisdictions as discussed later in this report. The final step is to document the different chronological stages to achieve the end goal of releasing prisoners on bail. Through this study, Prayas' endeavour was to understand the potential bottlenecks to this end and consequently, based on this ground evidence, recommend amendments to the law, in line with the various pronouncements of the higher judiciary.

Chapter 2: Socio-Economic Background of Respondents

The main purpose of this chapter is to present the social and economic background of the respondents, that is undertrial prisoners, in an attempt to ascertain if there is any correlation with regard to their socio-economic background and their likelihood to be charged with a crime (their likelihood to commit an offence or their likelihood to be arrested for the commission of an offence). A person's socio-economic context plays a vital role in the socialisation of a person and in determining how a person may be dealt with when they come in conflict with the CJS.

The chapter covers the respondents' age, education status, employment status, income, number of family members, place of origin, past history/continuing involvement with alcohol and/or drugs, the situation that led to their imprisonment, and so on.

Age

Out of the total of 37 respondents, two respondents were family of the undertrial prisoners and thus out of the remaining 35 respondents who were released prisoners, more than half of the respondents were between the ages of 20 and 40, seven respondents were between the ages of 40 and 60, one respondent was above the age of 60 (exact age was not known). Children in conflict with the law were not a part of this study.

According to the Life Course theory, the chronological age of an individual or family and the developmental milestones achieved by them can be used to outline and/or predict their vulnerability while engaging with the CJS, their risk of committing crimes or engaging with illegal activities, and the type of rehabilitation approach that can be used to reintegrate them to society.[7]

The findings of this study echo the findings present in the 'Crime in India' report released by National Records Crime Bureau (NCRB), where both evidence that a majority of the people arrested and charged with committing crimes are in the age-group of 20-40.[8]

Some of the contributing factors along with age are literacy and education status, employment status, source of income, vocational training, interpersonal relationships such

[7] Tripodi, S.J., Kim, J.S., & Bender, K, 'Is employment associated with reduced recidivism? The complex relationship between employment and crime' (2010) International Journal of offender Therapy and Comparative Criminology, 54 (5), 706-720.
[8] National Crime Records Bureau, *Crime in India* (National Crime Records Bureau; Crime in India 2021) accessed 3 June 2023.

as marriage, and unawareness about various government schemes for the upliftment of its people.

Gender

Out of all the respondents interviewed, 15 of them were women/identify as women, while the rest were men. The responses recorded in this study seem to be higher in comparison to the national average as women constitute less than five percent of the total prisoners in India (approximately 22,918 out of the 5,54,034 - NCRB 2021), while the global average for women prisoners with respect to the actual prison population is seven percent.

It is pertinent to note that while women make up a far lesser percentage of the prison population, the consequences of prison faced by them are far greater. Their nutritional needs are less likely to be met within the prison, they are far more likely to be ostracised by their family members and friends, they face greater challenges in gaining employment, and reintegrating into society post-release.

Family Situation

Families are one of the strongest pillars of socialisation in a person's life. Several studies have noted the significance of family support and cohesion, physical or mental illnesses of family members, poor parental practices, physical abuse and neglect, family conflicts and violence and higher risk of criminality among individuals. Family plays a crucial part in encouraging positive social behaviour and offers a solid foundation that supports an offender's desire to refrain from engaging in illegal or, rather, deviant activity.[9]

Out of all the respondents interviewed, at least a third had experienced some form of family conflict during their childhood or early years of upbringing. Twelve respondents mentioned having experienced at least one of the above issues within their family, and very little information was available regarding their childhood or formative years.

Education Status

Out of the total, 11 of the respondents had passed their 10th standard, nine had passed 12th standard, one had obtained a diploma, and only two had completed their Bachelor's degree. Further, 12 of the respondents had dropped out of school while four were illiterate. Some of the respondents expressed interest in pursuing higher education after they graduate, one

[9] Ministry of Women and Child Development, Government of India, *Women in Prisons India*, (June 2018)

of them had in fact planned to appear for the law entrance exam and graduate with a law degree in order to help people like him who were unable to afford a lawyer. Many researchers have explored associations between education and criminal behaviour. The studies found education can considerably lower criminal activity of a given population.[10]

Employment Status and Income

Out of all the respondents, at least 14 earned Rs. 10,000 per month or less. Rs. 10,000 are the minimum wages for unskilled labour in the state of Maharashtra. At least three of them did not have regular employment, while six were unemployed and dependent on their family or others for survival. Low socio-economic status has been linked to crime, conviction, and recidivism, according to various reports[11]. In this context, research has highlighted poorer social and economic strata, characterised by low income, unemployment, and vocational successes.[12] Thus, these reports concluded that a majority of prisoners belonged to low socio-economic groups, were employed in low-paying jobs, and had less-than-average educational backgrounds.

Dependency on Drugs and Alcohol

The experiences of the respondents showed their immediate family member or a close relative was addicted to alcohol or other substances. This led to stress or (parental or spousal) neglect, which could have led to the alleged offence. Out of the total respondents, seven had close family relatives (father/ husband) who were addicted to alcohol, while one respondent was directly involved in substance abuse which led to the commission of the alleged offence for which the respondent was imprisoned. According to research conducted by the United Nations office on drugs and crime, deviant behaviour attributable to substance abuse, has a direct bearing on accepted social status and crime. Observations in inter-cultural terms have found that what has been found to be criminally deviant behaviour in one culture may even be considered as mainstream in another culture[13]. Hence, it is concluded by the researchers that any rehabilitative mechanism employed in a societal context must account for such socio-cultural norms.

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[10] Hansen, K, 'Education and the crime-age profile' (2003) 43(1) British Journal of Criminology 141

[11] National Crime Records Bureau, 'Crime in India 2021' (National Crime Records Bureau) vol 1; Lochner, L. and Moretti, E. (2001). 'The effect of education on crime: Evidence from prison inmates, arrests, and self-reports', *The American Economic Review*, 94(1). doi:10.3386/w8605.

[12] Fleisher, B. M., 'The effect of income in delinquency' (1966) 13 American Economic Review 56

[13] '*The Social Impact of Drug Abuse'.* This study was originally prepared by UNDCP as a position paper for the World Summit for Social Development (Copenhagen, 6-12 March 1995) 24.

Chaper 3: Arrest: Form, Procedure and Impact

The notion of "*presumed innocent until proven guilty beyond reasonable doubt*" may be diluted in an individual's eyes when they are arrested, contrary to the procedure established by law. Personal liberty is taken away when an individual turns into an accused and is treated like one. On the flip side, the reluctance of the enforcement officers to record counter-cases, and only hear the 'vulnerable' victim without paying heed to the basic storyline of facts is still a rampant problem faced by undertrial prisoners. In *Binoy Jacob v. CBI,* [14] the High Court of Delhi opined that, in a country governed by rule of law the discretion of authority does not mean, whim, fancy or wholly arbitrary exercise of discretion.

The Cr.P.C. protects against arbitrary arrest as a police officer is obligated to disclose the grounds of the offence for the arrest with or without a warrant, a right guaranteed in the *Constitution of India*. Further, it is essential that the arrested person should be presented before the magistrate and have access to an advocate of their choice during interrogation. At the time of arrest, the evidentiary value of confessions is negligible, but not every arrested individual is aware of the protection against self-incrimination. *The Constitution of India* clearly provides safeguards against self-incrimination and illegal detention. Article 20(3) states that "*No person accused of any offence shall be compelled to be a witness against himself*"[15].

Further, judicial check is ensured in, both, *the Cr.P.C.* and *the Constitution of India* by obligating the prosecution agency to produce an accused person and report the concerned magistrate within a period of twenty-four hours. As enshrined in our Directive Principles of State Policy, it is the duty of the State to deliver justice in simple terms so that every person may readily approach the courts to assert their rights. The landmark judgement of the Supreme Court in the matter of *Selvi v State of Karnataka*[16] held that conducting a narcotic test for the purpose of obtaining evidence violated the rights of section against self-incrimination.

[14] *Binoy Jacob v. CBI,* (1993) CriLJ 1293.
[15] The Constitution of India 1949, art 20(3)
[16] *Selvi v. State of Karnataka*, AIR 2010 SC 1974

Mandatory Directions by the Judiciary

The Supreme Court of India under para 13 of the judgement in the case of *Arnesh Kumar v. State of Bihar*[17], pronounced that in order to ensure that police officer does not arrest the accused without a reason and magistrate does not authorise detention arbitrarily, the Court issued the following directions:

- All the State Governments should instruct its police officers not to automatically arrest a person when an offence under section 498-A of *the Indian Penal Code (IPC)* is registered. The necessity of arrest arises when the case falls under the parameter of section 41 of *the Cr.P.C.*
- All police officers shall be provided with the checklist containing specified clauses under Section 41 (1) (b) (ii).
- The police officer shall forward the checklist duly filed and furnished with the reason and material necessitating the arrest while producing the accused before the magistrate for further detention.
- The magistrate while authorising the order of further detention shall rely upon the report furnished by the police officer and only after recording the reason duly furnished on Police report and on the satisfaction, the Magistrate will authorise further detention.
- The decision not to arrest an accused be forwarded to Magistrate within two weeks from the date of institution of the case with a copy of Magistrate which may be extended by the Superintendent of police of the district for the reason to be recorded in writing.
- Notice of Appearance in terms of Section 41-A of *the Cr.P.C.* be served upon the accused within two weeks from the date of institution of case, which may be extended by the Superintendent of Police after recording the reason in writing.
- Failure to comply with the directions mentioned above shall render the police officer liable to be punished for contempt of court before the High Court having jurisdiction.
- Authorising detention by the Judicial Magistrate without recording the reason, the concerned Judicial Magistrate shall be liable for Departmental Proceedings by the High Court.

[17] *Arnesh Kumar v. State of Bihar, (2014)* 8 SCC 273

The landmark judgement of the Supreme Court headed by the bench of Justice Chandramauli Kr. Prasad and Justice Pinaki Chandra Ghose had judiciously brought out the issue of misuse of Section 498-A *of the IPC,* where the court not only granted bail but also gave directions to the state government and police officers on how to deal with arrest when a complaint or FIR is registered under Section 498-A of *the IPC*[18]. Thus, the core issue of criminal jurisprudence and enforcement agencies' power of arrest has been discussed by the Supreme Court in the light of Section 41 of *the Cr.P.C.* The directions issued by the Supreme Court in the ruling reprimanded the casual approach of the authorities in making arrest that was earlier based upon mere allegations or insignificant claims of commission of offence.

The Supreme Court issued a clear direction strengthening the provision of bail and arrest. In the matter of *Satender Kumar Antil v Central Bureau of Investigation*[19]*,* the court held that specific directions are required for the investigating agencies and also for the courts. Accordingly, the court deemed it appropriate to issue the following directions, which may be subject to state amendments:

- The Government of India may consider the introduction of a separate enactment in the nature of a Bail Act, so as to streamline the procedures of granting bail.
- The investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41A of the Code and the directions issued by this Court in the Arnesh Kumar case. Any dereliction on their part has to be brought to the notice of the higher authorities by the court, followed by appropriate action.
- The courts will have to satisfy themselves on the compliance of Section 41 and 41A of the Code. Any non-compliance would entitle the accused for grant of bail.
- All the State Governments and the Union Territories are directed to facilitate standing orders for the procedure to be followed under Section 41 and 41A of the Code while taking note of the order of the High Court of Delhi dated 07.02.2018 in *Writ Petition (C) No. 7608 of 2018* and the standing order issued by the Delhi Police i.e. *Standing Order No. 109 of 2020*, to comply with the mandate of Section 41A of the Code.

[18] *Arnesh Kumar, supra note 17.*
[19] *Satender Kumar Antil v. Central Bureau of Investigation & Anr,* 2023 LiveLaw (SC) 233.

- There need not be any insistence of a bail application while considering the application under Section 88, 170, 204 and 209 of the Code.
- There needs to be a strict compliance of the mandate laid down in the judgement of this court in Siddharth case.
- The State and Central Governments will have to comply with the directions issued by this Court from time to time with respect to the constitution of special courts. The High Courts in consultation with the State Governments will have to undertake an exercise on the need for the special courts. The vacancies in the position of Presiding Officers of the special courts will have to be filled up expeditiously.
- The High Courts are directed to undertake the exercise of identifying the undertrial prisoners who are not able to comply with the bail conditions. After doing so, appropriate action will have to be taken in light of Section 440 of the Code, facilitating the release.
- While insisting upon sureties the mandate of Section 440 of the Code has to be kept in mind.
- An exercise will have to be done in a similar manner to comply with the mandate of Section 436A of the Code, both, at the district judiciary level and the High Court as earlier directed by this Court in the Bhim Singh case, followed by appropriate orders.
- Bail applications ought to be disposed of within a period of two weeks except if the provisions mandate otherwise, with the exception being an intervening application.
- Applications for anticipatory bail are expected to be disposed of within a period of six weeks with the exception of any intervening application.
- All State Governments, Union Territories and High Courts are directed to file affidavits/ status reports within a period of four months.

However, our study shows that these principles are established in *Satendra Kumar Antil* and *Arnesh Kumar* are often not implemented. From our sample, out of the 37 interviewed, 27 respondents were in custody for offences for which the punishment is more than seven years of imprisonment (includes life imprisonment and/or death penalty). While the other 10 respondents were in custody for offences where punishment is lesser than seven years of imprisonment (including petty and serious offences). In our sample, six respondents were charged with offences where punishment included life imprisonment and/or death penalty.

Despite the Supreme Court's instructions and the conditions under Section 41, accused persons continue to languish in custody for years for relatively minor and serious offences, with punishments lesser than seven years of imprisonment. It is to be noted that our sample included a maximum number of respondents who were arrested for alleged heinous offences, for which the minimum punishment under the IPC or any other law for the time being in force is imprisonment for seven years or more. However, it was also observed that in the sample, despite not being charged with serious offences (for which punishment under the IPC, or any other law in force, is imprisonment between three to seven years), those in custody have to wait for a long period to avail bail. The various judicial principles and pronouncements need practical application. This can be achieved by sensitising the police force and creating public awareness that arrest may not be applicable in all the cases. There should be cogent reasons to arrest a person.

Conduct of the Police and Conditions Leading up to Arrest

This section deals with the arrest procedure as faced by the respondent. The objective is to highlight the challenges faced by the respondent when they came into contact with the CJS.

One of the respondents shared her experience of being at the wrong place at the wrong time. Ms. P, a delivery partner for a major food app, was near the outskirts of Mumbai and her parked bike was about to be towed away by the traffic police. A police officer allegedly snapped a few pictures of the woman without her consent. He further questioned the character and integrity of the driver, claiming that she was not a delivery partner, rather using it as a front for other alleged activities. The police officer also took a video of this entire incident and arrested Ms. P without informing her of the charges. She was taken to the police station where she claimed to be physically assaulted by the constable for a few hours and only after 5:30 p.m. was she allowed to call her family members to inform them of the arrest. She was not informed of her rights, nor given access to free legal aid advocate. Ms. R, too, shared she was refused the right to consult a legal aid advocate.

The experiences of the respondents showed that accused persons are often kept in the dark about their rights during an arrest made by the police. Such actions clearly contravene the legal parameters laid down in the case of DK Basu[20].

[20] *Arnesh Kumar,* supra note 17.

Apathy of the Police

There is substantial reporting of apathy prevalent among the police towards the accused persons. During the course of interview, respondents reported they were not informed by the police about the charges against them. Moreover, allegations of torture were also reported by the respondents. Some of the respondents made specific allegations about the police officials demanding bribes to not register a case against them. They also claimed the police refused to show any relevant documents pertaining to the alleged arrest. Around six out of 35 respondents (17%) reported misuse of power by the police at the time of the arrest.

From allegations of being misinformed to withholding arrest-related information, the released prisoners' accounts reflected the police officials' apathetic understanding of the plight of the accused. The allegations showed the police had not fulfilled their obligations on behalf of the state to protect its citizens from arbitrary arrest.

> *"When we tried questioning the police about complaints and documents, we were threatened into not questioning their authority. They entered our house and beat us up without giving all details about the complaint against us."- Young male prisoner*

We see a recurring trend of the police withholding information from the arrested persons. In another instance, the police arrested a doctor from his clinic in a taluka of Thane district, allegedly without proper investigation. The doctor was accused of misbehaving with a female adivasi patient. T police allegedly asked for a bribe of Rs. 30,000/- to let him go. Since the doctor had a good reputation with his staff, the case was closed relatively quickly. There have were four more instances reported where the police were reluctant to register a cross-complaint reflecting bias against the accused, hindering their access to justice.

The Supreme Court had made observations in a case which involved a case of police custodial brutality leading to death of the victim. The Court strictly noted that *'the custodial violence on the deceased which led to the death is abhorrent, unacceptable in the civilised society and a clear violation of rights guaranteed under Article 21 of the Constitution'*[21].

Further, it held that:

> *As the police in this case are the violators of law, who had the primary responsibility to protect and uphold law, thereby mandating the punishment for such violation to be*

[21] *Pravat Chandra Mohanty v. The State Of Odisha & Anr*, LL 2021 SC 80, p. 40

> *proportionately stringent so as to have effective deterrent effect and instill confidence in the society. It may not be out of context to remind that the motto of Maharashtra State Police is "Sadrakshnaya Khalanighrahanaya" (in Sanskrit which means to protect good and to punish evil), which needs to be respected. Those, who are called upon to administer the criminal law, must bear in mind that they have a duty not merely to the individual accused before them, but also to the State and to the community at large. Such incidents involving police usually tend to deplete the confidence in our criminal justice system much more than those incidents involving private individuals. We must additionally factor this aspect while imposing an appropriate punishment on the accused herein.*[22]

Recently, the Government of Maharashtra introduced the *Maharashtra Division Level Police Complaint Authority (Administration and Procedure) Regulations, 2018,* wherein Police Complaints Authorities (PCAs) are established as independent organisations, tasked with investigating public complaints made against police officers alleging grave misconduct, dishonesty, and abuse of power. With one PCA at the state-level[23], Maharashtra has six at the divisional levels at Nashik, Pune, Aurangabad, Nagpur, Amravati, and Konkan. The Act under which these regulations are made empower the State and Divisional PCAs to receive complaints of death in police custody, grievous hurt (under *Section 320 of the Indian Penal Code, 1860*), rape or attempt to commit rape, arrest or detention, without following the prescribed procedure, corruption, extortion, land or house grabbing or any other serious violation of law or abuse of lawful authority[24].

Conditions of the Family

Over the last 33 years, Prayas has endeavoured that the familial roots of the accused person sustained throughout the strenuous period of incarceration of the accused. From the perspectives of children of accused persons, the role of the welfare institutions required the concerted efforts of multiple stakeholders[25]. For instance, through a study conducted by Prayas in 2002 on children of women prisoners, it emerged that Prison Welfare Officers in Delhi (from the Directorate of Social Welfare) expressed divergent views as to who would take responsibility for the well-being of children whose mothers were held in prison. While

[22] *Pravat Chandra Mohanty, supra note 23*, p. 32
[23] Maharashtra Police (Amendment and Continuance) Act 2014, s 22P
[24] Maharashtra Police (Amendment and Continuance) Act 2014, s 22Q(1)
[25] Forced Separation children of Imprisoned Mothers (foreword by Justice (Retd.) C.S.Dharmadhikari. 2003. pp. 146-147.

one officer believed that it was the responsibility of the parents and the state had no role to play for their children; other officers believed it was the collective responsibility of the state to take care of the children. This dichotomy clearly shows that family relationships assume complex and difficult characteristics when a relative is incarcerated[26]. The experiences of the respondents related to strained relationships were clearly observed in this study. One of the respondents shared her plight of being arrested in front of her young children of impressionable age. During the period she spent in prison, she worried about the well-being of her children, including their shelter, food and other basic requirements. The respondent suggested that the police should keep in mind important aspects about well-being of the accused person's children while arresting the person and try to arrange alternate accommodation with a family member/ neighbour, so as to not disrupt their social environment. As one respondent said about their experience of getting their family involved in the post- arrest procedure:

> *"I requested the police to call my mother, but the police did not agree. They said they will release me if I pay a bribe or bail directly. Then the police went to my village to inquire."*

However, in one of the cases, an undertrial prisoner, Mr. A stated:

> *"They (the police) were helpful when we told them about our mother's conditions and how we need medicines and food etc. on time. But at the police station I think they should have explained the process to us better instead of just asking us not to get into this mess. They should have helped us in the first step itself."*

It can be inferred that the police can ensure just delivery of services on behalf of the state, but there is much room for improvement.

The findings showed that in certain circumstances, police officials exhibited custodial violence against the incarcerated persons despite being legally bound to protect the rights of the incarcerated persons. It has also emerged from the narrations of the respondents that the police officers, at times, play a biased role while investigating an altercation. For instance, Mr. B shared he got involved in a fight within a private event, so the police were called to resolve the matter. Mr. B shared he had to bear the brunt of the police lathis inspite of his recent serious injury. Mr. B further shared these atrocities continued at the police

[26] *Roshan Beevi And Ors. v. Joint Secretary To Government Of Tamil Nadu,* 1984 (15) ELT 289 Mad

station as well, where he claimed he was beaten up by the police. He was taken for a medical check-up at night and next morning he was presented before a magistrate and sent to the prison.

In the case of Ms. L, the police, post her arrest, failed to make arrangements for the medical requirements of her daughter, despite producing relevant medical documents. She was allowed to see her daughter only through video conferencing mode.

