CHAPTER – II

CONCEPT OF BAIL: A HISTORICAL PERSPECTIVE

2.1 INTRODUCTION

The concept of bail has a long history and deep roots in English and American law. In medieval England the custom grew out of the need to free untried prisoners from disease-ridden jails while they were waiting for the delayed trials to be conducted by travelling justice.¹ Prisoners were bailed or delivered to reputable third parties of their own choosing who accepted responsibility for assuring their appearance at trial. If the accused did not appear, his bail or would stand trial in his place. Eventually it became the practice for property owners who accepted responsibility for accused persons to forfeit money when their charges failed to appear for trial. From this grew the modern practice of posting a money bond through a commercial bondsman who receives a cash premium for his service, and usually demands some collateral as well. In the event of non-appearance, the bond is forfeited after a grace period of a number of days during which the bondsman may produce the accused in Court.²

Usually, bail is a kind of asset or property given by the court as a security for consideration of release from being arrested or to avoid being jailed, as an identification that the accused or suspect will be present on the day of hearing or trial and where if he fails to appear before the court on the given day then his property may be sized or forfeit the bail. The amount deposited shall be returned at the end of the trial if the accused present at every hearing regardless of whether the accused has found guilty or acquitted.

The administration of bail has seen changed enormously from this original bail setting and these changes in America can be attributed largely to the intersection during the 20th century of two historical phenomena. The first was

the slow evolution from the personal surety system using unsecured financial conditions to a commercial surety system primarily using secured financial conditions. The second was the often misunderstood creation and nurturing of a bail or no bail or release or no release dichotomy which continues to this day.

The history of bail tells us that the pre-trial releases and detention system that worked effectively over the centuries. Moreover, the bail side of the dichotomy functioned most effectively through an uncompensated and un-indemnified personal surety system based on unsecured financial conditions. What we in America today know as the traditional money bail system – a system relying primarily on secured financial conditions administered through commercial sureties is, historically speaking, a relatively new system that was encouraged to solve America’s dilemma of the unnecessary detention of bailable defendants in the 1800s. Unfortunately, however, the traditional money bail system has only exacerbated the two primary abuses that have typically led to historical correction:

(1) The unnecessary detention of bailable defendants, whom we now often categorize as lower risk.

(2) The release of those persons whom we feel should be unbailable defendants, and whom we now often categorize as higher risk.

The history of bail also instructs us on the proper purpose of bail. Specifically, while avoiding blood feuds may have been the primary purpose for the original bail setting, once more public processes and jails were fully introduced into the administration of criminal justice, the purpose of bail changed to one of providing a mechanism of conditional release. Concomitantly, the purpose of, no bail was and is detention. Historically speaking, the only purpose for limiting or conditioning pre-trial release was to assure that the accused come to court or otherwise face justice. That changed in the 1970s and 1980s, as jurisdictions began to recognize public safety as a second constitutionally valid
purpose for limiting pre-trial freedom. It is a matter of court to grant bail or not. In some countries bail is allowed very commonly and at some countries it is very hard to get bail. If the courts find that the accused will not appear in court if he is allowed bail and there is chance that he will abscond in such cases, court may not allow bail.

2.2 ORIGIN OF THE WORD BAIL

The word ‘bail’ is derived from the old French verb baillier, which means to give or deliver. The word is also related to the Latin word bajulare meaning to bear a burden. It allows individuals to live their lives until they are brought to trial, giving individuals a taste of freedom while they prepare their defence. Bail itself has a very interesting history – and how it has been applied often says quite a bit about the relationship between the legal system and those who have been accused of a crime. Bail’s origins are ancient, but the concept itself has been familiar throughout history.