Interestingly, the Supreme Court, in the year 1997, issued a series of guidelines to deal with the prosecution machinery abusing its power of arrest, widely known as the *D.K. Basu* Guidelines[27]. The D.K. Basu Guidelines laid down the following 11 fundamental procedures to be followed when a person is arrested:

i. Identification: Every police officer shall wear, accurately and clearly visible on his uniform, identification and name tags while arresting or interrogating a suspect. The details of all police officers who are interrogating suspects are required to be recorded in a register.
ii. Memo of arrest: Every police officer making an arrest is required to prepare a memo of arrest at the time of arrest, which shall be attested by at least one witness. Such a witness may be a family member of the arrested person or any respectable person in the locality of the arrest of the person. The memo must include the time and date of arrest and such a memo must be countersigned by the arrested person as well.
iii. Information of arrest: The arrested person is entitled to have one friend or relative, acquaintance, or well-wisher informed, as soon as practically possible, that he has been arrested and is being detained at the particular place, unless such friend or relative is also the witness who attested the Memo of Arrest.
iv. Information of arrest to a erson outside the district: In the event such a person to be informed lives outside the district of the police station where the arrestee is detained, the police are required to inform such a person of the details of the arrest including time, place of arrest and place of custody through a telegram to be sent via the concerned police station and the District Legal Aid Authority.
v. Informing the right to the arrestee: The arrested person is required to be informed of the grounds of arrest, as also under Article 22(1)[2] of the Indian Constitution,

[27] *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610

and of his right to have a relative or friend informed of the arrest. This must be done as soon as the police arrest the respective person.

vi. Diary Entry: An entry in the Police Diary is required to be made at the place of detention. It must include the details of the arrest, the name of the friend or relative, or other individual informed of the arrest, along with the names and details of the police officials holding the arrestee in custody.

vii. Inspection Memo: The arrestee, at the time of arrest, has a right to request a physical examination for any minor or major injuries, and such injuries must be recorded at that time. This is to be mentioned in the Inspection Memo and is required to be signed by both the arrestee and the police officer who made the arrest. The arrestee is also entitled to receive a copy of this memo.

viii. Medical examination: The arrestee is required to undergo a medical examination every 48 hours during the period of detention. Such examination must be conducted by a trained doctor, one who is on the panel of approved doctors, as appointed by the Director of Health Services of the respective State.

ix. Copies of documents to Illaqa Magistrate: The police are required to send a copy of all documents about the arrest, including the Memo of Arrest, the Inspection Memo, and all other documents mentioned, to the Illaqa Magistrate for their records.

x. Right to a lawyer: The arrestee has the right to consult and be defended by a legal practitioner of their own choice, as also provided by Article 22(1)[3]of the Indian Constitution. The police are required to allow them to meet their lawyer during interrogation, albeit not throughout.

xi. Police Control Room: All district and state headquarters are required to have Police Control Rooms. The officer making the arrest is duty-bound to inform the control room regarding the details of the arrest and the place where the arrestee is kept in custody. This must be done in all cases of arrest and within 12 hours of arrest. The notice board of the control room should display such information accurately and clearly.

Chapter 4: Conditions in Prison

Once an accused is integrated into a prison institution it becomes their whole world immediately. Being in remand or custody when the future of their dependents is at stake takes a toll on mental health of the undertrial prisoners, as they try their best to maintain contact with the outside world through DLSAs and NGOs. Incarceration of the person would also result in institutionalisation of persons. In other words, inmates would be subjected to a large number of prison rules and regulations during their period of incarceration. The Bombay High Court had to even intervene in the affairs of prison administration for ensuring fundamental needs of prisoners that is, ensuring proper arrangements are made for inmates to meet their advocates and relatives in the matter of *Janadalat v. The State of Maharashtra and Anr*.[28]

Role of the District Legal Services Authority

This project carries a very important mandate with regard to strengthening the legal aid system, particularly while dealing with the undertrial prisoners. One of the researchers placed at the Thane DLSA as a Legal Fellow, was responsible to coordinate with the lawyers empanelled with the DLSA about the cases of the various clients in coordination with the Prayas Fellows working in prisons. This engagement, over the course of the past three years, has led us to understand the gaps between awareness of the legal aid regime and that of the statutory framework put in place by the legislative and administrative mechanisms laid down by the State; these are discussed in the subsequent sections.

General Awareness of the Prisoners

During the interview process, our main aim was to understand the level of awareness with regard to bail conditions of the undertrial prisoner, as well as their experience in getting a DLSA Lawyer to represent them in court. It was observed that eight out of 10 respondents did not know the specificities of the bail condition and relied on a DLSA lawyer, private lawyer, or family member to make arrangements from the outside.

When questioned about the number of lawyers that approached the undertrial prisoners, majority of them responded that an NGO had reached out to them before a legal aid lawyer.

[28] *Janadalat v. The State of Maharashtra and Anr,* PIL no.161255457. Order dated 1.3.20.2017.

For those that started off with a legal aid lawyer, it was seen that they had more grievances towards the system of bail than the prisoners with private lawyers. One of the interviewees expressed their concern as:

> *"I don't know about the fee, but he (the DLSA advocate) asked for one lakh to wind up the case within a year. The case wasn't even going on, the dates kept going forward. It was very inconvenient, nobody did anything."*

For instance, an undertrial prisoner arrested for a bailable offence had to change their representative three times in the span of the pandemic to adjust to the changing landscape of the courts at that time. Mr. J, the prisoner in question stated:

> *"I had an advocate appointed to me but he was only a name on the Vakalatnama for me. When my bail application got rejected, I was left in prison for four months with no certainty even though I appointed a private lawyer to handle the case. After a year of prison, Prayas reached out to me and arranged my surety amount and fast tracked the process. Thereafter, I requested the Prayas Fellow's name be added as my representative for my High Court appearance. Still it cost my family two lakh rupees to expedite the process throughout the 3 years I was in prison."*

Mr. J also indicated to us that the lawyer originally assigned to him was reluctant to take his case in the pandemic due to lack of incentive.

Often, prisoners just follow the instructions of the representative as it is difficult for a lay-person to have full knowledge about the provisions of law charged on him and the conditions that need to be fulfilled by him and his family. In an interview, a respondent shared:

> *"Then they applied for bail for me. And it got passed after I spent two years in jail… I heard that I had to furnish Rupees 10,000 for bail but I don't know whether it was furnished or not. I was released four to five months after bail was passed."*

Framework of Legal Aid in India

Article 39A of *the Constitution of India* addresses the provision of free legal services to Indian citizens[29], with an aim to provide free and professional legal assistance for counselling and legal advice as well as administration of cases before courts and tribunals.

[29] The Constitution of India 1949, art 39A

It also aims to spread legal awareness among the public, focusing on beneficiaries of social law and the general public on a variety of legal concerns. A special effort is made in this mandate to provide free legal aid to undertrial prisoners whose cases are pending in the courts.

The mandate guarantees equal access to justice through free legal aid or legislation that benefits persons who cannot access justice due to economic circumstances or any other challenges. One of the responsibilities of the State is to create a legal system that promotes justice on the basis of equal opportunity for all people who are denied access to justice due to any socio-economic reasons. As a result, they must arrange for persons to get free legal assistance. There is a four-level system for the dispensation on legal Services in India. Legal Aid institutions are constituted as per the *Legal Services Authorities Act, 1987*. These include the National Legal Service Authority (NALSA), the State Legal Service Authority (SLSA), the District Legal Service Authority (DLSA) and the Taluka Legal Service Committee (TLSC). At the national and state levels, there is a bifurcation of roles between the authority and committees under the Act. The body at the national level that is NALSA, frames policies to disseminate legal literacy by organising Lok Adalats and supervising the SLSA, DLSA and TLSCs. The High Court and Supreme Court Legal Services Committees focus on appointing advocates for eligible persons approaching the Supreme Court and the High Courts for legal aid, under the Act.[30]

The scheme of the Legal Services Act mandates the legal services as a cornerstone of justice; they serve to meet the goals of equal justice, regardless of an individual's socio-economic status. Its existence demonstrates the implementation and benefits of a socialist structure of a country. Lack of legal services may lead to the misapplication of the law, which was created to safeguard the rights of the disadvantaged and aggrieved. The following are the necessary criteria for providing legal services in India:

> *"Every person who has to file or defend a case shall be entitled to legal services under this Act if that person, is:*
>
> - *a member of a Scheduled Caste or Scheduled Tribe;*
> - *a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;*

[30] The Legal Services Authorities Act 1987, ss 3A, 4, 8, 8A, 9, 10, 11A, 11B

- *a women or a child; 1[(d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);] 1[(d) a person with disability as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996);]"*
- *a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster; or*
- *an industrial workman; or*
- *in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956) or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause*
- *of section 2 of the Mental Health Act, 1987 (14 of 1987); or 2[(h) in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.*
- *in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government, if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Government, if the case is before the Supreme Court.]"*[31]

The Supreme Court order dated on 4.12.2018 in the matter of issued guidelines through NALSA, required the formation of a Standard Operation Procedure for Under Trial Review Committees (UTRCs). Under the guidelines, NALSA has recommended quarterly meetings to be held by the UTRCs.

[31] The Legal Services Authority Act 1987, s. 12

"In case undertrial prisoners (UTPs) covered under Section 436A Cr.P.C.: UTRC may recommend to the concerned trial court to take up the matter and consider him/her for release on bail if there are no special reasons to deny bail, with or without sureties.

UTPs released on bail by the court, but have not been able to furnish sureties: The UTRC may recommend the trial court to examine the reason why the accused is not furnishing surety/ bail bonds and if he/she is unable to do so due to poverty, then the trial court may consider reducing the bail amount on the application of the lawyer under S.440, Cr.P.C. or release on personal bond.

UTPs accused of compoundable offences: The UTRC may recommend to the trial court to consider if the offence can be compounded between the complainant and the accused as per law.

UTPs eligible under Section 436 of Cr.P.C.: The UTRC may recommend to the trial court to consider releasing such an accused on personal bond in case he is unable to furnish bail bond within seven days of bail order.

UTPs who may be covered under Section 3 of the Probation of Offenders Act, namely accused of offence under Sections 379, 380, 381, 404, 420 IPC or alleged to be an offence not more than 2 years imprisonment:

The UTRC may recommend to the trial court to consider invoking the Probation of Offenders Act in fit cases as also plea bargaining in appropriate cases.

Convicts who have undergone their sentence or are entitled to release because of remission granted to them: The UTRC may examine the reason for non-release of the convict and the Officer in-charge of prison may be recommended to look into the matter so that the convict is released as soon as possible.

UTPs become eligible to be released on bail under Section 167(2)(a)(i) & (ii) of the Code read with Section 36A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (where persons accused of Section 19 or Section 24 or Section 27A or for offences involving commercial quantity) and where investigation is not completed in 60/90/180 days: The UTRC may recommend to the trial court to consider release of the accused in cases where charge sheet is not submitted within the statutory time frame.

UTPs who are imprisoned for offences which carry a maximum punishment of 2 years: The UTRC may recommend to the trial court to consider releasing the UTP on bail in such cases.

UTPs who are detained under Chapter VIII of the Cr.P.C. i.e. under Sections 107, 108, 109 and 151 of Cr.P.C.: The Executive Magistrate/ District Magistrate court may be recommended to release/discharge such persons with or without conditions or to make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

UTPs who are sick or infirm and require specialised medical treatment: The UTRC may examine the medical condition of the inmate and if it is found that the inmate is very sick and specialised treatment is essential for survival, then the UTRC may recommend the trial court to consider granting bail on medical ground, as provided under S.437, Cr.P.C, even for temporary period.

UTPs women offenders: Women UTPs who are not accused of serious offences may be considered for release on bail under S.437, Cr.P.C, especially if they are first time offenders by the concerned trial courts. The UTRC may also recommend suitable measures under the directions of the Hon'ble Court in R. D. Upadhyay vs State of A.P. & Ors. (AIR 2006 SC 1946).

UTPs who are first time offenders between the ages 19 and 21 years and in custody for the offence punishable with less than 7 years of imprisonment and have suffered at least 1/4th of the maximum sentence possible: The UTRC may request the trial court to consider granting bail to such young offenders. If the person is found guilty in the course of trial, benefit of S.3 or S.4 of the Probation of Offenders Act, 1958, may be given to the accused.

UTPs who are of unsound mind and must be dealt with by Chapter XXV of the Code: UTRC may recommend the trial court to take appropriate steps in accordance with Chapter XXV of the Code and provide adequate treatment to such inmates.

UTPs eligible for release under Section 437(6) of Cr.P.C., wherein in a case triable by a Magistrate, the trial of a person accused of any non-bailable offence has not been concluded within a period of 60 days from the first date fixed for taking evidence in the case: UTRC may request the trial court to consider granting bail to such UTPs under Section 437(6) of Cr.P.C.

The UTRC shall enter its recommendation in column no. 21-23 of Annexure-A and column no.15-17 of Annexure-B.

- *Recommendation of UTRC*
- *Date of recommendation*
- *Brief reasons for UTRC recommendation*

The UTRC shall share recommendations with the concerned Trial Court/Jail Superintendent and Secretary, DLSA. Jail Superintendent shall bring it to the notice of UTP/Convict. Secretary, DLSA shall instruct the panel lawyers to move appropriate application in legal aided cases. The Trial Courts may deal with the recommendations in the manner deemed appropriate for each particular case with the assistance of Legal Aid/Private Lawyer." [32]

Financial Aspects

"I just need help with the advocate fee. I don't have the kind of money to pay their fees. I told him I'll pay for the parts. He wants one lakh for both me and my brother-in-law. My children are also studying in a government school" – respondent

The above statement resonates with most of the undertrial prisoners in the prisons of Maharashtra. The other side of the coin is the surety bail money which puts a tremendous burden on the family:

"The judge passed the bail for Rs. 30,000/-, Rs. 15,000 for each case. I asked my wife and she said she didn't have money."

Any reductions in this bail amount are always welcomed and appreciated as one of the respondents shared:

"He (The Prayas Legal Fellow) pleaded before the court to reduce my bail amount and it became Rupees 30,000 in total. First bail was rejected. I got bail from the jail court with Adv Mishra's help. I asked for a reduction of the bail amount and they reduced it to Rupees 10,000."

Rarely do DLSA lawyers reach out to prisoners but even if they do, the road to getting bail is not smooth. A prisoner recalled his personal experience:

[32] NALSA, *UTRC Guideline SOP*, paras 3.1 to 3.5, pp 7-8.

"I found a lawyer inside the jail and he asked me for Rs. 20,000 first. The one who was with me in jail said he is a good lawyer, so I will get out. So I asked the number of the lawyer and my family called that person. But her charges were so high. She asked for Rs. 60,000. Then my wife spoke with me and she tried to arrange money so finally we met (a legal fellow) from Thana (to help us get bail)."

For the rest of the prisoners who are not so fortunate, gathering a seemingly small amount for a middle class, can be a daunting task, especially when done without proper guidance. There are various intersectionalities that come to the fore when a woman is arrested and has no one to look out for her when she enters the prison institution. While interviewing a Legal Fellow, they shed light on a client who was deprived of the basic human necessities:

"No appointment of lawyer at the time of her arrest, she was six months inside the prison, no other organisation or anyone helped her during this period, her employer removed her from the job. Till date no lawyer was appointed, we filled up the form for legal aid lawyer. She needed time to stand a surety, no one gave surety, initially cash bail was granted for 15,000/-, now they require a "gharpatti", but didn't find gharpatti. She saved ten thousand rupees, if anyone got for surety gharpattis she would pay the amount to them, she was tense for the next court date. She wants to get out of this case. She wants to support her family by driving a rickshaw, and needs support to get a licence. Inside the prison the harassment to women is extraordinary - no regular court dates are given to attend, no mulakat when weekly three days mulakats are allowed, no facility to speak on phone or to give article, things given by inmate's family, no nutritious diet because of which the inmate was sick, stone in rice, uncooked chapatis and the most horrific instance of the same tablet given for all diseases by the resident doctor for prison."

The Mental Agony of Undertrial Prisoners

"In the jail they'd say once you get arrested it'll keep happening again and again. But I'm not that kind of person. When I was trying to get bail, the process was too long and it was horrible inside. I was always tense and I used to cry a lot. I missed everyone, and thought of my family often. I used to pray to Lord Ganesha. I used to work there and I got Rupees 1500 when I left. I worked for two months. I didn't have money and I told (the representatives) that (an NGO) will pay for my bail. He also paid Rupees 5000 for the lawyer."- A respondent

While shifting between remands, a prisoner experienced a very frightful and lonely time in prison where he shared:

> *"...couldn't meet anyone to let them know about my whereabouts. I couldn't communicate with my advocate. There was a quarantine in the jail. There was also a financial problem with paying for the private advocate. When the police were shifting me to judicial custody, they changed my surname and caused me a lot of problems with identity verification for the bail. There was also a systemic delay from the court staff."*

It was disheartening to see a few prisoners helpless and clueless about their legal representative. As one of them said:

> *"No one volunteered to be my lawyer, My lawyers name I don't know, and he was for 1 month only, I don't know his fees, my initial bail was rejected in sessions court, my lawyer got me bail after 3 months after chargesheet, later I got one more lawyer after first rejected from my family. I had filled a form inside to get a lawyer after talking to (a legal fellow from Prayas)."*

A few commonalities among every interview were that the police could have been more prompt in informing the arrested person about their right to free legal representation under the legal aid regime. Pointing out the systemic bias, a respondent stated:

> *"No lawyer (was) through DLSA, (I have) no knowledge about legal or anything before. I feel only the victim person got a lawyer, not the accused person. After I was released on bail, Prayas provided me with the lawyer for my case."*

The lack of will of the lawyers was highlighted in the below-mentioned narration as well, where the respondent could not afford the fees of the lawyer engaged:

> *"The next court appearance is scheduled and I told the lawyer I would pay Rs. 500 to 1,000 as per my capacity. The lawyer stated that she would appear in court, but she did not on the scheduled date. When I was in prison there was no primary breadwinner, my father was ill, he was drunk, my mother was having so many problems, I am only one earning member of my family, after my release within one and half month my father died."*

A research conducted in the city of Delhi reflected similar experiences of an incompetent lawyer, complaints of legal aid lawyers demanding fees for their services, neglect of duties toward legal aid beneficiaries; a probable cause of the lack of commitment was preference

over private practice.[33] Thus, need for a nationwide reform is evident from the respondents' voices and previous research.

The Legal Aid Defence Counsel Scheme

In an attempt to make legal systems more accessible, the NALSA has introduced the Legal Aid Defence Counsel (LADC) system recently. The NALSA has taken initiative to implement a public defender scheme to improve the services of the legal aid institutions particularly in relation to criminal cases. Under the scheme, lawyers are selected for an interview process and they are assigned three ranks: Chief Legal Aid Defence Counsel, Deputy Chief Legal Aid Defence Counsel, and the Assistant Legal Aid Defence Counsels. Their roles and responsibilities are as follows.

Chief Legal Aid Defence Counsel

- Conducting trials and appeals and bail matters in courts along with deputy chief and Assistant Legal Aid Defence Counsels,
- Assigning duties to Deputy Legal Aid Defence Counsels in the office,
- Assigning duties of Assistant Legal Aid Defence Counsel for assisting him and Deputy Chief Legal Aid Defence Counsel and for other work including legal research,
- Ensure proper legal research, planning effective defence strategy and thorough preparation in each and every legal aided case,
- Ensure maintenance of complete files of legal aid seekers,
- Ensure proper documentation with regard to legal aid assistance provided, ensure maintenance of up-to-date record of legal aided cases,
- Will be overall in charge of administration of the office of Legal Aid Defence Counsel Office.
- Ensure quality legal aid,
- Consultation and ensuring updation of the case progress to the client and his/her relative(s),
- Any work/duty assigned by the Legal Services Authority.

[33] Jeet Singh Mann, 'Impact Of Competency And Commitment Of The Legal Aid Counsels On The Legal Aid System In The City Of Delhi' (2018) 60(2) Journal Of The Indian Law Institute 200

Deputy Chief Legal Aid Defence Counsel

- Conducting trials/ appeals/ Remand work /Bail applications/visits to prisons etc., as assigned by Chief Legal Aid Defence Counsel.
- Filing and arguing appeals and bail applications in Courts.
- Maintaining complete case files
- Doing legal research in legal aided cases and guiding Assistant Legal Aid Defence Counsel and law students attached with the office in legal research.
- Proper client interviews at various stages for quality research work and representation at remand, trial and appellate stage.
- All or any of the work of the Chief defence Counsel as per assignment and any work/duty assigned by Legal Services Authority.

Assistant Legal Aid Defence Counsel

- Filing of cases, conducting trials in Magistrate trial cases,
- Remand/bail and other miscellaneous work,
- legal research in legal aided cases,
- Visits to Prison and Legal aid Clinics as per directions,
- Providing assistance at pre-arrest stage to suspects,
- Assisting Chief Legal Aid Defence Counsel and Deputy Legal Aid. Defence Counsel(s) in conduct of legal aid cases,
- Assisting in developing a defence strategy after sifting through all of the evidence collected by the prosecution and after hearing the accused's version of what happened during the alleged crime in question,
- Visiting location/area of alleged crime, having discussions with family members etc., for effective and meaningful input of defence strategy,
- Handling queries of legal aid seekers,
- Updating legal aid seekers about the progress of their cases,
- Assisting in maintaining complete files of legal aided cases,
- Handling legal queries relating to criminal matters on telephone,
- Any other work related to legal aid assigned by Chief Legal Aid Defence Counsel, or any work/duty assigned by Legal Services Authority

Office Assistant for keeping updated record of legal aided cases

- Uploading the updated record/progress of the legal aided cases on NALSA portal

and digital platforms as per directions,

- Maintaining complete files of legal aided cases and keeping files with proper index in a systematic manner,
- Typing applications, petitions, appeals etc.