While bail can be traced to ancient Rome, our traditional American understanding of bail derives primarily from English roots. When the Germanic tribes the Angles, the Saxons, and the Jutes migrated to Britain after the fall of Rome in the fifth century, they brought with them the blood feud as the primary means of settling disputes. Whenever one person wronged another, the families of the accused and the victim would often pursue a private war until all persons in one or both of the families were killed. This form of ‘justice’, however, was brutal and costly, and so these tribes quickly settled on a different legal system based on compensation first with goods and later with money to settle wrongs. This compensation, in turn, was based on the concept of the ‘wergeld’, meaning ‘man price’ or ‘man payment’ and sometimes more generally called a ‘bot’, which was a value placed on every person and apparently on every person’s property, according to social rank. Historians note

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the existence of detailed tariffs assigning full wergeld amounts to be paid for killing persons of various ranks as well as partial amounts payable for injuries, such as loss of limbs or other wrongs. As a replacement to the blood feud between families, the wergeld system was also initially based on concepts of kinship and private justice, which meant that wrongs were still settled between families, unlike today, where crimes are considered to be wrongs against all people or the state. Bail laws are different among the states, often due to the extent to which those states have fully embraced the principles and practices evolving out of the two previous generations of bail reform in the 1960s and 1980s. Even in states with similar laws, however, pre-trial practices can nonetheless vary widely. Indeed, local practices can vary among jurisdictions under the same state laws, and, given the great discretion often afforded at bail, even among judges within individual jurisdictions. Disparity beyond that needed to individualize bail settings can rightfully cause concerns over equal justice, through which Americans can be reasonably assured that the laws will not have widely varying application depending on their particular geographical location, court, or judge.

Normally, state and federal constitutional law would provide adequate benchmarks to maintain equal justice, but with bail we have an unfortunate scarcity of language and opinions from which to gauge particular practices or even the laws from which those practices derive. Fortunately, however, we have best practice standards on pre-trial release and detention that take fundamental legal principles and marry them with research to make recommendations concerning virtually every issue surrounding pre-trial justice.

In this current generation of pre-trial reform, we are realizing that both bail practices and the laws themselves from court rules to constitutions, must be held up to best practices and the legal principles underlying them to create bail schemes that are fair and applied somewhat equally among the states.\(^5\)

2.2.1 Roman

While the notion of bail has been traced to ancient Rome\(^6\), the American understanding of bail is derived from 1,000-year-old English roots. A study of this “modern” history of bail reveals two fundamental themes. First, as noted in June Carbone’s comprehensive study of the topic, “bail originally reflected the judicial officer’s prediction of trial outcome. “In fact, bail bond decisions are all about prediction, albeit today about the prediction of a defendant’s probability of making all court appearances and not committing any new crimes. The science of accurately predicting a defendant’s pre-trial conduct, and misconduct, has only emerged over the past few decades, and it continues to improve. Second, the concept of using bail bonds as a means to avoid pre-trial imprisonment historically arose from a series of cases alleging abuses in the pre-trial release or detention decision-making process. These abuses were originally often linked to the inability to predict trial outcome, and later to the inability to adequately predict court appearance and the commission of new crimes. This, in turn, led to an over-reliance on judicial discretion to grant or deny a bail bond and the fixing of some money amount or other condition of pre-trial release that presumably helped mitigate a defendant’s pre-trial misconduct. Accordingly, the following history of bail suggests that as our ability to predict a defendant’s pre-trial conduct becomes more accurate, our need for reforming how bail is administered will initially be great, and then should diminish over time.\(^7\)

2.3 HISTORY OF BAIL

Under the English law, the operational mode for interim release of an accused was that a surety had to be bound to produce the accused to stand his trial on the day appointed for such trial. And if the accused failed to as per the

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\(^6\) Gerald P. Monks, History of Bail, (1982).
\(^7\) https://www.pretrial.org/download/pji.../PJI-History%20of%20Bail%20Revised.pdf
stipulated today the surety himself would stand trial in his place as such a position would seemingly be untenable in a land where Magna Carta has remained the mainstay of liberty. But the law of bail, of the kind mentioned above, subsisted and emanated from the courts concern and obligations towards the king’s peace which, heretically had been intolerant of any disturbance being accused to the public or to interests of the sovereign. It can thus be found that the concept of bail under the English common law concerned itself with both the values namely, that of personal freedom as well as that of the security of the politico-legal system. In India the concept is traced back to ancient Hindu jurisprudence which required, *inter alia*, an expedient disposal of disputes by the functionaries responsible for administration of justice. No laxity could be afforded in the matter as it entailed penalties on the functionaries. The concept of bail can traced back to 399 BC, when Plato tried to create a bond for the release of Socrates. The modern bail system evolved from a series of laws originating in the middle ages in England.