The primary objective of organising this new system was to provide competent and quality legal services in criminal matters to all eligible persons and to manage and implement legal aid system in a professional manner in criminal matters.

The framers of the scheme perceive the following advantages:

- Increase in availability and accessibility of Legal Aid Defence counsels,
- Effective and efficient representation by experienced lawyers,
- Timely and lively Client Consultations,
- Effective monitoring and mentoring of legal aided cases,
- Professional management of legal aid work in criminal matters,
- Enhanced responsiveness leading to updating of legal aid seekers
- about the progress of their cases,
- Ensuring accountability on the part of the legal aid providers

It was observed after the interactions with the panelled lawyers in the LADC system that they have experienced the following changes after implementation of the LADC scheme:

- Earlier the reimbursement processes relating to the costs for filing applications and other proceedings in a court were often delayed, spanning up to one year, which had a demoralizing impact on the legal aid lawyers. The present system has improved financial aspects by consolidating salary disbursements, office infrastructure, and miscellaneous facilities that assist in operational feasibility. For instance, earlier printing cost used to be borne by the counsels and was later reimbursed to them after a lot of delays but now printing can effectively take place with the office infrastructure sparing the counsels of the additional burden. This has made the provision of availing certified copy of required documents more accessible as compared to the previous system.
- It has been observed that the present system of LADC has resulted in better accountability from the empanelled lawyers as they are provided with proper registers which document progress of the system as a whole in terms of number of bail applications filed, number of trials conducted, number of modifications of bail

applications filed which makes the lawyers motivated for ensuring justice for their clients.

- However, one limitation is the insufficient number of LADCs relative to the population served. This limitation is exacerbated by the scheme's exclusive operation in district headquarters only, rather than at the taluka (sub-district) level. It is harder to follow-up and manage cases when the geographical area is large and the distance between one taluka to other taluka is large. Thus, the prisoners whose cases are pending at taluka court are unable to access speedy justice as they are still provided legal aid services through the previous system. This in the eyes of the researcher there exists a disparity between the courts located in the rural areas vis-à-vis those located in the urban areas, in terms of effectiveness of the services.
- Furthermore, payment irregularities have emerged as a recurring concern, with legal aid counsels occasionally encountering delays in salary disbursements. These delays, in addition to the restrictions on engaging in alternative employment, adversely affect the livelihoods of these legal practitioners and act as a demotivating factor.
- In instances where the matter presented before the Judicial Magistrate First Class (JMFC) is found to be triable by the Court of Sessions only, the case gets committed to the Court of Sessions. Currently, it has been observed that if the matter is pending before JMFC, in practice, it is usually for the Deputy Counsel who takes up the case before the Court of Session. However, when the matter is taken to the Deputy Counsel, they suggest that the matter first needs to be committed to the Court of Sessions and it is only after that they can proceed with the requisite step. As soon as an accused is sent to the Judicial Custody, they get entitled to file for the bail. However, if one wishes to file for bail while the case is still under JMFC jurisdiction and has not yet been committed, the application for bail can only be made before a specific Sessions Judge after taking the file from the lower court. As a result of this experience, a recommendation has been tendered by Legal Fellows associated with Prayas to the DLSA. It suggests that, until the process is streamlined, to safeguard the fundamental right of an accused to seek bail, bail applications may be expedited by submitting them to the Court of Sessions in accordance with the established roster.

Underscoring the necessity for such adjustments, a case in point involved a female prisoner charged with human trafficking, where it was observed that the co-accused individuals had successfully obtained bail. Consequently, a request was made to the DLSA to appoint the same Deputy Counsel who secured bail for the co-accused, thereby facilitating the pursuit of bail for the female prisoner even prior to the filing of the chargesheet. This procedural shift is indicative of the necessity for adapting new advocacy strategies to the evolving LADC system.

Concurrently, capacity building initiatives for various stakeholders are imperative to ensure the LADC system's effective implementation, while extant gaps can be filled by issuing comprehensive guidelines in this regard. Socio-legal intervention must also be encouraged to initiate a dialogue between the stakeholders to ensure that the merits of the case are properly brought forward at all the stages of legal proceedings.

Chapter 5: Challenges faced *Vis-À-Vis* Judiciary

This chapter deals with the challenges faced by respondents while being brought into contact with the judicial system. It deals with the day–to-day obstacles faced by the respondents as a result of being charged by the police machinery.

The Prayas Fellows shared they had observed over the course of the project that in several instances, the accused persons are not properly represented at the stage of first production report, post arrest or even through the course of subsequent production before the concerned magistrate or before the Sessions Court as the case may be. As informed during the course of the interviews, one of the clients managed to secure bail with the intervention of DLSA advocate as well as the fellows. It was seen that the client was implicated in three different cases. In such a scenario, the question arises '*what was the date of the custody?*' to determine the time spent by the undertrial prisoner for the present as well as subsequent cases. A few of the challenges faced by the respondents detailed out in this chapter.

Allegation of False Cases

Few of the respondents stated that they had been arrested on false charges. Some of these respondents emphasised that they had nothing to do with the crime in question. This section tries to explore some of these cases in detail.

One of the respondents, Ms. CRJ, stated that the charge she was arrested under, wherein she was accused of trafficking her daughter into commercial sex work or enabling sexual abuse of her daughter, were false accusations and that her co-accused were responsible for this crime. She claimed that she had no idea about what happened to her child when she went to work and did not know about the nature of her daughter's work. She expressed her concerns about being unable to arrange a lawyer on their own and that her family had to rely on the co-accused. She mentioned that her daughter managed to get the lawyer's contact details from the the co-accused's family.

In the case of MR, he claimed that he was falsely accused of theft. He said that he was at the suburban railway station on his way home. However, while he waited, he was arrested by the police and they physically abused him. He further claimed that the police demanded money from him in order to free him. He was not aware of any details about his case, but he was in custody until a legal aid lawyer managed to contact his family. He was in prison until his brother came to help with his bail.

In a similar case, Ms. A was arrested for theft. She claimed that the police arrested her based on the call logs of her co-accused. She claimed that they were merely travelling together but the police assumed that they had committed a theft in collaboration. She claimed the police demanded money from her and when she said she lacked the sum, she was accused in the case. Further, they did not allow her to contact her family members who lived in another state. Therefore, she had to be in custody until another person in the prison helped her get in touch with a lawyer. Similarly, Ms. KF also claimed that the case against her was false because she had no way of having access to huge amounts of narcotic substances.

As seen above, multiple respondents claimed that they were accused of false charges and there were attempts to extort money by the police in order to be let free. The police demanding bribes emerged as a common theme across interviews. Furthermore, given the lack of access to lawyers' contacts, the accused persons continued to stay in custody as they had no way of proving that they didn't commit the act in question.

It would be interesting to note that the Supreme Court observed in the case of *Himanshu Kumar And Others v. State Of Chhattisgarh And others* ,[34] that those "who falsely charged" must refer to the original or initial accusation putting or seeking to put in motion.

Pendency of Multiple Cases

During the course of the interview, one of the respondents was arrested by the police on account of his pleading guilty in one of the three cases registered against him. The Fellows managed to secure bail in two of his cases, but the respondent had withheld the fact from the Fellows that he had pleaded guilty in the third case. Accordingly, he was arrested by the police, so that he could undergo his sentence as a result of conviction arising out of pleading guilty.

A full bench of the Allahabad High Court in the case of *Shabbu v. state of U.P.*[35] held that the date of custody of the subsequent case should be the date of registration of the subsequent FIR. While dealing with *Pradeep Kumar Sethy v. State of Orissa*,[36] condemned the action of the concerned magistrate when it found that the petitioner was not produced before the magistrate of the case in concern, as he was in custody in connection with another case. The High Court found that not acting as per the provisions of the law with regard to subsequent

[34] *Himanshu Kumar And Others v. State Of Chhattisgarh And Clothes,* 2022 Live Law (Sc) 598
[35] *Shabbu v. The State of U.P,* 1982 CriLJ 1757
[36] *Pradeep Kumar Sethy v. State of Orissa,* 2022 Live Law (Ori) 115

remnant had led to the petitioner remaining in custody for a period of more than nine years. Under the circumstances the court directed that petitioner be released on bail forthwith[37] from custody in the context of Section 439 that is, physical control or at least physical presence of the accused in court coupled with submission to the jurisdiction and orders of the court.

According to the experiences of the Prayas Fellows, there is a tendency among the accused of pleading guilty, rather than seeking recourse of a bail application, wherein facts were withheld from them as discussed above.

The Supreme Court in the case of *Mahipal v Rajesh Kumar and another* [38] while discussing the amplitude and power of the Court under Section 439 Cr.P.C, observed:

> *"The determination of whether a case is fit for the grant of bail involves the balancing of numerous factors, among which the nature of the offence, the severity of the punishment and a prima facie view of the involvement of the accused are important. No straight jacket formula exists for courts to assess an application for the grant or rejection of bail. At the stage of assessing whether a case is fit for the grant of bail, the court is not required to enter into a detailed analysis of the evidence on record to establish beyond reasonable doubt the commission of the crime by the accused. That is a matter for trial. However, the Court is required to examine whether there is a prima facie or reasonable ground to believe that the accused had committed the offence and on a balance of the considerations involved, the continued custody of the accused sub-serves the purpose of the criminal justice system."*

It could be deduced that the basic jurisprudence relating to bail remains the same, where the grant of bail is the rule and refusal is the exception to ensure that the accused has the opportunity of securing a fair trial.[39] Despite this thumb rule, 'gravity of the offence' is an aspect that the Court has to consider. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of a 'grave offence'. While considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the

[37] *Niranjan Singh v. Prabhakar,* AIR 1980 SC 785
[38] *Mahipal v. Rajesh Kumar and Anr.*, (2020) 2 SCC 118
[39] *Nikesh Tarachand Shah v. Union Of India,* 2018 SCC.1

circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature, nor does the bail jurisprudence indicate the same.[40]

Undoubtedly, the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has been circumscribed by a large number of decisions rendered by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case. This practice of the judiciary and bar associations can lead to an unaccountable system. Essentially, advocates often have to file multiple bail applications over 45 to 90 days before bail is granted. This unwritten rule creates an image that the court takes the crime seriously and only grants bail after repeated requests, resulting in a significant time spent by the accused in prison, which may satisfy public expectations of punishment. However, for the rich and powerful, they can secure immediate release through legal recourse. This practice essentially delays freedom for ordinary prisoners, criminalising their relative poverty. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in *Nikesh Tarachand Shah v. Union of India* going back to the days of the Magna Carta[41], wherein the right to liberty and right against unlawful imprisonment were enshrined as rights; the Indian judiciary ensured that such fundamental rights remain as fundamental freedoms for the citizens of India.[42] The Supreme Court[43] noted that it was held way back in *Nagendra v. King-Emperor*[44] that bail is not to be withheld as a punishment. Reference was also made to *Emperor v. Hutchinson*[45] wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal

[40] *P. Chidambaram v. Directorate of Enforcement,* (2020) 13 SCC 791
[41] Magna Carta 1297.
[42] Nicholas Vincent 'Magna Carta Translation' (2014). National Archives and Records Administration, https://www.archives.gov/files/press/press-kits/magna-carta/magna-carta-translation.pdf. Last accessed 21 July 2023
[43] *Gurbaksh Singh Sibbia v. State of Punjab* 1980 AIR 1632, 1980 SCR (3) 383
[44] *Nagendra v. King-Emperor* AIR 1924 Cal 476
[45] *Emperor v. Hutchinson* AIR 1931 All 356

interpretation to the provision for bail is almost a century old, traced back to India's colonial period.

The researchers wish to clarify that they are not advocating for bail to be granted in every case. Whether bail is granted or denied is entirely up to the judge, and while this discretion is unrestricted, it must be used judiciously and with compassion. It is important for the judge to provide a well-reasoned decision, as there have been instances where bail was denied arbitrarily. Additionally, the conditions for bail should not be so stringent that they cannot be reasonably met, as this would render the grant of bail meaningless. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.[46]

In the matter of *Satish Kumar v. State Of Gujarat*,[47] The Supreme Court extensively considered many of its own precedents and emphasised that *"the judges are constantly reminding themselves that the use of discretion has to be guided by law. Moreover, what is fair under the obtaining circumstances."* Hence, discretion of granting and refusing bail should not be exercised in a fashion which is contrary to the principles established by judicial precedents. This trend in itself portrays the deplorable state of affairs as the apex court has to time and again remind the lower courts about the fact that bail is the rule and jail is an exception.

This chapter further aims to study the use of discretionary powers of the judge, to highlight any bias, both positive and negative, towards the undertrial prisoner, and to include conditions of bail which affected their release from prison. We further divide this chapter based on various conditions that affected the accused persons. These are high surety amounts, false cases, involvement of NGOs, delays in the trial, verification and irregular court dates.

High Surety Amount and Related Concerns

One of the most common themes that emerged from the data with regard to access to bail is the high surety amounts that need to be furnished by the accused in order to be released on bail. In following cases, we noticed that although bail itself had been granted by the court,

[46] *Dataram Singh v. The State Of Uttar Pradesh* (2018) 3 SCC 22.
[47] *Satish Kumar Jayanti Lal Dabgar v. State Of Gujarat,* (2015) 7 SCC 359

the respondents were not released from custody because of their inability to produce suitable sureties.

In the case of CRJ, she was not released although her lawyer had applied for bail. She was in custody for about two years until an NGO furnished her bail amount for her release. She also stated that she is not aware of too many details but she knew that it was a cash bail and it was not until the NGO paid the amount that she was released. Similarly, PM claimed that she could not furnish the amount on her own hence she had to take help from an NGO to get herself released. She further claimed that all her savings were spent while dealing with the case.

A stated that her mother had to take a loan to deal with her case; she said that she did not have the money to pay for the bail and had to take loans. She also stated that there were two cases filed against her, hence she had to arrange two different amounts to be released. She further mentioned that her lawyer demanded high fees due to which she could not appoint them, further delaying her bail. She said that although an organisation helped her get bail filed and got her surety amount reduced in both cases, it was still unaffordable for her (which was over Rs. 20,000) in both cases. Similarly, A stated that she could not furnish the cash and hence was not released. She was finally released when an NGO helped her pay for the bail. KF stated that there were multiple cases against her and now her family is in debt because they had to borrow money to get her released. She said that they do not have enough money to invest in their children's education because all their earnings were spent in dealing with the case and paying interest on already taken loans.

Ms. SK said that her cash bail was for Rs. 50,000 and she was not released because she was unable to arrange the amount. Therefore, she worked at the prison and saved up to Rs. 20,000 and the rest was furnished with the help of an organisation. SK was arrested on 24th May, 2017 and released on 29th May, 2019. However, she was granted bail during the first hearing itself. She spent more than two years in custody due to lack of financial resources.

Similarly, Mr. N's release was also delayed due to the high surety amount. He was arrested on the 18th April, 2019 and released on 27th March, 2021. He spent close to two years in prison although he was granted bail during his first hearing. In N's case, he could not contact a lawyer for about five months and as soon as he was represented after five months, his bail was passed by the court for Rs. 25,000. However, his brother, a tailor, could not arrange the money as it was very high for him. In Mr. M case, his initial bail amount was up to Rs. 30,000

which he was unable to arrange. Therefore, he remained imprisoned for six months after being granted the bail. Similarly, in Mr. J's case, there was a delay in his release due to the high surety amount. His father took help from an organisation to furnish his bail amount.

Ms. AM stated that she did not know how her brother-in-law and her lawyer managed to furnish the amount, but she was released four to five months after she was granted bail by the court. She spent over two years in jail because she could not access a lawyer but after she did, she was not released due to lack of fulfilment of cash bail. She was also unaware of her bail being passed.

In *Mithun Chatterjee v. State Of Odisha*[48] one may further note that the Supreme Court had issued directions that bail conditions imposed over an accused person should not be excessive in nature. In a recent development, the High Court of Bombay has issued a notification by exercising its extraordinary writ jurisdiction[49] directing there would be no requirement to produce solvency certificates for sureties of the amount below Rs. 50,000. Earlier, solvency certificates were mandatory to be produced for sureties exceeding the amount of Rs. 15,000.[50] In the matter of *Sagayam v. State*,[51] the Madras High court held that even a beggar can stand as a surety. The Madhya Pradesh High Court held that community service could be the valid imposition of conditions for bail. However, such conditions should not be onerous or excessive in nature.[52] The order extends the scope and extent of bail conditions as referred in Section 437 (3) of Cr.P.C. to include Community Service by referring to decisions of the Supreme Court[53].

Involvement of NGOs

In most cases, we observed that the respondents could access bail only after NGO intervention, which was at two different levels: First, to access a lawyer and second, to help with furnishing surety or cash for bail. As explained in the previous sub-section, many respondents stated that they did not know a lawyer or they were not allowed to contact their family members.

[48] *Mithun Chatterjee v. State Of Odisha,* LL 2021 SC 652
[49] The Constitution of India 1949, art. 227(3), 235
[50] The High Court of Judicature at Bombay: Appellate Side, Notification No. Rule/P.805/2021 dated 27.09.2022; Criminal Manual, 1980, Chapter I, paragraph 14 (4).
[51] *Sagayam @ Devasagayam v. State,* 2017 SCC OnLine Mad 1653
[52] *Sunita Gandharv v. State of M.P,* 2020 SCC Online MP 2193
[53] *Babu Singh & Ors. Vs. State of U.P.*, AIR 1978 SC 527; Gudikanti Narasimhulu and Ors. Vs. Public Prosecutor, High Court of Andhra Pradeh, AIR 1978 SC 429; Moti Ram and Ors. Vs. State of Madhya Pradesh, AIR 1978 SC 1594.

NGOs aided respondents in multiple ways. In the case of Ms. SK, they helped her appoint a legal aid lawyer. In the cases of Ms. RJ and Ms. A, the organisations represented the respondents. In both these cases, respondents claimed that their cases were delayed because of private lawyers whom they had previously appointed and who did not do anything about the case. They claimed that their bail process started only after the organisation got in touch with them although they had already appointed a lawyer.

In several other cases, respondents said that NGOs helped them get a lawyer as they did not know any lawyers themselves and weren't contacted by legal aid lawyers. Whereas in some cases, an NGO had to helped them furnish bail amount in order to be released from jail.

Finally, it is worth noting that in all the cases mentioned above, the reason to depend on legal aid NGOs was either because of lack of knowledge about DSLA services or being unable to get in touch with them and lack of finances to appoint a private lawyer. In cases such as Ms. R's, she said that their family did not know any legal practitioner, hence she had to rely on external aid. During the course of the project, Prayas and its staff had to visit NGOs in at least 315 cases, over the period of 2018 to 2021[54].

Delays in Trial and Irregular Court Dates

The Supreme Court has held that delay in conducting of trial, even in cases where bail conditions are stringent such as cases under the UAPA, the accused can be granted bail on grounds of delay in conducting trial.[55]

Ms. PM stated that her trial had not progressed even though she would attend her case proceedings in the Court regularly. She shared that the complainant party did not appear in the court causing the delay in her trial. She further stated that this delay has created a stressful situation in her life, as she wants the trial to end and focus on her own and her family's lives.

Ms. CR says that although she was in prison for more than two years and has been out on bail now, her trial has not started. She says that court dates are listed once in two or three months but the trial itself has not started. Therefore, she has to keep visiting the court until the case gets over. Ms. AM said that she was first taken for a physical court hearing after

[54] Dr. Anup Surendranath, Medha Deo, Dr. Vijay Raghavan, Sharli Mudaliyar, and Saugata Hazra, 'Legal Representation for Undertrials in Maharashtra' (2023) 49.
[55] *Union of India v. K. A. Najeeb,* 2021, 3 SCC 713

spending one year in prison as an undertrial. She said that she wants the case to end quickly as it is being dragged and is causing her inconvenience.

Verification of Documents

Unique Identification Authority of India has issued a notification where in the prison induction documents issued by prison officer with signature and seal can be accepted as proof of identity and proof of address for the purpose of issuing Aadhar card.[56] Two respondents mentioned that they were not granted bail due to lack of verification of documents or improper documentation which further delayed their release. There were four main instances that were noticed.

First, in the case of Mr. JN, he mentioned that the police spelt his surname wrong and therefore, created many problems in verification of his identity during the bail process. Second, Mr. SNR, said that his bail was initially rejected due to incorrect address on his application. His background clarifies that he did not have a permanent address in Mumbai and was a migrant to the state, but his bail was still rejected based on address verification. Finally, in the case of Ms. A, she said that her stay in jail was extended because of lack of documents. She said that her identity documents were at home, which was in a different state and therefore, she had to wait to file for bail until the documents were sent by her family. Fourth, in the case of Ms. RC, she said that her initial bail application was rejected because of lack of documentation and thus, she had to re-submit her entire application to avail bail.

Further, there were six instances where the chargesheet was found to be incomplete and/or not containing facts that made a case against them. In more than three instances, the arrest dates were misrepresented. This raises the question 'whether the filing of such a chargesheet without completing the investigation will extinguish the right of an accused for grant of default bail?' was considered by the Apex Court in *Ritu Chhabria v. Union of India*[57]. The Supreme Court noted that such a chargesheet, if filed by an investigating authority without first completing the investigation, would not extinguish the right to default bail under Section 167(2) Cr.P.C. and extended the right of default bail under Section 167(2) of

[56] Unique Identification of India, *'List of Acceptable Supporting Documents for Aadhar Enrolment (0-5 years), 2023)* p,7 item no. 30.
[57] *Ritu Chhabria v. Union of India*, 2023 LiveLaw SC 352

the Cr.P.C. to not merely a statutory right, but a fundamental right that flows from Article 21 of the Constitution of India.