### 2.3.1 Evolution of Bail in England

Bail, in English common law, is the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety, taken for his appearance on a certain day and a place named. The surety is termed bail because is termed bail because the person arrested or imprisoned is placed in the custody of those who bind themselves or become the bailers for his due appearance when required. So he may be re-seized by them and surrendered to the court, when they are discharged from further liability. The sureties must be sufficient in the opinion of the court to answer for the sum for which they are bound and, as a rule, only householders are accepted, and an accomplice of the person to be bailed or an infant would not be accepted.

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11 Encyclopediabritannica.
all summary cases. It is obligatory in all misdemeanours, except such as have been placed on the level of felonies, viz., obtaining or attempting to obtain property on false pretences, receiving property so obtained or stolen, perjury or subordinate of perjury, concealment of birth, wilful or indecent exposure of the person, riot, assault in pursuance of a conspiracy to raise wages, assault upon a peace officer in the execution of his duty or upon anyone assisting him, neglect or breach of duty as a peace officer, any prosecution of which the costs are payable out of the country or borough rate or fund.

There existed a concept of circuit courts during the medieval times in Britain. Judges used to periodically go on circuit to various parts of the country to decide cases. The terms sessions and Quarter sessions are thus derived from the intervals at which such Courts were held. In the meanwhile, the under-trials were kept in prison awaiting their trials. These prisoners were kept in very unhygienic and inhumane conditions this was caused the spread of a lot of diseases. This agitated the under-trials, who were hence separated from the accused. This led to their release on their securing a surety, so that it was ensured that the person would appear on the appointed date for hearing. If he did not appear then his surety was held liable and was made to face trial. Slowly the concept of monetary bail came into existence and the said under-trials were asked to give a monetary bond, which was liable to get forfeited on non-appearance.

In The Magna Carta, in 1215, the first step was taken in granting rights to citizens. It said that no man could be taken or imprisoned without being judged by his peers or the law of the land. Then in 1275, the Statute of Westminster was enacted which divided offences as bailable and non bailable. It also determined which judges and officials could make decisions on bail. In 1677,

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13 Statute of Westminster, 1275 (3rd Edw. 1), also known as the statute of Westminster codified the existing law in England in 51 chapters.
the Habeas Corpus Act\textsuperscript{14} was added to the right of petition of 1628, which gave the right to the defendant the right to be told of the charges against him, the right to know if the charges against him were bailable or not. The Habeas Corpus Act, 1679 states, “A Magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate’s discretion, unless it shall appear that the Party is committed for such Matter offences for which by law the Prisoner is not granted bail”.\textsuperscript{15} The concept of bail has a long history in English common law. As far as 1689 in the bill of rights, English parliament held that bail must be reasonable. A principal which later incorporated into the American 8th amendment to the Constitution of America. The concept of bail comes out into the view from the clash between states power to restrict and deprive the liberty of a man who allegedly have committed a crime and presumption of guidelines of deceitful in his favour. In 1689 came The English Bill of Rights\textsuperscript{16}, which provided safeguards against judges setting bail too high. It stated that excessive bail has been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required. In the Bill of Rights, 1689 parliament held that a bail must be reasonable, the principle which was later incorporated into the American 8th Amendment to the Constitution.\textsuperscript{17}

\textbf{2.3.2 English Common Law}

Bail is the freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety, taken for his appearance on a certain day and a place named.\textsuperscript{18} The surety termed bail because the person arrested or

\textsuperscript{14} Habeas Corpus Act, 1679 is an Act of the Parliament of England (31 chapter 2C. 2) passed during the region of king Charles II to define and strengthen the ancient prerogative writ of Habeas Corpus where by persons unlawfully detained can be ordered to be prosecuted before a Court of law.

\textsuperscript{15} http://www.legalserviceindia.com/articles/bail_poor.htm.