Another recurring trend is that the accomplices to a crime are often questioned regarding the whereabouts of the alleged perpetrator and are arrested for the same purpose. In this regard, while considering the evidentiary value of an approver, the SC in *Sarwan Singh v. The State of Punjab*[58] observed that: *"even if a confession is voluntary, it must also be established that it is true and, for that purpose, it is necessary to examine it and compare it with the rest of the prosecution evidence and the probabilities of the case."*

[58] *Sarwan Singh v. The State Of Punjab,* 1957 AIR 637, 1957 SCR 953

Chapter 6: Post-Release Situation

This chapter documents the post-release experiences of the respondents. The analysis is based on the challenges faced by the respondents related to their income, economic sustainability, and the negative approach of society towards their reintegration from mainstream society. It also highlights the challenges regarding livelihood, prospective employment opportunities, or lack thereof. The chapter also explains the legal challenges faced by the respondents' after being released from the prison. The following findings on the respondents' socio-economic background contextualise their post-release struggles to reintegrate in the society.

Interviews were conducted with 37 respondents, out of which two were family members of the prison inmates. For the 37 interviewed respondents, the average age was around 33 years and two of the respondents were relatively older (55 and 62 years old). This suggests that most of the respondents belonged to the productive age-group. This made them eligible to be absorbed within the workforce.

Out of the 35 respondents, around nine percent were illiterate, 26 per cent were educated till the primary level, 14% up to secondary level, nine percent up to 12th standard and only one respondent was found to be a post-graduate. Seventeen per cent did not disclose their education status. Out of 37 respondents, almost 73% got support from their families, 11% were found without any kind of family support and 16% did not disclose this information.

Out of 35 the respondents, four of them were found to earn less than Rs. 5,000 per month, 11 of them had monthly income of Rs. 5,001to 10,000 and nine of them were found to earn over Rs. 10,001 up to 14,500 per month. Five of them were found to earn more than Rs. 14,501up to 15000, two of them reportedly earned monthly above Rs. 20,000 to 28,000. One of them had started their own shop recently. One respondent did not have any income, one respondent lived on a stipend amount Rs. 3,500 received from Prayas. Out of the total respondents, 65% were found to be earning less than minimum wages which is prescribed by the government (monthly Rs. 14,500). A total 25 respondents were unemployed.

Out of the 17 respondents who availed legal aid services (46% of total 37 respondents), 12 of them were found to have engaged private lawyers (32% of 37 respondents). It is worth

noting that around five of the respondents required services of both private and legal aid facilities.[59]

From a prospective of employability of released prisoners, half of the population under consideration were engaged in the workforce in some form. However, most of them were not adequately qualified or skilled to secure moderately skilled jobs, as a majority of them had not reached till secondary level of education (around 66%) Furthermore, around two percent of the respondents were illiterate. In other words, around 71% of the respondents would not be eligible for the absorption into any form of skilled jobs. To counter this challenge, researchers in the United States (U.S.) suggested prisoners imparted soft skills and other life skills which are consistent with market requirements. Doing so greatly enhances their employment opportunities. As part of this vocational training, prisoners are provided with on-the-job training which enables them to gain highly beneficial practical skills required for jobs. As a matter of building bridges to fulfil the gaps due to socio-economic disparity, Prayas has endeavoured to network with NGOs which have the resources to arrange for cash bail in order to facilitate the release of such persons.

It could be noted from various accounts of respondents that the immediate period after release was particularly difficult to sustain themselves. For example, Ms. AM, a released woman prisoner, reported:*"I had to work as a rag picker for two to three months after release. I did not find any other work at that time. I also had to beg to get some food to eat. After that, I worked as a maid in a household".*

Mr. N, a released male prisonershared: *"I had no place to stay after release, as my sister-in-law would not want to stay with me. In order to not to put brother and sister-in-law in difficulty, I had to lie to them that I was going to my friend's place. In reality, I spent two to three days sleeping near Sion hospital's gate."*

Ms. NM, another released woman prisoner, said:

> *"I am suffering from major medical issues due to which I require constant medical attention. I am facing a lot of isolation from society due to the nature of the disease. It was only after a few months after release that I could arrange for a medical practitioner through NGOs. I felt rejected within the society as the immediate neighbours heckled me and asked me to go away from the neighbourhood. They said*

[59] Erin Jacobs Valentine and Cindy Redcross, *'Transitional jobs after release from Prison: effects on employment and recidivism' (2015) 4(16)* IZA Journal of Labor Policy 2-3

things like 'enko bhagao- edhar nahi rakhneka' (she should be gone and she should not stay here).

Ms. AG, a released woman prisoner, said: *"I had committed theft for the sake of my sick husband but after lockdown, he deserted me and I am left alone to take the responsibility to educate our child. I hope to work hard and educate my daughter."*

Further, Ms. AM shared her detailed experience with the bail process:

> *"I was arrested on 7th September, 2016. I was arrested along with my brother-in-law. I didn't have a lawyer. I spent one year in jail and there was no one that came to meet us. We had no contact with anyone. My family didn't even come to see us. I spent two years in jail but I went to court after one year. My brother-in-law had met some lawyer, he asked them to get me a lawyer too. Then they applied for bail for me. And it got passed after I spent two years in jail. The lawyer that helped me was Shilpa ma'am. (Stated the phone number, she continued.) I heard that I had to furnish Rupees 10,000 for bail but I don't know whether it was furnished or not. I was released four to five months after bail was passed. I was released in 2018. I don't remember the date. But it was conditional bail. The condition was that I can't meet my kids until the case ends. Then I left the ashram without telling them. I met a woman called Roopali, then I told her my situation. We left the ashram together. I lived in the room she found for six months. I didn't even get work but she would take care of me. I then found an agent and found a job. I didn't meet my kids for years, I only saw them again two months ago. I also attend court dates regularly."*

It is found that respondents were facing great difficulties not only due to their economic background, but also due to social stigma leading to legal challenges. Therefore, one needs to intervene not only in court related matters, but also adopt a holistic approach to strengthen their societal roots. This is achieved by taking rehabilitative steps for the socio-economic rehabilitation of the families as a whole.

The findings reveal that the process of rehabilitation can start from within prison. One of the respondents was a teacher and after almost two years in prison, he could teach inmate students ranging from students who were non-literates to those who were due to appear for the tenth board examination. He expressed satisfaction for the fact that due to his intervention people could learn to speak English and were able to write in Marathi and English.

As per our analysis, the average family income of the respondents was a little above Rs. 9,500 and out of these about 51% respondents are financially dependent on their families and are currently not able to sustain themselves. In another study conducted in Kerala and Tamil Nadu, 74.7% of the respondents did not have a stable income[60]. Six respondents in this study reported that they were engaged in a particular form of self-employment such as vegetable seller, owner of small shop, traditional dental medicine, event management, bangle selling, cattle rearing, and making momos and egg rolls. In all, 15 of them were employed, two were in custody and 13 were unemployed.

Our analysis found that the majority of the respondents engaged in unskilled employment. The types of work included domestic work, food stall making momos and egg rolls, patient care, daily wage worker, farm workers, packaging food items, event management, assisting in a research centre on contract basis, sale of cutlery and bangle business, cattle rearing, rickshaw driver, and fashion designer. It can be seen that most prisoners belong to the marginalised section of society that is, they have a fragile family background, poor health situation and educational status. Reports show that this is a global phenomenon, where most prisoners represent the most marginalised sections of the society, regardless of whether the country is an advanced economy or otherwise[61].

[60] Dr. R. Santosh, *'From Cell to society: Study of the Social Reintegration of Released Prisoner of Kerala and Tamilnadu'* (2019)

[61] David Berry, *'The Socioeconomic Impact of Pretrial Detention'* (2011) 22 Open Society Foundation along with United Nation Development Programme.

Chapter 7: Subsequent Court Appearances

This chapter aims to highlight the problems faced by clients in attending court dates on time and to assess the client's relationship with their lawyer. Subsequent court appearances play an important role in fast-tracking the case proceedings.

Problems Faced in attending Court Dates

Most of the respondents said that they attend court dates regularly. They stated they never miss court hearings. For example, Ms. R stated that her mother, who was one of the parties to the case, was exempted from attending court regularly due to her old age. Mr. J stated that he has to take leave from work often because of court dates. Mr. T stated that he only missed the court hearing once before and has not missed it since.

Mr. M stated that he forgets about his hearing dates and he does not know when his case is listed either. He said that his lawyer, who was appointed with the help of an organisation, helps him keep track of court dates now and he sends all the details to Mr. M on WhatsApp. Similarly, Mr. J also said that his lawyer keeps him updated about his hearing dates. Ms. N stated that he was exempted from regular court visits due to medical reasons and that he isn't updated about its status anymore as his lawyer takes care of it. Ms. K on the other hand stated that she regularly follows up with her lawyer and attends hearings.

Mr. S stated that he has to visit Mumbai only for the sake of court hearings as he has moved back to his native place. Ms. A stated that she also visits Mumbai for court hearings in specific. However, she added that she is not given monthly hearings as she lives out of city. Ms. P stated that although she attends the court dates regularly, her trial is getting delayed due to the other party not attending the hearings regularly. Mr. J stated that he checks on the e-courts website to find out his hearing date or he has to visit the court in person to find out.

An analysis of the interviews of the respondents showed that there were two primary reasons why they found it difficult to attend courts regularly post their release on bail. They are as follows:

Firstly, the distance between the concerned court and the place of work and/or residence was too far away for the purpose of commuting. This would often imply that the respondents would have to take a leave from their work to attend the court hearing. Evidently, taking frequent leaves from work for the purpose of attending court is often not

feasible, as the employer would not agree to grant multiple leaves. Secondly, it was found that the concerned respondent was too ill to attend court regularly.

On the other hand, considering the socio-economic challenges of commuting to far off courts or even during illness, recommendation may be made for amendments in the law to stipulate certain specific conditions under which an accused may be exempted from regular appearance in court. Liberty may be granted to courts to exempt personal appearance of the accused considering stigma and reintegration. However, there has to be a balance struck between needs of the accused persons and interest of justice, as expressed in Hari Singh's case below.

In a judgement by the Jharkhand High Court it was observed that absconding offenders posed very serious challenges to the smooth dispensation of justice. The Jharkhand High Court in the case of *Hari Singh v. State of Jharkhand*[62] observed that there should be some amendments to Section 299 of Cr.P.C. A Prayas Legal Fellow recalled an instance where a magistrate questioned the motive and integrity of Prayas as an organisation as the magistrate opined that Prayas did not pay due attention to ensure the released persons attended the court on the concerned dates.

In Sandip Kumar Tekriwal v. State of Bihar[63], the Patna High court held that although courts have the power to reject the application for exemption of personal appearance from the concerned court, it did not have the power to cancel the bail bond on the very same day. Taking into consideration the judicial precedence, the experience of the respondent and the experiences of the fellows it can be concluded that there needs to be constant monitoring and awareness generation about the virtues of co-operating with courts in terms of regular and punctual appearances and compliance with judicial order.

Relationship with Lawyers

Most respondents had come in contact with their lawyers through NGOs. So, they were unaware of complete details about their lawyer. However, some of them stated that their lawyers helped them stay updated on court hearing dates. Mr. M stated that his lawyer sent him all details on WhatsApp to attend court dates regularly. Ms. K and Mr. J also stated that

[62] *Hari Singh v. State of Jharkhand,* 2018 SCC Online Jhar 2534
[63] *Sandip Kumar Tekriwal v. State of Bihar* 2009 (2) PLJR

their respective lawyers gave updates to them about their court dates. Ms. N stated that his lawyer represented him at the court and got him exempted from the court.

Ms. AM stated that her lawyer quoted a rather high fee for speedy closure of the case. Renuka also stated that her private lawyer demanded high amounts of fee and hence, she relied on the legal aid lawyer. One respondent was not aware of his lawyer's name.

As we can see, irregular court dates affected the respondent's schedule at work and added to their travel expenses, especially if they lived in farther off regions. Furthermore, the findings also revealed that respondents who were regular contact with their lawyer were clearly more updated about the status of their case than others.

An interesting case regarding the conduct of advocates particularly in relation to charging hefty fees from clients was brought before the consideration of the Supreme Court in the matter of *B. Sunitha v. The State of Telangana*[64].

- It was observed that recurring strikes by the bar had contributed to the piling up of arrears jeopardising the consumers of justice and has thus led to weakening the system of administration of justice. While considering the mounting cost of litigation, it was observed that fees charged by some senior advocates are astronomical in character. The corporate sector is willing to retain talent at a high cost. It develops into a culture and it permeates down below. Role of the legal profession in strengthening the administration of justice must be in consonance with the mandate of Article 39A to ensure equal opportunity for access to justice. The legal profession must make its services available to the needy by developing its public sector. It was observed that like public hospitals for medical services, the public sector should play a role in providing legal services for those who cannot afford fees. Maintenance of irreducible minimum standards of the profession is a must for ensuring accountability of the legal profession. The methodology was required to be devised[65] as a part of social audit of the profession wherein consumers of justice were required to be given role.
- Referring to the lawyers' fee as a barrier to access to justice, it was observed that it was the duty of the Parliament to prescribe fee for services rendered by members of the legal profession. First step should be taken to prescribe floor and ceiling in fees.

[64] *B. Sunitha v. The State of Telangana,* 2018 1 SCC 3688
[65] *ibid*, Paras 2.17, 2.22, 2.24, 3.30, 3.4, 3.8, 3.25

- With regard to the role of the legal profession for strengthening the administration of justice, it was observed that members of the legal profession could have a decisive say in law-making being the largest group in legislative bodies. They could contribute to reducing the litigation instead of perpetuating disputes by counselling the parties and could contribute to reducing the delay in proceedings. Alternative modes of resolution of disputes should be explored and one such may be pre-trial conciliation proceedings. Reducing the number of witnesses to be examined by deleting the irrelevant witnesses, reducing the length of cross-examination, by avoiding unnecessary questions and adjournments, could help the administration of justice.
- Though the 131st Report was submitted in the year 1988, no effective law appears to have been enacted to regularise the fee or for providing the public sector services to utmost needy litigants without any fee or at standardised fee. Mechanism to deal with violation of professional ethics also does not appear to have been strengthened. Success of administration of justice to a great extent depends on successful regulation of the legal profession in light of the mandate under Article 39A for access to justice. Deficiency in the working of the present regulatory mechanism has been acknowledged by this Court in several decisions. Mandate for the Bench and the bar is to provide speedy and inexpensive justice to the victim of justice and to protect their rights. The legal system must continue to serve the victims of injustice.
- In view of this mandate, this Court requested the Law Commission to have a re-look at the regulatory mechanism and expressed the hope that the Government of India will consider the recommendation of the Law Commission. In its 266th Report dated 23rd March, 2017 submitted in the light of decision of this Court in Mahipal Singh Rana, it was noted that conduct of members of the legal profession who do not follow ethics contributes to the pendency of cases. Element of public service has to remain predominant. The Commission noted that there was a huge loss of working days by call of unjustified strikes in jurisdiction of various High Courts resulting in denial of justice to the litigant in public. Such dilatory tactics including seeking adjournments on unjustified grounds affect the speedy disposal of cases. The Commission also noted the instances of browbeating the courts for getting favourable orders obstructing administration of justice. The Law Commission also noted the contemptuous conduct of some members of the legal profession.

- The Law Commission thereafter considered the issue of review of the regulatory framework of the legal profession. Referring to the developments in other countries it was observed that there was dire necessity of reviewing regulatory mechanisms not only in the matter of discipline and misconduct but also in other areas. It was suggested that the constitution of the Bar Council required a change for which an Amendment Bill was also recommended.
- We hope that the concerned authorities in the Government will take cognizance of the issue of introducing requisite legislative changes for an effective regulatory mechanism to check violation of professional ethics and also to ensure access to legal services which is major component of access to justice mandated under Article 39A of the Constitution.

Chapter 8: A Case for Aligning Indian Judicial Principles with its Practices: A Jurisdictional Comparative Analysis

Ms. A, suggests a regularised system of visitation and court dates. Perturbed by the quality of food, nutrition and medical facilities in jail, she recommends the provision of better facilities.

> *"The food is not good. There is stone in rice. The chapathi is half-baked. If we fall sick, they give the same medicines for all diseases", she recalls. Another respondent Ms. A says, "At the police station, I was hit and beaten by them. I didn't like the way they treated me. That was a problem. Then at the jail, I used to cry and then others started talking to me and consoling me. Even court dates didn't come on time which is causing a lot of problems, I wasn't made to appear in front of court on time either. The police didn't even help me get in touch with the government lawyer, they should help us when we are stuck." Interestingly, some of the respondents are taking matters into their own hands. Ms. A, aghast with the plight of the system, is studying to become a lawyer to help people like her. Ms. R's daughter too, studying to become a lawyer. "All of this happened to us but at least my daughter is getting an education now to be a lawyer so I think that's a good thing," Ms. R rejoiced.*

Ms. B suggested the need for child care in and out of prison when both parents are incarcerated and increasing trained female police officers. She further recalls how the appointment of a lawyer in a timely fashion would have greatly benefited her, both, financially and socially. Mr. H, unable to meet his family throughout the time spent in custody, point out, *"Families are not allowed for a meeting with us by the guards, they say they didn't get an order, they even take money, Rs. 500 to 1000, there is partiality in this respect. They should also allow us to meet family in the police station."*

Thus, the need for bail reform is clear. This study attempted to start its inquiry right at the beginning of an undertrial prisoner's journey – how is bail granted and on what basis? This chapter presents the answers to these questions.

To grant or not to grant bail is a decision made to either release or detain an accused in custody by setting a series of terms and conditions. This mammoth task carries serious consequences to not only the accused himself but also his family, the victim (and their family), societal safety and the sanctity of the judicial process. This decision, in India, is

made by a judicial officer to ensure that the defendant will not only appear in court, but also not tamper with the judicial process. To make this decision more informed, all relevant information for the case and release is produced before this officer. This chapter examines a risk assessment system for this actuarial analysis that helps classify high-risk, medium-risk and low-risk defendants, to thus make a decision about their release.

Through the course of this project, we have found that the Indian judiciary does not have a fixed set of determinative factors evaluated before granting bail. Without a definition of bail set in the Code that makes 'securing attendance' an objective, courts often attempt to determine the guilt of the accused, which is antithetical to the purpose of a bail hearing. It has been clearly established in principles laid down by this very judiciary that the objective of bail is to 'secure attendance' as opposed to 'evaluating evidence'.

Risk assessment systems, also known as the PARS (Pre-trial Assessment and Supervision), is aimed to assess a candidate's behaviour in relation to the case. Developed first in the U.S., these systems, based on a plethora of factors, determine how much of a risk it is to release the accused on bail and assess if the accused herein will appear in subsequent hearing and the possibility of re-committing crimes while out of custody.

This chapter analyses a variety of risk assessment systems throughout two jurisdictions - particularly, the U.S. and Australia - in an attempt to evaluate best practices of risk assessment to grant bail around the world. This comparative analysis is done to assess the scope of bail reform in India drawing from international perspectives. By identifying best practices across these jurisdictions, this chapter has three suggestions: one, to lay down a conclusive definition of bail with securing attendance as its object in the Code; two, to align judicial principles regarding the grant of bail with that of its practice; and thirdly, to have a conclusive and all-encompassing list of factors, where the socio-economic conditions of the accused to be assessed, evaluated and considered at each bail hearing.

A plethora of judicial precedents have reiterated that punishment is not the purpose of keeping a person in judicial custody. While, in principle, bail is meant to secure attendance of the accused at the trial, Indian courts today attempt to evaluate and assess the likelihood of the accused to have committed the crime in itself. This turns a bail hearing into one that discusses merit and by extension, the guilt of the accused that is to be reserved for hearing on a later date. The above backdrop clearly makes the case for exploring reformative approaches with regard to apparatus of bail as found in the statute books as well as judicial

pronouncements. The researchers are of the view that a comparative analysis of other jurisdictions around the world would aid this process.

Discussing the Definition of Bail in India

First and foremost, one should consider how the concept of bail is defined in the Indian legal context. Although consistently used, the term "bail" is not defined in the Cr.P.C. It merely makes a classification between bailable and non-bailable offences leaving a wide gap open for interpretation.

The word "bail" has been defined in the Black's Law Dictionary as: *"A security such as cash or a bond; esp., security required by a court for the release of a prisoner who must appear in court at a future time."* [66] (underlined for emphasis). Further, Wharton's Law Lexicon[67] defines bail as:

> *"to set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and at a place certain, which security is called bail, because the party arrested or imprisoned is delivered into the hands of those who bind themselves or become bail for his due appearance when required, in order that he may be safely protected from prison, to which they have, if they fear his escape, etc., the legal power to deliver him." (underlined for emphasis)*

Jurisprudence has always looked at bail as a provision to secure the appearance of the Defendant at the forthcoming trial. The Indian Judiciary, too, recognises this. As long back as in 1924, the High Court of Calcutta in *In Re Nagendra Nath Chakravarti*[68] iterated that the object of bail is to secure the attendance of the accused at the trial and that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment.

Further, the Apex Court in *Sanjay Chandra v. CBI*[69], has reiterated that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail and is neither punitive nor preventative. It held:

[66] Henry Cambell Black, *Black's Law Dictionary* (9th Edn, West) 160
[67] ibid (14th edn,West) 105
[68] *In Re Nagendra Nath Chakravarti*, 1923 SCC OnLine Cal 318 pp. 479-80
[69] *Sanjay Chandra v. CBI,* (2012) 1 SCC 40 pp. 21-22

> *"The deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts, it notes, owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty."*

Furthermore, the Supreme Court noted:

> *"From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, "necessity" is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances."*[70]

The Court additionally stated the importance of this presumption of innocence prior to trial. It noted:

> *"apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson."*[71]

This purpose and object of securing attendance is comparable to those in other parallel jurisdictions as well. American Jurisprudence affirms as follows:

> *"Where the granting of bail lies within the discretion of the court, the granting or denial is regulated, to a large extent, by the facts and circumstances of each particular case. Since the object of the detention or imprisonment of the accused is to secure his appearance and submission to the jurisdiction and the judgement of the court, the primary inquiry is whether a recognizance or bond would effect that end."*[72]

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[70] *ibid,* p. 22
[71] *Sanjay Chandra v. CBI,* (2012) 1 SCC 40 pp. 23
[72] American Jurisprudence, 2nd Edition Vol. 8, p. 806, para 39; cited in Satender Kumar Antil v. Central Bureau Of Investigation 2023 LiveLaw (SC) 233

Australian jurists, too, hold this view and note that *bail is 'process-oriented', aiming to ensure that the accused re-appears in court either to face charges or be sentenced*[73]. While in the Netherlands, the object of for keeping people in custody are to prevent them from the failing to attend their trial (i.e. absconding); tampering with evidence or interfering with witnesses; or committing another offence[74].

This objective of custody, as a way of securing attendance, permeates in the way risk is assessed in each of these jurisdictions prior to the grant of bail.

An Analysis of Risk Assessment Systems across USA

1. The Public Safety Assessment (PSA) Test

The Public Safety Assessment (PSA) Test, used widely by around 20 states like in the US including Arizona, Kentucky, New Jersey, and Utah and other nations like Australia, has three separate scales, each of which calculates a score for one of the following outcomes: failure to appear (FTA), new criminal activity (NCA), and new violent criminal activity (NVCA). The PSA uses four factors to calculate the FTA score: pending charge at the time of the arrest, prior conviction (misdemeanour or felony), prior failure to appear in the past 2 years and prior failure to appear older than 2 years. The PSA uses seven factors to calculate the NCA score: age at current arrest, pending charges at the time of the arrest, prior misdemeanour convictions, prior felony convictions, prior violent convictions, prior failure to appear in the past 2 years and prior sentences to incarceration[75]. Lastly, the PSA uses five factors to calculate the NVCA score: the current violent offense, pending charges at the time of the arrest, prior convictions (misdemeanour or felony) and any prior violent convictions[76].

These factors are drawn from the existing case and from the defendant's prior criminal history to determine if the accused herein is a risk to society. Each factor listed above is weighted and assigned different points according to the strength of its relationship with the specific pre-trial outcome. At the end of the assessment, the points for each pretrial outcome are totalled. The total points assigned to FTA and NCA are then converted to two

[73] D Chappell and P Wilson, Australian Crime and Criminal Justice (2005), 147.
[74] Fair Trials International,*Criminal Proceedings and Defence Rights in the Netherlands* (2014)
[75] 'How the PSA Works, Advancing Pre-trial Policy and Research' (*Advancing PreTrial Policy Research*, May 2020) <https://advancingpretrial.org/psa/factors/> last accessed on 19th July 2023
[76] 'How the PSA Works, Advancing Pre-trial Policy and Research' (*Advancing PreTrial Policy Research*, May 2020) <https://advancingpretrial.org/psa/factors/> last accessed on 19th July 2023

separate scales ranging from 1 to 6[77]. Lower scores indicate a greater likelihood of pre-trial success. The points assigned to NVCA are converted to a scaled score and then to the presence or absence of a "violence flag."

2. The Ohio Risk Assessment Tool (ORAS-PAT)

The Ohio Risk Assessment Tool (ORAS-PAT), similar to the one in Colorado, also includes residential stability, illegal drug use during the past six months, severe drug use problems as factors to be assessed in the Defendant. It includes a Community Supervision Tool (CST) which assesses the following[78]:

a. Criminal History,

b. Education, Employment and Financial Situation

c. Family and Social Support

d. Neighbourhood Problems

e. Substance Use

f. Peer Associations

g. Criminal Attitudes and Behavioral Patterns

This arithmetic assessment is prevalent in the ORAS-PAT, too, which assesses two primary outcomes: failure to appear and likelihood of re-arrest. The two outcomes are compounded together in the model development process and are compounded in the final model. The output of the model is a score on a scale of 0-9[79]. What is peculiar about this tool is that the risk assessment does require an in-person interview.

3. Alaska's Assessment System

Alaska's Assessment System is an evidence-based model that looks away from the accused's ability to pay to avail bail to a more objective analysis of the risk they pose. Based on the state's data, an actuarial statistical tool is developed that calculates risk. It measures two things- one, the likelihood of failure to appear (essentially if they release you, how likely are

[77] 'Risk Assessment Factsheet: Public Safety Assessment, Stanford Pretrial Risk Assessment Tools Factsheet Project' (*Standford Law School*, 2019) <https://law.stanford.edu/pretrial-risk-assessment-tools-factsheet-project/> last accessed on 19th July 2023

[78] Risk Assessment Factsheet: Public Safety Assessment, Stanford Pretrial Risk Assessment Tools Factsheet Project' (*Standford Law School*, 2019) <https://law.stanford.edu/pretrial-risk-assessment-tools-factsheet-project/> last accessed on 19th July 2023

[79] Edward J. Latessa, et al., "The Creation and Validation of the Ohio Risk Assessment System (ORAS)' (2010) 74(1) Federal Probation 16.

you to come back to Court for the hearing) and two, the likelihood of a new criminal arrest (only arrest and not necessary to be convicted)[80].

Firstly, its 'Failure to appear' risk factors are based on the arrest history of the Defendant including the age at first arrest, prior FTA warrants, FTA warrants in the last 3 years, current FTA, the current property charge as well as the current motor vehicle charge of the accused.

This is followed by an assessment of its 'new criminal arrest' risk factors, also based on the same parameters, including the age of the accused at first arrest, arrests in the last five years, convictions in the last three years, sentences that included probation, sentences in the past five years that included probation and sentences included incarceration (not wholly suspended) in the past three years.

4. The Colorado Pre-trial Assessment Tool (CPAT-R)

Unlike the PSA test, the Colorado Pre-trial Assessment (CPAT-R) model does consider the following community and social factors, including the housing status of the defendant, whether the defendant has a phone, whether the defendant contributes to residential payments, history of problems with alcohol and mental health history, and whether the defendant has other pending cases, among other factors[81]. The predictors chosen include employment/ education, time at current residence, problems with alcohol or drugs, prior arrests, arrests in the last year, age at first arrest, prior FTA, FTA in the last year, pending charge at arrest, active warrant, and prior violent arrest.

5. The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) Pretrial Release Risk Scale (PRRS-II)

The state of California uses this system of risk assessment developed by researchers at Northpointe, Inc. (now 'Equivant'). This model, unlike PRRS-I does not include age at assessment as a factor. Using "subject matter knowledge," the researchers identified 38 variables in the full COMPAS assessment data as "potential candidates for model development"[82]. These variables pertained to criminal history, employment, education,

[80] Fox, Geri & Pamela Cravez , "Alaska Pretrial Risk Assessment Tool (Transcript)" (2018) 34(3) Alaska Justice Forum.
[81] Victoria A. Terranova & Kyle C. Ward, 'Colorado Pretrial Assessment Tool Validation Project Final Report' (2020) University of Northern Colorado.
[82] Research and Development Department, Northpointe, Inc, *Kent County Pretrial Services Outcomes Study: Developing and Testing the COMPAS Pretrial Release Risk Scale* (April 23, 2010).

housing, substance abuse and gang affiliation. The output of the PRRS II is a risk score (1-10) and a corresponding risk level (Low, Medium, High). These risk levels were determined by transforming risk scores into deciles scores, analyzing the trends in probability of failure, and then cutting the deciles into groups. As a result, 50% of the cases fell into the medium risk level. This model too includes an in-person interview to assess the Defendant's employment status & how long they have been living at your current residence[83]. Court records and case file information can be used to answer the other items as listed below.

The PRRS II model assesses the following factors:

- Number of pending charges or holds
- Which offence category represents the most serious current offence
- Number of times sentenced to jail for more than 30 days
- Number of times failed to appear for scheduled court hearing
- Number of times arrested/charged with a new crime while on pre-trial release
- History of drug abuse (dichotomous variable)
- Length of time in current community or neighbourhood
- Employment Status (Full Time; Part Time; Unemployed; Not in labour force)

The CAPA uses the following scale factors to calculate a raw score.

- Number of pending charges or holds
- Top charge is a felony property or fraud offence
- Number of times sentenced to jail 30 days or more
- Number of times failed to appear for scheduled court hearing
- Arrested/charged with a new crime that resulted in conviction while on pre-trial release
- History of drug abuse
- On probation or parole at time of current offence

6. The Virginia Pre-trial Risk Assessment Instrument (VPRAI)

Created by the Virginia Department of Criminal Justice Services, the Virginia Pre-trial Risk

[83] Risk Assessment Factsheet, The Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) Pretrial Release Risk Scale (PRRS-II) (2019) Available here: https://law.stanford.edu/wp-content/uploads/2019/06/COMPAS-PRRS-II-Factsheet-Final-6.20.pdf

Assessment Instrument utilizes nine risk factors to classify a defendant in one of five risk levels. The risk categories represent the possibility that a defendant will be arrested or fail to appear for a scheduled court appearance while they are awaiting trial. The risk variables include measures of the Defendant's criminal history, residence, occupation, and substance misuse are among the risk variables. During the development of this tool, researchers claim to have ensured that no bias is pursued on the basis of sex, race or income. The instrument was shown to equitably classify Defendants regardless of the community type in which the arrest occurred, ensuring that the instrument can be effectively applied state-wide.

The nine factors considered in this assessment are as listed. The first six factors are measures of criminal history. The remaining factors are measures of residence, employment/ primary child caregiver, and substance abuse.

i. Charge Type - Defendants charged with a felony were more likely to fail pending trial than defendants charged with a misdemeanour.
ii. Pending Charge(s) - Defendants who had a pending charge(s) at the time of their arrest were more likely to fail pending trial.
iii. Outstanding Warrant(s) - Defendants who had outstanding warrant(s) in another locality for charges unrelated to the current arrest were more likely to fail pending trial.
iv. Criminal History - Defendants with at least one prior misdemeanor or felony conviction were more likely to fail pending trial.
v. Two or more Failure to Appear Convictions - Defendants with two or more failures to appear convictions were more likely to fail pending trial.
vi. Two or more Violent Convictions - Defendants with two or more violent convictions were more likely to fail pending trial.
vii. Duration of stay at Current Residence - Defendants who had lived at their current residence for less than one year were more likely to fail pending trial.
viii. Employed/Primary Child Caregiver - Defendants who had not been employed continuously at one or more jobs during the two years prior to their arrest or who were not the primary caregiver for a child at the time of their arrest were more likely to fail pending trial.
ix. History of Drug Abuse **-** Defendants with a history of drug abuse were more likely to fail pending trial.

This risk instrument is provided to judicial officers to consider in addition to the nature and circumstances of the offense and the weight of the evidence will assist them in making the bail decision such that: (1) "lower risk" defendants can be safely released into the community pending trial; (2) the risk of "moderate" and "higher" risk defendants can be minimized by utilizing appropriate release conditions, community resources, and/or interventions upon release; and (3) the "highest risk" defendants, those for whom no condition or combination of conditions can reasonably assure the safety of the community or appearance in court, can be detained pending trial.[84]

The listed systems however, are not all encompassing in any manner. Although these systems attempt to follow an objective method to assess risk, they are critiqued for perpetuating age-old biases of gender, class, ethnicity, religion, and sex, as observed by several researchers across the world. Research highlights that the Colorado Pretrial Assessment Tool (CPAT-R), for instance, unfairly discriminates against Black persons and Black persons and homeless people are more often mistakenly identified as 'high risk', when compared to white people and people with housing facilities[85]. Furthermore, most of these systems lack a one-on-one interaction with the Defendant through an interview or by recording their statements. They merely take decisions based on the quantitative data with the qualitative aspects missing in this process.

Risk Assessment in Australia

In Australia, the current law allows the magistrate to take into account any factor that seems relevant to whether a defendant will attend at the next court hearing or commit further alleged offences on bail. Research also points that history of any previous grants of bail to the accused helps the subsequent bail application.[86] The Public Safety Assessment Court (PSA Court) warrants particular attention here as an example of an approach that does not simply rely on algorithms to determine bail application outcomes.[87] This PSA-Court approach begins prior to the first appearance, with a pre-trial officer reviewing the defendant's criminal history record to identify the presence of any risk factors. The

[84] Marie VanNostrand, 'Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument' (2003) Virginia Department of Criminal Justice Service.
[85] Brian P. Schaefer and Tom Hughes, 'Examining Judicial Pretrial Release Decisions: The Influence of Risk Assessments and Race' (2019) 20(2) Criminology, Criminal Justice, Law & Society 47
[86] Travers, Max, et al. 'Bail Decision-Making and Pretrial Services: a Comparative Study of Magistrates Courts in Four Australian States' (2020) Report to the Criminology Research Advisory Council Grant: CRG 34/16–17
[87] John L. Koepke & David G. Robinson, 'Danger Ahead: Risk Assessment and the Future of Bail Reform' (2018) 93 Wash. L. Rev. 1725.

presence (or absence) of up to nine risk factors (e.g. pending charges at time of arrest, prior convictions, prior failure to appear, age) is then used to predict three specific outcomes: failure to appear; new criminal activity; and new violent criminal activity.[88]

The scores from the PSA Court are then imported into a decision-making framework and converted into a clear recommendation, which can range from release on one's own recognisance (an undertaking to appear) or release subject to various levels of supervision (e.g. with electronic monitoring) to detention (remand to custody). This recommendation is then provided to the court. The legal decision-maker can consider it as evidence when arriving at a final judgement.

Judicial officers in Australia, much like in India, are tasked to consider the risks of whether a defendant will attend the next court hearing or might commit offences while on bail. The bail authority also has to assess the risk of defendants harming themselves or interfering with witnesses. Magistrates are asked to assess and take into account vulnerabilities including the use of alcohol and other drugs, mental health issues, brain injury or cognitive impairment, and homelessness as prescribed by, or in the absence of, legislation on vulnerability in their jurisdiction. They also have the power to ask defendants to seek, or to continue, treatment. In some cases, defendants ask through their lawyers for such issues to be taken into account, when applying for bail.

Despite this framework in place, research shows that magistrates restricted their bail decision-making to a strict following of legislated legal criteria, with a partial exception to this observed in Victoria because of the embedded bail support services in many of their courts[89]. The primary bail concerns were the committing of alleged offences while on bail and failure to appear, with the idea that most vulnerabilities could contribute to the latter. Most magistrates showed little or no interest in the social or psychological causes of offending, unless they were directly relevant to the assessment of risk in a bail decision.

Risk Assessment Methods in India

Indian Courts, as per set precedents in law, consider the following factors for grant of bail. It has been held that certain circumstances need to be considered in granting bail, like whether the applicant has already been in custody and the trial is not likely to conclude for

[88] Desmarais, S. L., Monahan, J., & Austin, J, 'The Empirical Case for Pretrial Risk Assessment Instruments' (2022) 49(6) Criminal Justice and Behavior 807.
[89] Travers, Max, et al. *'Bail Decision-Making and Pretrial Services: a Comparative Study of Magistrates Courts in Four Australian States'* (2020) Report to the Criminology Research Advisory Council Grant: CRG 34/16–17.

some time, which can be characterized as unreasonable.[90] India, however, does not have any actuarial process to assess this risk. Thus, it is recommended that the grant/ denial of bail be done on a set list of factors, which are evaluated by a combination of an algorithm and an officer.

- The nature and gravity of the charge;[91]
- The severity of punishment in case of conviction and the nature of supporting evidence;[92]
- The position and the status of the accused with reference to the victim and the witnesses;[93]
- The reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;[94]
- Prima facie satisfaction of the Court in support of the charge.[95]
- The likelihood of the accused
    - repeating the offence[96]
    - fleeing from justice;[97]
    - of jeopardizing his own life being faced with a grim prospect of possible conviction in the case;[98]
- Illegal detention;[99]
- Undue delay in the trial of the case;[100]
- Severity of the punishment in the event of conviction;[101]

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[90] *Ram Govind Upadhyay v. Sudarshan Singh and Ors,* AIR 2002 SC1475
[91] *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[92] *State of Maharashtra v. Sitaram Popat Vital,* AIR 2004 SC 4258
[93] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41
[94] *State of Maharashtra v. Sitaram Popat Vital,* AIR 2004 SC 4258; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[95] *State of Maharashtra v. Sitaram Popat Vital*, AIR 2004 SC 4258; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[96] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors,* AIR 2001 SC 1444; *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41; *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960
[97] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41; *Prasanta Kumar Sarkar v. Ashis Chatterjee,* (2010) 14 SCC 496; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960;
[98] *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41
[99] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors,* AIR 2001 SC 1444
[100] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors*, AIR 2001 SC 1444
[101] *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee,* (2010) 14 SCC 496

- Danger of the accused absconding or fleeing, if released on bail;[102]
- Character, behaviour, means, position and standing of the accused;[103]
- The nature and gravity of the circumstances in which the offence is committed;[104]
- The history of the case as well as of its investigation;[105]
- Any other relevant grounds which, in view of so many variable factors, cannot be exhaustively pre-decided.

The courts in India have also held that mere existence of pending cases[106], criminal antecedents[107] and the gravity of the offence[108] cannot be a decisive grounds to deny bail to the Defendant.

The Bombay Sessions Court in *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra*[109], the Defendant was accused of robbery but there was *no incriminating evidence* found against the Applicant for the specific overt act in the commission of the offence except for his physical presence. The Court, further noting that the Applicant had already suffered incarceration for the last two years, a bail order was passed.

The Bombay High Court, in *Deepak Shrikany Aggawal v. The State of Maharashtra*[110], denied bail despite the appellant being in custody for more than six years in a case where for the offence in question, the maximum term is seven years by stating the seriousness of the offence. The Supreme Court overturned this order and allowed the appeal and granted bail noting his *time spent in custody*. In *Ms. Y v. The State of Rajasthan and Anr.*[111], the Court noted the following factors to grant bail: one, the seriousness of the offence committed herein (i.e. rape under Section 375 of the IPC); the relationship and its influence on the complainant as an elder family member; and the short period of imprisonment of three months, which was not of such a magnitude as to push the Court towards granting bail.

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[102] *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[103] *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[104] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41
[105] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41
[106] *Sumit v. State of U.P.,* 2010 Cri.L.J. 1435 (SC).
[107] *Maulana Mohmmad Amir Rishadi v. State of U.P. and Another,* 2012(2) Mh. L. J. (Cri.) 412.
[108] *Sanjay Chandra v. Central Bureau of Investigation,* (2012)1 SCC (Cri) 26.
[109] *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra*, CRIMINAL BAIL APPLICATION NO.1737 OF 2021
[110] *Deepak Shrikany Aggawal v. The State of Maharashtra* CRIMINAL APPEAL NO. 302 OF 2022 (Arising out of SLP (Crl.) No. 9969 of 2021).
[111] *Ms. Y v. The State of Rajasthan and Anr.,* CRIMINAL APPEAL No. 649 of 2022 (ARISING OUT OF SLP (CRL.) No. 7893 of 2021)

Recently, in *Brijmani Devi v. Pappu Kumar*[112], the Court noted that while the period of custody is a relevant factor in deciding bail, the same has to be weighed simultaneously with the totality of the circumstances and the criminal antecedents of the accused. Additionally, the Jammu, Kashmir and Ladakh High Court, in *Ravinder Gupta v/s UT of JK*[113], has held that the mere existence of multiple registered FIRs against an accused person is not sufficient to deny him bail.

Interestingly, in *Ruksana Murtuza Shaikh v. The State of Maharashtra*[114], the *gender* of the accused was a factor in availing bail. The Bombay High Court further noted the duration of her custody and noting the *absence of material record* suggesting her involvement, granted bail believing that the Applicant is unlikely to have committed the offence. Further, in the order of Varavara Rao, the Supreme Court considered the 82-year old's *age*, his *medical conditions* and also the two and half year *period of actual custody* spent by him. The bench also noted that trial is yet to begin in the case and even *charges have not been framed* even though a chargesheet had been filed.

One of the respondents' mother, who was incarcerated with her in this study, was released subject to her old age as well. Ms. R recalls:

> *"It was all three of us. My mother, my daughter and I. First my mother got released and then me and my daughter. But we didn't know the procedure, so we got stuck. There was no one to help us get out of jail, but during COVID they exempted my mother because of her old age."*

This has been confirmed by our study as well. In a bail application made(in *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra*[115]), the accused's offence was petty (i.e. robbery). However, the Court considered his previous incarceration of two years prior to the date of hearing and granted bail due to insufficient evidence. Mr. S, who spent twenty-six months and 19 days in custody, further recounts that, "*when his bail application was made at the court, they rejected bail because of an incorrect address on the application."*

It is observed that Indian courts have a greater focus on the merits of the case - to determine whether the accused could in all likelihood have committed the crime herein - by

[112] *Brijmani Devi v. Pappu Kumar,* 2022 4 SCC 497
[113] *Ravinder Gupta v. UT of JK,* 2022 Live Law (JKL) 187
[114] *Ruksana Murtuza Shaikh v. The State of Maharashtra* BAIL APPLICATION NO. 3447 OF 2019
[115] *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra,* CRIMINAL BAIL APPLICATION NO.1737 OF 2021

considering factors like material records, charges, time in custody and evidence presented as opposed to non-merit factors that include criminal history and other socio-economic factors. It is hence argued that this approach is rather flawed.