\textsuperscript{16} Bill of Rights 1989 known as English Bill of Rights is an Act of Parliament of England that deals with Constitutional matter and sets out certain basic civil rights.


imprisoned is placed in the custody of those who bind themselves or become
the bailers for his due appearance when required. So he may be re-seized by
them, if they suspect that he is about to escape and surrendered to the court,
when they are discharged from further liability. The sureties must be sufficient
in the opinion of the court to answer for the sum for which they are bound and,
as a rule, only householders are accepted, and an accomplice of the person to
be bailed or an infant would not be accepted as security.\textsuperscript{19} Bail is obligatory in
all summary cases. Obligatory in all misdemeanours, except such as have been
placed on the level of felonies, viz., obtaining or attempting to obtain property
on false pretences, receiving property so obtained or stolen, perjury or
subordination of perjury, concealment of birth, wilful or indecent exposure of
the person, riot, assault in pursuance of a conspiracy to raise wages, assault
upon a peace officer in the execution of his duty or upon anyone assisting him,
neglect or breach of duty as a peace officer, any prosecution of which the costs
are payable out of the country or borough rate or fund.\textsuperscript{20}

\textbf{2.3.3 In Medieval England}

Methods to insure the accused would appear for trial began as early as criminal
trials themselves. Until the 13th century, however, the conditions under which
a defendant could be detained before trial or released with guarantees that he
would return were dictated by the local Sheriffs. As the regional representative
of the crown, the sheriff possessed sovereign authority to release or hold
suspects. The sheriffs, in other words, could use any standard and weigh any
factor in determining whether to admit a suspect to bail. This broad authority
was not always judiciously administered. Some sheriffs exploited the bail
system for their own gain. Accordingly, the absence of limits on the power of
the sheriffs was stated as a major grievance leading to the Statute of

\textsuperscript{20} \textit{Ibid.}, 2.
Westminster. In medieval England, the sheriffs originally possessed the sovereign authority to release or hold suspected criminals. Some sheriffs would exploit the bail for their own gain. The Statute of Westminster (1275) limited the discretion of sheriffs with respect to the bail. Although sheriffs still had the authority to fix the amount of bail required, the statute stipulates which crimes are bailable and which are not.

In the early 17th century, King Charles I ordered noblemen to issue him loans. Those who refused were imprisoned. Five of the prisoners filed a habeas corpus petition arguing that they should not be held indefinitely without trial or bail. In the Petition of Right (1628) Parliament argued that the King had flouted Magna Carta by imprisoning people without just cause.

Parliament responded to the King’s action and the Court’s ruling with the Petition of Right of 1628. The Petition protested that contrary to the Magna Carta and other laws guaranteeing that no man be imprisoned without due process of law, the King had recently imprisoned people before trial “without any cause showed”. The Petition concluded that “no freeman, in any manner as before mentioned, be imprisoned or detained...”. The act guaranteed, therefore, that man could not be held before trial on the basis of an unspecific accusation. This did not, however, provide an absolute right to bail. The offences enumerated in the Statute of Westminster remained bailable and non-bailable. Therefore, an individual charged with a non-bailable offence could not contend that he had a legal entitlement to bail.

21 Edw. 1. C. 15 In additional to Capital Offences, the list included “Thieves openly defamed and known”, those “taken for House-burning feloniously done”, or those taken for counterfeiting and many other non-capital offences.
22 Supra note 13.
23 King Charles I (19 Nov., 1600 – 30 January, 1649) was Monarch of Three Kingdoms of England, Scotland and Ireland from March 27, 1625 until his execution in 1649.
24 The Petition of Right (1628) is one of England’s most famous Constitutional documents. It was written by Parliament as an objection to an overseas of authority by King Charles I during his reason English citizens saw this overseas authority as a major infringement on their civil rights.
25 Ibid.
In olden days in England the sheriff was used to be supreme authority of a town, he was vested with number of powers under his belt right from town administration to judicial decisions, out of which one authority was arresting and releasing a person on bail in other words he was given power to hold or release a suspected criminal.

But this has made the sheriff more powerful and some time he misuses his authority for his personal gain. The sheriff was given the authority to fix amount of bail, in accordance with the crimes committed or suspected whether bailable or not. But as the time passed this practice slowly fainted and by change of time the system of bail has changed, and as the time passed the magistrate got the power of granting bail.

A magistrate shall discharge prisoners from their imprisonment taking their recognizance, with one or more surety or sureties, in any sum according to the magistrate’s discretion.