The following table provides a comparative analysis of the features of international systems with India:

Features - Country	United States (U.S.)	Australia	India
Merits of the case	Courts in the USA only pertain their view to the 'the nature of the primary charge' and 'whether the primary charge was a misdemeanor or a felony.' during the bail hearing.[116]	The Australian judicial system, much like in India, considers the 'seriousness of the offence.'[117] However, it does not delve into any more detail.	Higher judiciary in India has prioritised a focus on an assessment of the merits of the case in the recent years using the following factors: • The nature and gravity of the charge[118] • The severity of punishment in case of conviction • The nature of supporting evidence;[119] • The position and the status of the accused with reference to the victim and the witnesses;[120] • The reasonable apprehension of tampering of the witness or apprehension of

[116] It was observed that the Defendants charged with a felony were 61 percent more likely to fail pending trial when compared to defendants who were charged with a misdemeanor or infraction. Read at: https://www.uscourts.gov/sites/default/files/73_2_1_0.pdf
[117] Bail Act 1985 (SA), s 10(1)(a)
[118] *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496
[119] *State of Maharashtra v. Sitaram Popat Vital,* AIR 2004 SC 4258
[120] *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41

			threat to the complainant;[121] • Prima facie satisfaction of the Court in support of the charge,[122] • Illegal detention;[123] • Undue delay in the trial of the case;[124] • Severity of the punishment in the event of conviction;[125] • Danger of the accused absconding or fleeing, if released on bail; • The history of the case as well as of its investigation;[126]
Criminal History	What is common to most of the assessment systems analysed above are the following factors: Factors to assess failure to appear: • Pending charge at the time of the arrest • Prior convictions	Much like the PSA test in the USA, PSA Courts use the following factors to assess risk: • Age at current arrest • Current violent offense • Current violent offense & 20 years old or younger	The Court only considers the criminal history of the accused on a case-by-case basis and does so to assess the following factors: The likelihood of the accused to: • repeating the offence[127]

[121] *State of Maharashtra v. Sitaram Popat Vital,* AIR 2004 SC 4258; *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Gurcharan Singh v. State (Delhi Administration),* AIR 1978 SC 179; 1978 SCC (Cr) 41; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496

[122] *State of Maharashtra v. Sitaram Popat Vital,* AIR 2004 SC 4258; *State of U.P. v. Amarmani Tripathi,* (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496

[123] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors.*, AIR 2001 SC 1444

[124] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors.*, AIR 2001 SC 1444

[125] *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496

[126] *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41

[127] *Prahlad Singh Bhati v. N.C.T. Delhi and Ors.*, AIR 2001 SC 1444; *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960

	• Prior instances failure to appear • Current property charges • Current motor vehicle charges The factors used to assess if there is a possibility of the accused engaging in criminal activity after release on bail: • Current charges and violent offences (if any) • Age at current arrest • Pending charges at the time of the arrest • Prior convictions • Prior instances of failure to appear • Prior arrests and instances of incarceration (which may/may not have led to convictions)	• Pending charge at the time of the offense • Prior misdemeanour conviction • Prior felony conviction • Prior conviction (misdemeanour or felony) • Prior violent conviction • Prior failure to appear in the past two years • Prior failure to appear older than two years • Prior sentence to incarceration	• fleeing from justice;[128] • of jeopardizing his own life being faced with a grim prospect of possible conviction in the case;[129] Interestingly, Indian Courts have held that a mere criminal history or the existence of pending cases against the accused does not warrant denial of bail.
Community and Social factors	While the PSA test does not account for socio-economic and community factors, other models consider the following factors: • housing status of the defendant and residential stability • whether the defendant has a phone	Magistrates are asked to assess and take into account vulnerabilities of the accused while granting bail. They include: • The use of alcohol and other drugs • Mental illness and disability	The Court considers limitedly the following socio-economic factors: • Character of the accused • Behavioural patterns of the accused • Means and social position and

[128] *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496; *State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960;

[129] *Gurcharan Singh v. State (Delhi Administration)*, AIR 1978 SC 179; 1978 SCC (Cr) 41

	• whether the defendant contributes to residential payments • history of problems with alcohol, drug use • mental health history of the Defendant • whether the defendant has other pending cases • Family and Social Support • Neighbourhood and Peer Associations • Criminal Attitudes and Behavioural Patterns	• Brain injury or cognitive impairment, • Homelessness • Age • Spoken language • Cultural background	standing of the accused[130]

Conclusion

The comprehensive analysis of assessment models in this chapter highlights the need for a clear definition of bail to be laid down in the Code that lays down its object of securing attendance as opposed to appreciating the evidence at this stage. It is noted that this approach to bail by the Indian higher judiciary is fundamentally misplaced. The objective of a bail hearing is not for the Court to conduct a preliminary assessment of whether the accused is guilty. This ought not to be a point for consideration prior to trial.

Given the complexities of variables to be considered during the grant of bail, a body needs to be created for actuarial methodical assessment of bail. This body will comprehensively assess the risk factors as a part of a new reformed bail regime as proposed by the Court.

Further, researchers note that many indigent defendants who pose neither a danger to public safety nor risk of flight, nonetheless remain in custody, unable to turn to even a private bail bonding company for release. Thus, a uniform set list of factors that assess risk

[130] *State of U.P. v. Amarmani Tripathi* (2005), 8 SCC 21 : 2005 SCC (Cri) 1960; *Prasanta Kumar Sarkar v. Ashis Chatterjee*, (2010) 14 SCC 496

would benefit these individuals, who would otherwise be ineligible for release under a uniform, offence-focussed bail schedule. And thus, with lesser time spent in custody, and with individual defendants spending lesser time behind bars exposed to more severe offenders[131], this can translate in to lower recidivism rates.[132]

[131] Richard F. Lowden, 'Risk Assessment Algorithms: The Answer to an Inequitable Bail System?' (2018) 19 North Carolina Journal of Law & Tech. 221.
[132] Christopher T. Lowenkamp et al., 'The Hidden Costs of Pretrial Detention' (2013) 3 National Institute of Corrections.

Chapter 9: Suggestions and Recommendations

This chapter presents the various suggestions that Prayas' Legal Fellows had to share about the bail reforms. They had represented Prayas' clients, interacted with them first-hand, and assisted them in their bail process. Therefore, these suggestions and recommendations are from their experiences in working with various clients.

Suggestions by Prayas Fellows

This segment of the chapter encapsulates recommendations based on experience of the fellows and documents their suggestions on important socio-legal aspects that can improve the experiences of the undertrial prisoners with the CJS.

Suggestions for Clients' Families

One of the fellows explained that often the clients' families denied helping with bail due to the repeated arrest background of the persons concerned. Some of them would even want their son to continue being imprisoned. The fellow suggested that this is a problematic approach by the family towards the accused person. Wanting them to continue being in prison because they are accused of a crime is pre-determining their guilt before the court verdict and will further bear detrimental effects on the accused[133]. At the same time, it is crucial to recognize the substantial burden placed on the accused person's family, including the distressing experience of repeated arrests, the emotional toll of constant court appearances, and the strain on their limited financial resources. Families often get discouraged because this relentless cycle of arrests and legal proceedings not only disrupts their lives but also creates an environment of uncertainty and insecurity. While families may genuinely want to support their loved ones, their limited circumstances often prevent them from doing so effectively.

From the experience of the fellows it is seen that complex dynamics come into play when there is engagement in terms of socio-legal intervention. This can be seen while working with prisoners and in working with the stakeholders primarily the families of the prisoner. One may take note that as per training modules published by NALSA the para-legal volunteers are not only required to engage with the prisoner within prison, but also need to address the concerns of their families.

[133] National Legal Services Authority, 'Module for Training to Para-Legal volunteers', 30th October 2017. p.37.

It was recommended by the fellows that since there is research conducted by social workers which suggest that field work could act as a laboratory for social work education, proper training methodology may be developed by educational institutions such as the TISS in collaboration with legal aid institutions so that Para Legal volunteers can discharge their duties as lawyers and social workers in a professional and an effective manner in the future course of their careers.[134]

Further, as suggested by the fellows, one may seek assistance of the mandate of the Probation of Offenders Act, 1958, which requires that a probation officer inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method to adopt towards the accused person and submit reports to the court.[135] It is suggested that in such cases, the trial court magistrate or judge may direct a probation officer to make a home visit and submit a home assessment report to the court and may recommend additional conditions like asking the accused to remain in touch with an NGO or go for a de-addiction programme, in lieu of surety or cash bail.

Further, Ms. B, one of the Respondents, asked for child care in and out of prison when both parents are incarcerated. The Supreme Court, in the RD Upadhyay[136] case, addresses child care inside prison. It held that the child, living with incarcerated parents should not be neglected by the jail authorities or deprived of any right which is available to the children and is entitled to food, shelter, medical care, clothing, education, and recreational facilities as a matter of right. After the children attain the age of six years, the court, through the Social Welfare Department should appoint a trustworthy guardian for them or send them to welfare homes.

Suggestion for Improving Quality of Legal Aid

Many fellows explained that the quality of legal aid is not adequate despite being a constitutional mandate. One of the fellows suggested that the bail order copies or copy of orders passed by the courts should be sent to the accused in prison, because many times, they are not in contact with the DLSA lawyers and they are not aware about the progress in the case. Therefore, if there is any progress in the case or if there is a new order passed

[134] Anjali Dave , Vijay Raghvan, Durgesh Solanki, 'Centrality of Field Action in Social Work Education: A Case for Socio-legal Work' (2012) 42(4) Social Change 451, 453
[135] Probation of Offenders Act, 1958, s 14(a)
[136] *R.D. Upadhyay v. State of A.P*, AIR 2006 SC 1946

by the court, it must be sent to the accused person. Moreover, he says, many times, the DLSA lawyer does not meet the defendant in person, which leads to poor communication between the lawyer and the client.

It is pertinent to not that the Aurangabad Bench of the Bombay High Court in the matter of *State of Maharashtra v. Sheshrao Jadhav*[137] opined that the legal aid should not be provided for namesake, due credence is to be given to the length of experience and the type of cases by the concerned advocate, which should be recorded to the satisfaction of the trial court. This was followed by a judgement of the Gujarat High Court which relied on the said judgement of the Aurangabad bench of Bombay High Court. The Court stated that it was the trial court's duty to raise appropriate questions on the behalf of the accused if the concerned advocate was found to be inexperienced, particularly when the accused is charged with serious offences as far as bail is concerned.[138] The extensive directions of the Allahabad High Court need to be implemented on how bail applications are to be filed for persons who have '*pairokars*'. It is suggested that a similar direction may be adopted for the sake of Maharashtra as well as for pan-India.

It is suggested that copies of bail orders and all other orders passed by the court from time–to-time should be sent to the accused in prison through the prison superintendent. As per directions of the Hon'ble Supreme Court in the *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra*, the SC has made it mandatory for trial courts to send a copy of bail orders to the accused through the prison superintendent, vide its order passed on January 31, 2023[139].

Also, the copies of bail orders and all other orders passed by the court from time to time should be sent to the accused in prison through the prison superintendent. As per directions of the Hon'ble Supreme Court in *Sonadhar v. the State of Chhattisgarh*,[140] The SC has made it mandatory for trial courts to send a copy of bail orders to the accused through the prison superintendent, vide its order passed on January 31, 2023.

Further, the trial court should ensure that lawyers communicate with their clients in prison at least once a month either through a physical mulakat or through video

[137] *State of Maharashtra v. Sheshrao Jadhav*, Criminal Appeal No. 221 of 2002, ordered 21/12/2017.
[138] *State Of Gujarat v. Manjuben D/O. Kasturbhai*, Criminal Appeal N0. 474 of 2019, ordered 18/3/2019
[139] *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra,* CRIMINAL BAIL APPLICATION NO.1737 OF 2021
[140] *Sonadhar v. the State of Chhattisgarh*, 2022 LiveLaw (SC) 788

conferencing.[141] One may take note of order dated 23.9.2021 by the Supreme Court in the matter of delay in release of convicts on bail after grant of bail.[142] In this matter, the Supreme Court directed that the FASTER (Fast and Secured Transmission of Electronic Records) system be implemented across India from all prisons. This system is part of a proposal submitted by the government of India wherein all the interim orders, bail orders and court proceedings are to be transmitted to the concerned prison electronically. This direction is given by the court after it observed that prisoners are not being released on bail, even after passage of orders due to delay in communication of the same to the concerned prison. DLSA lawyers may be given some compensation in advance to take care of litigation expenses on behalf of the client.

Suggestions to Improve Legal Awareness

One of the fellows suggested that more awareness programmes should be organised at the community level in order to help everyone understand the legal system and procedures. She further suggested that the police need to be sensitised about legal rights of the accused persons as many of them lack sensitivity or have apathy towards the accused person, and therefore, misuse their powers. She also suggested that the DLSA lawyers should be trained in order to equip them to deal with accused persons better, without judgement or stigma. Further, research highlights the importance of visitations to the accused, their family, and thus, the society, by default.[143] This study found that prisoners' families require professional support to enable them to achieve positive experiences- in terms of education, fostering sensitivity, training, provision of better systems of information and family support work.

The researchers reiterated that the principle laid down in several judgments of the Supreme Court namely, D.K. Basu, Satender Kumar Antil, Arnesh Kumar, need to be enshrined in police manuals as well as syllabus of the judicial academies. In terms of stigma, commonalities are found between this study and research conducted in the U.S. As discussed in an earlier chapter, it was observed that a respondent faced difficulties post-release where he was not able to stay at home along with brother and his sister-in-law, mainly on account of the associated stigma with prior incarceration. From a social work

[141] *Ibid,* n. 38
[142] *"Re release of convicts after grants of Bail"*, W.P No(s). 4/20
[143] Danielle Sheehy, 'Staying Connected': Families' experiences of visiting an imprisoned relative and implications for social work practice' (2010) 2 Critical Social Thinking: Policy and Practice

perspective, the concept of the stigma faced by released prisoners bears a common thread between poor, socio-economic background as well as biases against particular communities. However, the findings of this study were not analysed according to their identity in terms of caste, religion, or socio-economic background. Further, research can be conducted in relation to the findings of this correlation between stigma and released persons' caste or religious background. The interplay of similar identity-related variables has been well-documented in research conducted in the UK, Europe, US, and Australia.[144] References may be drawn from research undertaken in the Indian contexts in relation to the over representation of certain communities.[145]Even in a general sense, the process of stigmatisation has been referred to as a toxic phenomenon, as it is seen that released prisoners try to pursue opportunities of employment or even leisure in one zone community.[146]

This discussion points that there is a significant element of stigma associated with former inmates. The possible solution is to observe the operation of probation hostels within the community. It is observed that the manager of the hostel adopted a "keep below the radar" strategy. This strategy is adopted in order to not to invite adverse publicity about the work of the hostel. Yet, there was a positive response from the community which regarded the work of the residence. This is particularly because the residence has contributed to the well-being of the community by undertaking activities such as cleaning a large amount of snow from the pathway.

One of the most pressing issues on which the respondents were brooding about was the property seized from them during arrest were not being returned by the police authorities upon their release.

For instance, Mr. J, complains that the police officials did not return any of his confiscated items, including his mobile, ring, purse, etc. which were deposited at the time of his arrest. This is a clear violation of established legal precedents. For instance, in *the State Of Orissa v. Ramachandra Das*[147], it was held that:

[144] Annakotova, 'Beyond courtesy stigma towards a multifaceted and cumulative model of stigmatisation of families of people in prison' (2020) 1 Forensic Science International: Mind and Law 7.
[145] Vijay Raghavan & Roshni Nair, 'Over-representation of Muslims: Prisons of Maharashtra' (2013) XLVIII (11) Economic and Political Weekly 12-17.
[146] Amy Frankel et al., 'Thoughts Beyond Stigma-Implication for Change Reflected in the Voices of Previously Incarcerated Citizens' (2021) Journal of Qualitative Criminal Justice & Criminology 6.
[147] State Of Orissa vs Ramachandra Das AIR 1991 Ori 197

> *'Once in a statutory proceeding it is found that the property seized cannot be retained and has to be returned to the owner under the statutory provisions, a statutory obligation exists to return the goods to the owner. The property is liable to be retained with the seizing authority until the adjudication becomes final. Consequently, there is an implied obligation to preserve the property intact and for that purpose to take such care of it as a reasonable person in like circumstances is expected to take. Similarly the State is bound to return the articles, once it is found that the seizure and confiscation is not tenable. Thus, there is not only a legal obligation to preserve the property intact, but also the obligation to take reasonable care of it so as to enable the Government to return in the same condition in which it was seized, the position of the Government, until the order becomes final, being that of a bailee.'*

Hence it is iterated that these directions and principles of Supreme Court have to be abided by police authorities and other officials seizing property of the accused person in a scrupulous manner.

Suggestions for the Judiciary

Many clients cannot reach court hearings on time due to reasons such as the police escort reaching late. In order to tackle this issue, one of the fellows suggested that online hearings to be made available in order to ease the process of travel. The E-Committee of the Supreme Court has issued model rules which are available on its website.[148]

Another fellow suggested that judges at all levels should be sensitised about the need to release undertrials on bail as per recent judgments of the Supreme Court and High Courts. The use of innovative conditions like asking an undertrial to remain under the supervision of a probation officer or an NGO should be tried in cases where the accused is released on PR bond. The court may also ask for a social assessment report by the Probation Officer before considering release of an accused under PR Bond. *The Probation of Offenders Act, 1958*, addresses this by assigning the following duties onto a probation officer:

"(a) inquire, in accordance with any directions of a court, into the circumstances or home surroundings of any person accused of an offence with a view to assist the court in determining the most suitable method of dealing with him and submit reports to the court;

[148] E-Committee, Information and Telecommunication Technology in the Indian Judiciary (2020) *Model Rules for Video Conferencing in Courts*, *e-Committee, Supreme Court of India*. Available at: https://ecommitteesci.gov.in/video-conference-hearing-in-district-courts/ (Accessed: 19th July 2023).

(b) supervise probationers and other persons placed under his supervision and, where necessary, endeavour to find them suitable employment;

(c) advise and assist offenders in the payment of compensation or costs ordered by the Court;

(d) advise and assist, in such cases and in such manner as may be prescribed, persons who have been released under section 4; and

(e) perform such other duties as may be prescribed."[149]

One of the fellows suggested that e-filing and digitisation of court processes must be encouraged. He further stated that video conferencing is a must according to the Supreme Court direction in the case of *Imityaz Khan v. State of Maharashtra*[150]. He suggested that email facilities must be available to various legal aid institutions in order to ease and fasten the processes.

Moreover, Ms. R vividly recalled the chaotic situation at the police station during her time in jail. She distinctly remembered feeling utterly uninformed about the legal procedures and processes, and laments the absence of any guidance to navigate through the system. Even at the police station, she mentioned the lack of assistance or explanations regarding the applicable laws. In light of such experiences, the recent judgement delivered by the Bombay High Court[151] appears commendable and has the potential to broaden the scope of criminal law. During the hearing of a Public Interest Litigation (PIL) concerning the scarcity of police personnel to escort undertrials to and from prison, the Court made an important remark, suggesting the redirection of cops from VIP security duties to fulfill this essential task. This move could prove to be a significant step in enhancing the efficiency of the CJS.

Other respondents suggested measures to avoid harsh ways of arresting. However, the issues that have been found need to be addressed through further in-depth research. Further, issues of police violence and custodial violence are explicitly covered in Section 330 IPC of voluntarily causing hurt and are violative of articles 20(1), 20 (2), 20 (3) and 21 of the Indian Constitution.

[149] The Probation of Offenders Act 1958, s 14
[150] *Imityaz Khan v. State of Maharashtra*, (2018) 9 SCC160
[151] Rosy Sequeira, 'Pull out VIP cop security, use it to take undertrials to court: HC' (Times of India, 21 Februray 2018) http://timesofindia.indiatimes.com/articleshow/63005880.cms?utm_source=contentofinterest&utm_medium=text&utm, Accessed 24th July 2023

Suggestions for Lawyers

One of the fellows suggested that based on the client's mental and physical health, appropriate remedies can be asked for before the court. He suggests that sections 437 and 329 of Cr.P.C. can be used in order to relieve persons with health issues from court proceedings or reduction in time under custody.

The experience of the fellows has shown that persons with possible mental illness did not cooperate in a conducive manner required to work towards providing relief to them, as per section 329 of Cr.P.C. In one of the instances, a client had reported that she had been possessed by a spirit; in another case an interview with a mother of an inmate revealed that the inmate was prescribed psychiatric medicine just prior to the commission of the alleged murder for which he was placed under judicial custody. However, in both the cases the fellows could not proceed to provide any legal relief as, both, the families and the inmates did not express any willingness to cooperate in these matters. The fellows followed a continuous dialogue to provide them with an environment where they would feel comfortable and secure to share their details regarding mental health complications.

Furthermore, the report 'Probation Hostels' (Approved Premises) Contribution to Public Protection, Rehabilitation and Resettlement'[152] looks at a thematic inspection that was carried out by the HM Inspectorate of Probation in the year 2017. It is interesting to note that there has been an extensive amount of work in relation to rehabilitation and resettlement of offenders through the means of probation hostels. It has been emphasised that serious offenders need a structured method of protecting the public and rehabilitation and resettlement of offenders. The bail hostels are a significant degree of focus on imparting life skills to the resident. However, there is very limited success in terms of rehabilitation in this regard. There is particular focus on rehabilitation in terms of imparting skills necessary to lead a productive life. For instance, there are facilities in the hostel to provide gardening, allotments, furniture restoration, outdoor activities and cookery classes.

Further, one of the legal fellows suggests that the LADC system must be strengthened to ensure that the LADC advocates get paid adequately such that the financial distress of hiring a lawyer is addressed to a great extent.

[152] HM Inspectorate of Probation, *Probation Hostels' (Approved Premises) Contribution to Public Protection, Rehabilitation and Resettlement* (2017) p. 1,7, 21,22,23,25.

Suggestions for the Legislature

The 156th report of the law commission published in the year 1997 recommends community service as a form of punishment. It was mainly to focus on relatively less serious offences with the focus on reformation of the convicted persons. The practices followed in the Netherlands emphasise that multiple factors contribute to the prison population reduction. [153] India should explore options to reform sentencing practices, ensuring that sentences are proportionate to the severity of the crime and considering alternatives such as community service. India should consider implementing a system that encourages prosecutors to use their discretion judiciously in the interest of justice, focussing on diversion programs, plea bargains. This can reduce the strain on the court system and prisons. India should adopt a holistic approach to criminal justice reform, considering the entire process from crime prevention to sentencing. Collaboration between different stakeholders, including law enforcement, prosecutors, judges, and social services, is crucial. Also, from the experiences shared by the respondents in this research, a willingness is observed to refrain from criminal activity if an appropriate ecosystem is developed by organisations such as Prayas. Civil society can play a vital role in terms of providing the means of a decent livelihood to all the released prisoners, be it on bail. Hence, codification of a proper law for community service is the need of the hour.[154]

It was found by the researchers in Netherlands that from the year 2011 to 2016 there was a drop in serious crime, such as rape, homicide, and assault, which had reduced by 41%.[155] The reduction in imprisonment has been attributed to less number of crimes been registered by the police, fewer cases sent to the prosecutors, increased number of waivers by the prosecution and increased number of acquittals by the judge. Literature available from California[156], U.S. for the year 1978 suggested diversionary programs to be put in place at pre-trial stage. This needs to be done after obtaining consent from the concerned judicial officer with respective provisions of law. An integral part of the program is the development of a service plan for persons. Under this scheme persons are given a voluntary option for them to undergo a diversion program where a person has to perform

[153] Miranda Boone, Sigrid Van Wingerde, Explaining the Collapse of the Prison Population in the Netherlands; Testing the Theories (2008) pp. 8-21.
[154] ibid
[155] ibid
[156] Performance Standards and Goals for Pretrial Release and Diversion (1978), pp. 75-114.

community service and appropriate agencies are to prepare a service plan in accordance with which a path for reformation of the accused person is charted out. In terms of record-keeping, details of the diversionary program are to be maintained by the concerned authorities for future reference. If the accused person successfully completes the program as per the terms and conditions then the case against him stands to be dismissed. The researchers find such programs to have great potential in terms of rehabilitation of undertrial prisoners in accordance with the ethos of Prayas.

In keeping with the directions issued by the Supreme Court in the matter of Satender Kumar Antil (supra), the researchers recommend a uniform bail law for the establishment of uniformity in the various processes that are paramount to uphold the principles of justice, liberty, and equality within the legal system. For example, one of the Prayas Legal Fellows observed that the Mumbai Metropolitan Courts accept income affidavits as a part of surety documents, while the Thane Magistrates' Courts do not. This discrepancy highlights the need for standardisation in the surety process across different jurisdictions. He has provided to the researchers an extensive note with recommendations for ensuring uniformity in bail guidelines (Annexure A). The researchers believe that there needs to be uniformity in the manner in which bail orders are passed by the courts. To this end, the researchers have developed a proforma which encapsulates various statutory obligations of the judges and the different guidelines pronounced via various judgements of the high courts and the Supreme Court of India; to be provided to judges tasked with deciding bail applications (Annexure B).

Recommendations based on Literature Review

This segment of the chapter deals with recommendation of the study based on the literature reviewed by the researchers.

Alternatives to Cash Bail

Like most of the undertrial population in India's prisons, Mr. S, was struggling to meet the surety to be deposited to avail bail, as he recalled, *"I was granted with cash bail of Rs. 50,000/-. I didn't have any money so had worked in prison to save money for bail."* Mr. V, on the other hand, did not even apply for bail due to his financial constraints and remained in custody for three years awaiting trial. For Mr. T, despite bail being passed immediately by the Court, he could not afford to meet the surety to be deposited.

This study as well as much of criminal justice literature in the Indian context critiques the provision of cash bail. With overcrowding of prisons, most of the inmates are presumptively innocent, serving as '*warehouses for the innocent'.*[157] These persons, mostly from a low socio-economic background, are in custody prior to trial solely because they cannot afford a cash bail. This practice ends up criminalising poverty[158]; the Courts have also identified this concern.[159]

The Law Commission, too, in its 21st report considered reforming the bail system. It highlighted in this report that 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. Courts must 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."*[160] Thus, this study also attempts to look at alternatives to money bail.

The Vera Institute of Justice conducted a study on New York's system and looked for alternatives to cash bail. They found that alternative modes of bail helped in making the parties appear at the court better than the previous cases. Two alternatives that were tried and suggested were: partially secured and unsecured bonds.

In the U.S., insurance companies do not pay for lower bail bonds because it is not profitable to them. Hence, it was suggested that instead of involving insurance companies, they could rely on family or friends. If the defendant breaks no conditions set by the court, then the money would be returned to the defendant, so that they are not financially set back. However, there are still downsides to this as there will be a requirement to arrange that money in the first place, hence, this is a very U.S.-specific alternative where the insurances are involved.

The other alternative that was suggested by Vera Institute was the unsecured bonds. In this system, the defendants are asked to pay only if they do not follow the conditions set

[157] Abhinav Sekhri, 'Separating Crime from Punishment: What India's Prisons Might Tell Us about Its Criminal Process' (2020) National Law School of India Review.
[158] Thea L. Sebastian & Alec Karakatsanis, 'Challenging Money Bail in the Courts' (2018) 57(3) Judges' Journal 23-27.
[159] *State of Rajasthan v. Balchand*, AIR 1977 SC 244; *Moti Ram and Ors. v .State of M.P*, AIR 1978 SC 1594; *Maneka Gandhi v. Union of India*, AIR 1978 SC 571
[160] 21st Law Commission of India Report, *Amendments To Criminal Procedure Code, 1973-Provisions Relating to Bail* (Law Com No 268, 2017) para 5.18

by the court or break any of the conditions. They are not asked to pay to get the bail itself. The report suggests that courts do not always assess the defendants individually. They concluded that when the New York system incorporated these other forms of bail, there were more appearances in the court which helped in concluding the case sooner.[161]

The American Civil Liberties Union (ACLU) has suggested the following as alternatives:

> *"Phone call reminders can increase appearance rates by 42% and mail reminders may increase appearance rates by as much as 33%.*
>
> *Unsecured monetary bail is more effective than monetary bail in getting defendants to come to court.*
>
> *Two-way text messaging apps that notify defendants of pending court dates and allow them to communicate with their lawyers has dramatically reduced failure to appear rates."*[162]

At this stage, the researchers looked at the Netherlands experience in incarceration. With no convicts left to jail, they are outsourcing their prisons to other nations like Belgium and Norway. This system, instead of long terms of punishment, uses both electronic tags as well as community services as alternative punishments. This, system of tags for electronic monitoring as a requirement of a suspended sentence or a substitution for a non-suspended prison term, was used to ensure surveillance; it was employed throughout the entire probation period akin to probation or community service. A 2015 study[163] compared detainees in Belgium with sentences of between six months and three years, and found that the subjects who completed their sentence at home wearing detectable ankle bracelets were less likely to reoffend than peers who had completed their sentence behind bars. Hence, it is seen that nearly attributing strict bail conditions may not achieve the desired end on preventing criminalisation of the accused persons. It is a rehabilitative approach towards reforming the persons who came in contact with the CJS, which makes a person refrain from indulging in criminal activity. Therefore, there needs to be an overhaul of both penal as well as bail apparatus in terms of scope of laws.

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[161] Insha Rahman, 'Against the Odds' (2017) Vera Institute of Justice <https://www.vera.org/publications/against-the-odds-bail-reform-new-york-city-criminal-courts>

[162] 'Smart Justice - Ending Cash Bail' (*ACLU Pennsylvania*, 15 January 2021) <https://www.aclupa.org/en/smart-justice-ending-cash-bail>

[163] Luc Robert and others, 'Virtual' versus 'real' prison: which is best?' (1st ed, Routledge 2017); Jyoti Belur and others, 'A systematic review of the effectiveness of the electronic monitoring of offenders' (2020) 68 Journal of Criminal Justice

The idea of community service as an alternative to extended prison sentences could be explored in the Indian criminal law[164]. Several judicial commissions, too, highlight this need. The Law Commission in its 156th Report of August, 1997 recommended that in Section 53 of the IPC, which deals with punishments include community service, along with three other types of punishments.

In 2002, the Justice Malimath Committee also recommended community service as a mode of punishment:

> *"12. …Public Justice is central to the whole scheme of bail law. Fleeting justice must be forbidden but punitive harshness should be minimised. Restorative devices to redeem the man, even, through community service, meditative drill, study classes or other resources should be innovated, and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offence while on judicially sanctioned 'free enterprise' should be provided against. No seeker of justice shall play confidence tricks on the court or community. Thus, conditions may be hung around bail orders, not to cripple but to protect. Such is the holistic jurisdiction and humanistic orientation invoked by the judicial discretion correlated to the values of our constitution." Gudikanti Narasimhulu*
>
> *"65. Perusal of these judgments indicates that beside Community Service, Meditative Drill, Study Classes, the guidance had been given in respect of Innovation of other resources also and this expression further gives discretion to the Courts to innovate new methods of Community Service and other reformatory modes as a part of Pre Trial Reforms."*
>
> *It notes that Section 437 (3) and other two related provisions of Section 438 (2) and 439 (1) give scope of Community Service as a bail condition and Community Service has both. The social and the cognitive benefits and it can serve not only as an alternative to Post Trial but also to Pre Trial reforms and in fact inclusion of Community Service as Post Inquiry measure in the Section 18 (1), it noted.*

Recently, another order of the Madhya Pradesh High Court[165] requested the Law Commission of India to consider the following and suggest suitable amendments to the

[164] *Supra* note 59.
[165] Veekesh Kalawat v. The State of Madhya Pradesh 2023 LiveLaw (MP) 50

POCSO Act:

> *"(a) Where the prosecutrix is below the age of consent but de facto consent is apparent, not to have a minimum sentence and instead, give the discretion to the Special Court (who is a senior Session Judge usually with more than twenty years of judicial experience) to impose a sentence as per the facts and circumstances of the case, which can extend up to twenty years; and*
>
> *(b) Where the prosecutrix is below the age of consent and the relationship has culminated in marriage (with or without children), there should not be any sentence of imprisonment and instead the Special Court be empowered to impose alternate correctional methods like community service etc." (underlined for emphasis)*

The Court, under its powers, can impose any condition in the interest of justice. Thus, it is strongly recommended that the Court look at community service as an alternative to lengthy prison sentences.

Further, studies also suggest that higher cash amounts do not necessarily lead to increase in court appearances.[166] In which case, it is suggested that monitoring systems such as GPS monitoring is used. Although some might argue against GPS monitoring due to privacy rights concerns. Such GPS monitoring or electronic tagging is also used in the United Kingdom as they mostly rely on conditional bails[167]. Some of the countries in the South-East Asia have adopted harsh bail systems. For instance, a report on mass detention in Cambodia[168] suggests that the country's bail system needs to be revamped, as in Thailand. It suggested that the number of crimes that require such heavy pre-trial detention need to be reduced by amendments to the law.[169]

This question of electronic tag was considered by the Law Commission as well in 2017. [170]The panel quoted a New Zealand law to define electronic tagging or electronically monitored (EM) bail as a mechanism that is also known as a "restrictive" form of bail. It

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[166] Teresa Wiltz, 'Locked Up: Is Cash Bail on the Way Out?' (*Stateline,* 1 March 2017) <http://pew.org/2lWNodH> accessed 19th July 2023

[167] 'Custody and Bail | Nidirect' (*NiDirect Government Services,* 15 January 2016) <https://www.nidirect.gov.uk/articles/custody-and-bail> accessed 19th July 2023

[168] 'Time for Bail: Ending Needless Mass Detentionf' (*Cambodian League for the Promotion and Defense of Human Rights*, October 2018) <https://www.licadho-cambodia.org/reports.php?perm=227> accessed 19th July 2023.

[169] David Hutt, 'The Bail Challenge in Southeast Asia' (*The Diplomat*, 26 July 2019) <https://thediplomat.com/2019/07/the-bail-challenge-in-southeast-asia/> accessed 19th July 2023.

[170] Amendment to Criminal Procedure code, 1973- Provisions Relating to **Bail, Report no. 268, p.n-99, may 2017.**

concluded that there would be significant impact on constitutional rights of citizens and it was of the opinion that such a system, if used, must be implemented with highest degree of caution and that such monitoring must be used only in grave and heinous crimes, where the accused person has a prior conviction in similar offences.

Certain recommendations were considered by the Law Commission in May 2017, and some interesting findings were considered by the commission.[171] However, a perusal of the report would suggest that many of the recommendations were regressive to the rights of the accused. For example, suggestions were made that the upper limit prescribed for finding of the chargesheet has to be extended from 60/90 to 90/180 days. Moreover, bail is denied not just to people convicted, but also to people nearly chargesheeted in an offence punishable with death, life imprisonment or imprisonment seven years or more. The researchers are of the opinion that views of defence counsel and civil society working for the welfare of the undertrial and convicted prisoner ought to be represented as members of the commission.

As is observed in *Veekesh Kalawat v. The State of Madhya Pradesh* (supra), Inspectorate of Probation (supra), it is suggested by the researchers that any new statute catering to the specific needs of bail, should contain provisions exclusively meant for persons for bail on the condition that they undertake certain activity as community service as an alternative to monetary bail (please see Annexure C for proposed structure of community service).

Research, too, notes the detrimental social effects of having such a tag system to entrench further discrimination against these undertrials by classifying them as 'harm' to the society. People will find it harder to get jobs, they will be ostracised and simply excluded for being identified with such a tag on. This is neither reformative nor restorative. In this study however, we suggest a technical change in the structure of the tag itself. It can be adapted to make it easy to be hidden, and also easy to track without being detrimental to such undertrial persons resulting in their exclusion from the society. Thus, we suggest that there is scope for scientific modification to adopt the Dutch system of electronic tagging as an alternative for custody for undertrials.

[171] Amendment to Criminal Procedure code, 1973- Provisions Relating to **Bail, Report no. 268, p.n-122 to 128, may 2017.**

Risk Assessment Systems

Risk Assessment systems, also known as the PARS (Pre-trial Assessment and Supervision) program is aimed to assess a candidate's behaviour in relation to the case. It looks at various facets such as failure to appear or other violations in order to study an accused's behaviour after being released on bail. It was developed in the U.S. as the country needed to find alternatives to dealing with pre-trial accused persons. A 2015 study showed that most of California's inmates – up to 62% of them – were not convicted and were only awaiting trial.[172] Therefore, they have been using "pre-trial" services wherein they assess the risk and make decisions about their bail and release. The same study concluded that not having such professional risk assessment methods will lead to judges using their professional judgement, which may be harmful as there may not be statistical judgement to arrive at the conclusion. Such systems have proven to help judges arrive at decisions for people still awaiting trial.

Moreover, such systems have also ensured regular court appearances by the accused persons rather than by cash bail. Although this study was limited to a specific country, the results it showed were promising to understand that pre-trial services offered more promise than cash bails in ensuring that the accused person attended court hearings regularly. The main drawback seems to be that the assessment needs to be carried out with proper guidance and that, ultimately, the discretion to use the same remains with the judge presiding over the case.

As highlighted in the previous chapter, there is a flawed approach of the Indian courts to bail itself. It is, thus, necessary for a precise definition of bail to be outlined in the Cr.P.C., with its objective of 'securing attendance' rather than evaluating the evidence at this point. Additionally, an authority for an actuarial, thorough evaluation of bail needs to be established, given the intricate nature of the elements that must be taken into account when granting release. The risk factors will be thoroughly evaluated by this authority as part of this reformed system. Thus, the researchers suggest there is an urgent need for the respective Legislative Assemblies of the state as well as the Parliament of India to consider discussions in relation to the appointment of a Public Safety Officer of the nature that is

[172] Matt Barno, Deyanira NevÃ¡rez MartÃnez & Kirk R Williams, 'Exploring Alternatives to Cash Bail: An Evaluation of Orange County's Pretrial Assessment and Release Supervision (PARS) Program' (2019) 45 American Journal of Criminal Justice 363.

found in Australia and U.S. so that the courts can be aided through independent assessments regarding the prospect of an undertrial prisoner to be released on bail.

Based on this research, it is strongly recommended that a reformative approach must be adopted as opposed to the current deterrent one to the bail regime as well as to the system of punishments.

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Annexure A

Subject: Recommendation for Establishing Uniformity in the Surety Process for Bail

I am writing to address a significant issue that has come to our attention within the legal system regarding the surety process for individuals granted bail by the Hon'ble courts. The process of surety plays an integral role in securing the release of accused persons on bail, and it has become apparent that there is a pressing need for uniformity in its implementation.

The surety process, which ensures that the accused individuals will faithfully attend court proceedings, is a crucial step in the judicial system. Unfortunately, instances have arisen where individuals who have been granted bail by the Hon'ble courts are unable to secure their release due to inconsistencies in the surety process. This situation not only impedes the timely resolution of cases but also impacts the fundamental right to liberty that our judicial system aims to protect.

The Hon'ble Supreme Court and High Courts across the country have provided directions and guidelines with regard to the surety process. Some example as under,

In the case of HANI NISHAD @ MOHAMMAD IMRAN @ VICKY v/s THE STATE of U. P. in SLA (Crl.) No. 8914-8915 of 2018, the Hon'ble Supreme Court observed that, "the petitioner shall execute a personal bond for Rs. 30,000/- and the same bond shall hold good for all 31 cases. There shall be two sureties who shall execute the bond for Rs. 30,000/- which bond shall hold good for all the 31 cases".

In the case of ABHISHEK KUMAR SHUKLA v/s THE STATE OF U.P. in case number APPLICATION U/S 482 No. 8144 of 2020 , the Hon'ble High Court recognized that, "Therefore, the texture of the Section 441-A of the Cr. P. C. which has been introduced by way of amendment made in the year 2006 clearly reflects that, a person may stand surety for more than one accused person to stand surety in more than one case and also for more than one accused person. However, as stated earlier, the status, verification and the competency of the surety will always be assessed by the trial court before acceptance."

In the case of SAGAYAM @ DEVASAGAYAM v/s THE STATE rep. by THE INSPECTOR OF POLICE in Crl. M. P. No. 3888 of 2017, the Hon'ble Madras High Court recognized that, "Court should be satisfied as to the genuineness, identity of the surety and his residential address.

It is equally applies to the accused. For this purpose, the Court can accept copy of anyone of the following documents after verification.

1. Passport
2. Ration card
3. PAN card
4. Driving license
5. Voter's ID
6. Aadhar Card
7. Photo ID issued by a recognised Educational Institution.

8. Photo Credit Card
9. Kissan Photo Passbook
10. Pensioner's Photo Card
11. Freedom fighter photo card
12. Identity Certificate with photo issued by a Gazetted officer or Tahsildar
13. Address card with photo issued by the Postal Department
14. Disability ID card or handicapped medical certificate issued by the Govt.
15. NREGS Job Card
16. CGHS/ECHS/State Government/ESIC Medical Card
17. Marriage Certificate issued by the Government
18. Post office Statement or Passbook
19. Water Bill
20. Electricity Bill
21. Property tax receipt
22. Landline Telephone Bill
23. Credit Card Statement
24. Income-Tax assessment order
25. Arms License
26. Certificate of Address issued by the Head, Village Panchayat or an Equivalent Authority
27. Registered Lease/ Sale/ Rent Agreement
28. Caste and Domicile Certificate that has photo issued by the State Government
29. Gas connection bill
30. Insurance Policy

From the above analysis, we have come to the conclusion that when the accused executes bail bond, when the surety executes surety bond, Court cannot insist production of property documents, surety need not be a government servant or a blood relative or a local surety."

However, despite the existence of such directions, we have observed disparities in the acceptance of surety documents by trial courts. In some instances, surety papers are not accepted due to the non-availability of certain documents or income proof. This lack of uniformity can lead to confusion and delay in the release of individuals who have been granted bail, creating an additional burden on the already overburdened legal system.

It is imperative that our judicial system upholds the principle of liberty for every individual, regardless of their origin or circumstances. To ensure a fair and consistent application of the surety process, we recommend the establishment of uniform guidelines that trial courts must adhere to. These guidelines should encompass the acceptance of various types of documents as surety, without imposing unnecessary restrictions that may hinder the release of deserving individuals. For instance, the Mumbai Metropolitan Courts accept Income Affidavits as a part of surety documents, while the Thane Magistrate Court does not. This discrepancy highlights the need for harmonisation in the surety process across different jurisdictions.

The establishment of uniformity in the surety process is paramount to uphold the principles of justice, liberty, and equality within our legal system. We humbly request your attention to this matter and advocate for the formulation of clear and standardized guidelines that can be universally applied by trial courts across the nation. By doing so, we can contribute to a more efficient, fair, and effective legal system that respects the rights of individuals and ensures the expeditious administration of justice.

Thank you for your consideration.

Annexure B

IN THE COURT OF J.M.F.C ABC, AT ABC

CR NO.

IN

RCC/SESSION CASE NO.

XYZ)....Applicant

V/s.

The State of Maharashtra

Through XYZ Police Station) ... Respondent

Proforma For Bail Order

(See Section……)

A. Fact of the Case

(Mention the basic facts of the case as put forth by the prosecution including sections the applicant the applicant is changed with…)

B. Basic Parameters

Whether Applicant Entitled to Statutory Bail U/S 436, 436 A, 167(2) etc.

B.1

Whether there is compliance of Section 41A Cr.P.C. (For Offenses Punishable Upto a term of 7 years or less)

B.2

Special Consideration U/S 437 (See sub-section 1 i.e. proviso to clause ii)

C. Arguments

C.1

Arguments advanced on behalf of the applicant

C.2

Arguments advanced by the prosecution

D. Mitigating/Aggravating factors under consideration for deciding bail application.

D.1

Mitigating factors under consideration for the grant of the bail application. (Minimum role of the applicant, absence of criminal antecedents, the ground of parity, minimum gravity of the offense, lack of prima facie evidence, stage of trial, etc.)

D.2

Aggravating factor under consideration for rejection of bail application. (Major role of the applicant, consideration of criminal antecedents, high gravity of the offense, Possibility of tampering evidence etc.)

E. Conclusion

(How Mitigating factors outweigh the aggravating factors for grant of bail/ How aggravating factors outweigh mitigating factor for rejection of bail)

F. Order (Socio-economic considerations are to be made in case of imposing conditions for bail)

Sd/

Signature of the presiding Judicial Officer Date

Place

Annexure C

Excerpts from the Submission to the National Criminal Law Reforms Committee, Chaired by the Vice Chancellor, National Law University, Delhi

What is community service?

"A community service programme is a programme through which convicted offenders are placed in unpaid positions with non-profit or tax-supported agencies to serve a specified number of hours performing work or service within a given time limit as a sentencing option or condition''[173]

Objectives of community service

In the UK the Home Office Circular[174] concerning National Standards for Community Service Orders states that an order has three main purposes:

a) Punishing the offender by requiring them to perform unpaid work, by the discipline of punctual reporting for work and loss of free time.

b) Reparation to the community by requiring the offender to do work which is socially useful, which repays the community for what the offender has done and which, if possible, makes good the damage done by offending.

c) Benefiting the community by providing work which otherwise would not be done.

Effectiveness of community service

A study by Martin Killias, Marcelo Aebi and Denis Ribeaud (2000) concluded that:

(i) Alternatives to imprisonment, such as community service, may reduce future delinquency (that is, recidivism) more than imprisonment.

(ii) Short-term imprisonment does not seem to increase criminality, nor does it seem to jeopardise job or private life opportunities. However, it shapes negative attitudes towards the sentence and the criminal justice system.

(iii) Reductions of recidivism (and later delinquency) may depend less on improving job and other life perspectives, and more on helping offenders to view their conviction and sentence as a result of their own behaviour and not of a judge's (or any other third parties') 'fault'.

(iv) If (iii) should hold true, efforts should be made, by judges and other criminal justice officials, to explain to defendants the rationale of decisions, and to enhance their feeling of having been treated fairly. The results of the experiment conducted in Milwaukee (Paternoster et al. 1997) point in the same direction.[175]

[173]Ibid pp. 51 - 52
[174]UK the Home Office Circular N° 18 of 1989
[175]Martin Killias, Marcelo Aebi and Denis Ribeaud . (2000). Does Community Service Rehabilitate better than Short-term Imprisonment?: Results of a Controlled Experiment, The Howard Journal, Vol. 39, No 1. (February, 2000), pp. 40-57.

Findings of the 156th Report of the Law Commission of India

The Law Commission of India in the year 1997 observed a dichotomy amongst stakeholders involved in implementation of such a penal sanction by the State. While group of five judges were of the opinion that community service should apply to serious offences, the Law Commission of Himachal Pradesh was of the opinion that community service must apply to only less serious offences. Some of the stakeholders have even questioned the relevance of community service in India.[176]

Role of the Supreme Court

The Honourable Supreme Court of India had directed an offender to undergo community service in State Tr. P.S. Lodhi Colony New Delhi V. Sanjeev Nanda in a hit and run case involving a vehicle. The court ordered:

(1) Accused has to pay an amount of Rs.50 lakh (Rupees Fifty lakh) to the Union of India within six months, which will be utilized for providing compensation to the victim of motor accidents, where the vehicle owner, driver etc. could not be traced, like victims of hit and run cases. On default, he will have to undergo simple imprisonment for one year. This amount be kept in a different head to be used for the aforesaid purpose only.

(2) The accused would do community service for two years which will be arranged by the Ministry of Social Justice and Empowerment within two months. On default, he will have to undergo simple imprisonment for two years.[177]

In the Soleman Sk v/s State of West Bengal case, the apex court opined, "*as we are of the opinion that the ends of justice would be met by directing the petitioner who is now a registered medical practitioner aged 32 years, practicing in Murshidabad to perform community service. The learned counsel for the state suggested that this obligation of performing community service could be met with by a direction being to the petitioner to plant trees. We accept the suggestion made by the learned counsel for the petitioner and direct the petitioner to plant 100 trees within a period of one year*".[178]

C. Suggestions for legislative reforms

In the backdrop of what is discussed, expanding the statutory structure provided for in the procedure of plea bargaining and probation[179] would be best suited to address the needs of both the victim and the offender:

1. The scope of plea bargaining as provided for in section 265A may be made expanded to include which are eligible under the Probation of Offenders' Act, 1958, i.e. offences where the maximum sentence does not amount to life imprisonment or death. Due credence may be given to the needs of the victim as well as prospects of reformation

[176]See the 156th Law Commission report of 1997 p 476
[177]State Tr. P.S. Lodhi Colony New Delhi V.Sanjeev Nanda [2012] 12 S.C.R. 881
[178]Solemaman Sk V/s State Of West Bengal Miscellaneous Application No.381 Of 2019 In Special Leave Petition (crl.) No.709 Of 2019
[179]ibid 9,ibid 3

of the offender through means of probation or community service in all such offences, once the guilt is proved.

2. Section 53 of the Indian Penal Code may be amended to include compensation and community service as new forms of punishment.
3. Since a framework for providing alternatives to imprisonment as punishment has already been provided for in the statutory regime of probation,[180] the same provisions should be amended to include a structure for community service.

Structure of community service

Offences may be divided in three categories based on the sentences:

1. Offences where the maximum sentence is 3 years or less – these should be categorized as **non-imprisonment offences** with community service and/or compensation to the victim / victim's family in lieu of community service.
2. Offences where the maximum sentence is more than 3 years but upto 7 years – these should be categorized as offences where imprisonment may be awarded but preferably awarded community service or probation as per the provisions of the PO Act, 1958, and/or compensation to the victim / victim's family.
3. Offences where maximum sentence is more than 7 years – rigorous imprisonment and/or fine and/or compensation to the victim / victim's family or release on probation as per the provisions of the PO Act, 1958.

Roadmap

1. Community service shall be offered to a convicted person in offences where the maximum sentence is less than 7 years.
2. The convicted person has to opt for community service in lieu of imprisonment.
3. The Community Service Order (CSO) should specify the number of hours of community service per week that the person has to perform.
4. Usually, the number of hours of community service may be calculated on the basis of 6 hours per day of the total number of days of imprisonment after deducting the number of days of remission that may be admissible for good behaviour if the person were imprisoned. For example, if the person is convicted for one year of imprisonment, community service hours would be calculated at the rate of 6 hours per day x 22 days per month x 12 months (assuming 8 days of remission per month) = 1584 hours of community service. This means the person would have to perform 132 hours of community service per month or 32 hours of community service per week. The order may specify a minimum no of hours to be done per week, for example, it may specify minimum 16 hours per week, in which case the period of community service would increase. The more the number of hours the person completes in a week, the shorter the period of community service order would be.

[180]ibid 3 see section 360 Code Of Criminal Procedure, 1973

5. The CSO has to be supervised by a Community Service Order Officer (CSOO) or Probation Officer (PO).
6. The CSOO or PO shall remain in touch with the offender through visits to the site of the community service, telephone calls and asking the offender to visit their office once a month.
7. The CSOO / PO would maintain a record of the number of hours completed every month and the visits made to their office / field visits made by them during the month.
8. The CSO structure would imply creation of a network of recognised voluntary organisations / NGOs / local bodies, who would be empaneled by the DLSA in the district as recognised bodies to accept placement of convicted offenders.
9. The nature of work given under a CSO should lead to improving the social responsibility of the offender towards the community and should not be given any work which is degrading in nature. The person may be asked to do volunteer work in organisations that are engaged in public service, for example, in the field of health care, education, civic rights, child care institutions, elderly care work, legal rights and education, community development, rural development, etc.
10. Each such person shall have a supervisor in the placement organisation to supervise the work of the offender and play a proactive role in motivating the person to become a responsible citizen.
11. The organisation may pay a subsistence stipend to the person depending on the nature of work and availability of funds with them.
12. The supervisor in the placement organisation would be in close touch with the CSOO / PO, and shall immediately report any violation of conditions of the CSO, as directed by the court.
13. The court may impose any other condition along with the CSO, as it may deem fit, for example, asking the offender to undergo a drug detoxification and rehabilitation programme, or to attend Alcoholics or Narcotics Anonymous sessions or to go for counselling sessions, or complete a vocational training course, etc.
14. The CSOO / PO, based on the good behaviour and satisfactory report from the placement organisation about the conduct and performance of the offender at their work place, may recommend to the court to reduce the number of hours of community service after completion of at least half the number of hours that the person is supposed to complete.

D. Proposed amendments in the Probation of Offenders' Act and Borstal Schools Act

1. An amendment in section 3 of PO Act should be introduced in the definition of petty offences to include offences where maximum sentence is 3 years or less. This will allow such offences to be considered for release on admonition.
2. An amendment should be introduced in Section 4 to include community service under the supervision of a probation officer or a community service officer.

3. NGOs should be recognised in each district by the state government to implement community service orders.
4. There should be provision to compensate / remunerate the NGO for placement of probationer in the organisation for a specified period of time.
5. There should be provision for aftercare hostel for probationers who do not have shelter during the probation period.
6. There should be provision for rehabilitation grant and counselling services for probationers.
7. The age limit for Borstal Schools should be between 18 to 25 years.
8. Youth offenders in the age group of 18 to 25 years may be considered to be sent to a Borstal School if convicted for a period upto 5 years.
9. Consent of parents' clause in the Borstal Schools Act should be removed from the law, since the persons being considered under this law are adults.
10. The Inspector General of Prisons should have the powers to transfer any youth offender convicted of an offence to a Borstal School for a period of 1 to 3 years, as part of the period of imprisonment that the convicted youth offender is serving.

Annexure D

Prayas – Tata Institute of Social Sciences, Mumbai

Interview Guide

Thank you for agreeing to participate in this interview. The interview is part of a research study (Experiences of persons been released on bail: Accessing Bail and Post Bail)undertaken by the Prayas, Tata Institute of Social Sciences, Mumbai. Your identity and answers provided by you will be kept confidential.

Date of the Interview:

Name of the Interviewer:

Name of the Respondent:

Mode of the Interview: Physical visit / Telephonic / Online

Before I begin the Interview, I will explain the **Objectives of the study:**

a) To understand the issues and problems faced by undertrials in accessing bail (grant of bail and release on bail)
b) To understand the problems relating to sustaining the release on bail

Interview Guide for Released prisoner

1. **Please tell me something about yourself, family members:**
    a) Who are you living with (alone, family, friend, relative etc.)
    b) Address and phone no:
    c) Native place (address)
    d) Education status, occupation and earning source, income (respondent and family)
    e) If you have children, how old and are they going to school?
2. Please explain about the situation as to how you came to prison (socio-economic vulnerability, addiction, friend circle, etc.)
3. Type of offence – sections, Bailable / Non-bailable
4. Did you take any steps to get released before reaching the prison (lawyer arranged) in petty offences (e.g. table bail, payment of fine and get released, produced documents)
5. Please could you tell me about **the role of DLSA** and private lawyer in your case? Who helped to appoint the lawyer? (explore communication with client and family and payment of fees (accessing bail and post bail)
6. Type of bail granted in your case and time period to get the bail. What kind of help/ support you received and from whom?

7. Did you face any **problems / challenges** in accessing bail and post bail (understand challenges faced from f**amily, friends or neighbours, police or in court or from an advocate (DSLA and private) or any other etc.** communication with advocate and payment (private advocate), systemic delay from court staff.
    a) Before arrest
    b) Till bail granted
    c) Bail compliance (provisional bail, surety, cash bail, documents, insolvency, PR bond etc)
    d) Post granting of bail
    e) Post release from prison
8. Please could you share the date of release on bail? Do you have knowledge/awareness about the court direction/conditions to attend police or report to the police regularly (next court date, attend police station regularly etc.).
9. Are you fulfilling the conditions set out in court order (Attending last court date and police station etc.)
10. As DLSA lawyer role is till granting of bail, did you face any difficulty (during trial) post that period? Do you have a lawyer in your case for trail? Name of lawyer and phone no: .
11. Post Release:
    a. How are you managing your expenses? Did you face any financial problems? If yes, please explain
    b. Are you employed? If yes, please give details (like form of work, payment schedule (per day / 15 days / monthly) income). If no, have you tried to find employment and what has been the experience so far?
    c. Are there any other problems you want to speak about?
12. Do you need any support post release? If yes, what kind of support please explain.

Suggestions and Recommendations

13. Based on your experience, please can you share a few suggestions / suitable recommendations to the concerned government departments to address the problems (accessing bail and post bail)

Thank you for taking your time. Your responses are valuable to our study. We appreciate your time.

Interview Guide for Fellows and DLSA Lawyers

1. Please can you explain your role and experiences while working on accessing bail and post bail
2. Please can you share briefly about the cases in provisional bail and regular bail :
   a. Share some challenges and experiences while dealing with the case
   b. Explain time taken to seek bail in :
      i. Bailable and non-bailable cases
      ii. Cognizable and non-cognizable
      iii. Punishment upto 3 years, 3 to 7 years, more than 7 years
      iv. Heinous crime - NDPS, POSCO, Murder, Rape, human trafficking etc
   c. Please can you explain is it easier to seek bail in which offences. Do some cases take longer time to access bail?
   d. Pleas can you explain how do you strategize cases in accessing bail (like case laws, judgements, documents from family, home visit report, meeting the Judges, discussion with prison superintendent, hospital report (physical and mental health-related)
3. Please could you explain even though after accessing bail in bailable and non-bailable offences, yet inmates are still in prison for a longer time (based on field experiences). What could be possible reasons for this?
4. Did you network with any NGO in accessing bail
5. Did you face any **problems/challenges** in accessing bail and post bail (understand challenges faced from f**amily, friends or neighbours, police or in court or from an advocate (DSLA and private) or any other etc.** communication with advocate, systemic delay from court staff.

   f) Before arrest

   g) Till bail granted

   h) Bail compliance (provisional bail, surety, cash bail, documents, insolvency, PR bond etc)

   i) Post granting of bail

   j) Post release from prison

Legal mandate: The interviewer can brief the respondents on the bail related judgements from Supreme Court and High Court. Explain the main features of the Judgement. The team to understand what happens on the ground and what judgement says.

6. Did you use any of the supreme and high court judgements to seek bail
7. Please could you share the implementation gaps (as prescribed under legal mandate and prison manuals). And the steps taken by you to deal with the challenges.

Suggestions and Recommendations

Based on your experience, please can you share a few suggestions / suitable recommendations to the concerned government departments to address the problems?

Thank you for taking your time. Your responses are valuable to our study. We appreciate your time.

Annexure E

List of Cases

1. *Arnesh Kumar vs State of Bihar (2014)* 8 SCC 273
2. *B. Sunitha v. The state of Telangana* 2018 1 SCC 3688
3. *Binoy Jacob v. CBI* 1993 CriLJ 1293
4. *Brijmani Devi v. Pappu Kumar,* 2022 4 SCC 497
5. *D.K.Basu v. State of West Bengal*, AIR 1997 SC 610
6. *Dataram Singh vs The State Of Uttar Pradesh* on 6 February, 2018
7. *Deepak Shrikany Aggawal v. The State of Maharashtra* CRIMINAL APPEAL NO. 302 OF 2022 (Arising out of SLP (Crl.) No. 9969 of 2021)
8. *Emperor v. Hutchinson,* AIR 1931 All 356
9. *Gurbaksh Singh Sibbia v. State of Punjab,* 1980 AIR 1632, 1980 SCR (3) 383
10. *Gurcharan Singh vs. State (Delhi Administration)* AIR 1978 SC 179; 1978 SCC (Cr) 41
11. *Hari Singh v. State of Jharkhand* 2018 SCC Online Jhar 2534
12. *Himanshu Kumar And Others v. State Of Chhattisgarh And Clothes,* 2022 Live Law (Sc) 598
13. *Imityaz Khan v. State of Maharashtra (2018) 9 SCC160*
14. *In re Nagendra Nath Chakravarti,* 1923 SCC OnLine Cal 318
15. *Janadalat v. The State of Maharashtra and Anr,* PIL no.161255457. Order dated 1.3.20.2017.
16. *Mahipal v. Rajesh Kumar and Anr.*, (2020) 2 SCC 118
17. *Maneka Gandhi v Union of India* AIR 1978 SC 571
18. *Maulana Mohmmad Amir Rishadi vs. State of U.P. and another.* 2012(2) Mh. L. J. (Cri.) 412.
19. *Mithun Chatterjee up v. State Of Odisha* LL 2021 SC 652
20. *Mohammad Sharif Aslam Shaikh v. The State of Maharashtra*, CRIMINAL BAIL APPLICATION NO.1737 OF 2021
21. Moti Ram and Ors. v State of M.P AIR 1978 SC 1594
22. *Ms. Y v. The State of Rajasthan and Anr.* CRIMINAL APPEAL No. 649 of 2022 (ARISING OUT OF SLP (CRL.) No. 7893 of 2021)
23. *Nagendra v. King-Emperor* AIR 1924 Cal 476
24. *Nikesh Tarachand Shah v. Union Of India* 2018 SCC.1
25. *Niranjan Singh v. Prabhakar* AIR 1980 SC 785
26. *P. Chidambaram v. Directorate of Enforcement* (2020) 13 SCC 791
27. *Pradeep Kumar Sethy v. State of Orissa* 2022 Live Law (Ori) 115
28. *Prahlad Singh Bhati vs. N.C.T. Delhi and Ors* AIR 2001 SC 1444;

29. *Prasanta Kumar Sarkar v. Ashis Chatterjee,* (2010) 14 SCC 496
30. *Pravat Chandra Mohanty vs The State Of Odisha & Anr* LL 2021 SC 80
31. *Rasiklal Vs. Kishore, AI*R (2009) SCC (Criminal) 338.
32. *Ravinder Gupta v. UT of JK* 2022 Live Law (JKL) 187
33. *Ritu Chhabria v. Union of India* 2023 LiveLaw SC 352
34. *Roshan Beevi And Ors. v. Joint Secretary To Government Of Tamil Nadu* 1984 (15) ELT 289 Mad
35. *Ruksana Murtuza Shaikh v. The State of Maharashtra* BAIL APPLICATION NO. 3447 OF 2019
36. *Sagayam @ Devasagayam v. State* 2017 SCC OnLine Mad 1653
37. *Sandip Kumar Tekriwal v. State of Bihar* 2009 (2) PLJR
38. *Sanjay Chandra Vs. Central Bureau of Investigation* (2012)1 SCC (Cri) 26.
39. *Sarwan Singh v. The State Of Punjab* 1957 AIR 637, 1957 SCR 953
40. *Satender Kumar Antil v. Central Bureau of Investigation & Anr* 2023 LiveLaw (SC) 233.
41. *Satish Kumar Jayanti Lal Dabgar vs State Of Gujarat* (2015) 7 SCC 359
42. *Selvi v. State of Karnataka A*IR 2010 SC 1974
43. *Shabbu v. The State of U.P* 1982 CriLJ 1757
44. *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* CRIMINAL APPEAL NO. 2271 2010. (Arising out of SLP (Crl.) No.7615 of 2009)
45. *Sonadhar v. the State of Chhattisgarh* 2022 LiveLaw (SC) 788
46. *State Of Gujarat vs Manjuben D/O. Kasturbhai* CRIMINAL APPEAL NO. 474 of 2019 on 18 March, 2019
47. *State of Maharashtra v. Sheshrao Jadhav,* criminal appeal no. 221 of 2002, ordered 21/12/2017.
48. *State of Maharashtra v. Sitaram Popat Vital* AIR 2004 SC 4258
49. *State of Rajasthan v. Balchand* AIR 1977 SC 244
50. *State of U.P. v. Amarmani Tripathi (*2005) 8 SCC 21 : 2005 SCC (Cri) 1960
51. *Sumit v. State of U.P.* 2010 Cri.L.J. 1435 (SC).
52. *Sunita Gandharv v. State of M.P* 2020 SCC Online MP 2193
53. *Union of India v. K. A. Najeeb* 2021, 3 SCC 713