As per the English law bail can be granted in three different forms.

(i) **Bail by police.** The police has the authority to release a suspect person being charged on condition that he has to come to police station whenever he is asked.

(ii) **Police to Court.** Where having been charged a suspect is given bail but must attend his first Court hearing at the date as given by the Court.

(iii) **Bail by Court.** Bail where having already been in Court a suspect is granted bail pending further investigation or while the case continues.

The King, the courts and the sheriffs were able to frustrate the intent of the Petition of Right through procedural delays in granting the writs of habeas corpus. In 1676, for example, when Francis Jenkes sought a writ of habeas corpus concerning his imprisonment for the vague charge of “sedition”, it was denied at first because the Court was “outside term”, and later because the case
was not calendared; furthermore, when the court was requested to calendar the case it refused to do so. In response to the rampant procedural delays in providing habeas corpus as evidenced by Jenkes Case Parliament passed the Habeas Corpus Act of 1677.27

In medieval England, methods to insure the accused would appear for trial began as early as criminal trials themselves. Until the 13th century, however, the conditions under which a defendant could be detained before trial or released with guarantees that he would return were dictated by the local Sheriffs. As the regional representative of the crown, the sheriff possessed sovereign authority to release or hold suspects. The sheriffs, in other words, could use any standard and weigh any factor in determining whether to admit a suspect to bail. This broad authority was not always judiciously administered. Some sheriffs exploited the bail system for their own gain. Accordingly, the absence of limits on the power of the sheriffs was stated as a major grievance leading to the Statute of Westminster.

The Statute of Westminster in 1275 eliminated the discretion of sheriffs with respect to which crimes would be bailable. Under the Statute, the bailable and non-bailable offences were specifically listed. The sheriffs retained the authority to decide the amount of bail and to weigh all relevant factors to arrive at that amount. The Statute, however, was far from a universal right to bail. Not only were some offences explicitly excluded from bail, but the statutes’ restrictions were confined to the abuses of the sheriffs. The justices of the realm were exempt from its provisions.

Applicability of the statute to the judges was the key issue several centuries later when bail law underwent its next major change. In the early seventeenth century, King Charles I received no funds from the Parliament. Therefore, he forced some noblemen to issue him loans. Those who refused to lend the sovereign money were imprisoned without bail. Five incarcerated knights filed

a habeas corpus petition arguing that they could not be held indefinitely without trial or bail. The King would neither bail the prisoners nor inform them of any charges against them. The King’s reason for keeping the charges secret were evident: the charges were illegal; the knights had no obligation to lend to the King. When the case was brought before the Court, counsel for the knights argued that without a trial or conviction, the petitioners were being detained solely on the basis of an unsubstantiated and unstated accusation. Attorney General Heath contended that the King could best balance the interests of individual liberty against the interests of state security when exercising his sovereign authority to imprison. The Court upheld this sovereign prerogative argument.

Parliament responded to the King’s action and the court’s ruling with the Petition of Right of 1628. The Petition protested that contrary to the Magna Carta 28 and other laws guaranteeing that no man be imprisoned without due process of law, the King had recently imprisoned people before trial “without any cause showed.” The Petition concluded that “no freeman, in any manner as before mentioned, be imprisoned or detained…” The act guaranteed, therefore, that man could not be held before trial on the basis of an unspecific accusation. This did not, however, provide an absolute right to bail. The offences enumerated in the Statute of Westminster remained bailable and non-bailable. Therefore, an individual charged with a non-bailable offence could not contend that he had a legal entitlement to bail. 29

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28 Magna Carta is a Charter (the great Charter) is a Charter agreed to by King Jonh of England at Runnymede, near Windsor, on 15th June, 1215.
29 https://money.howstuffworks.com/bail3.htm
was not calendared; furthermore, when the court was requested to calendar the case it refused to do so. In response to the rampant procedural delays in providing habeas corpus as evidenced by Jenkes Case, Parliament passed the Habeas Corpus Act of 1677. The act strengthened the guarantee of habeas corpus by specifying that a magistrate.

2.3.4 The Habeas Corpus Act, 1679\textsuperscript{30} of England

A magistrate shall discharge prisoners from their Imprisonment taking their Recognizance, with one or more Surety or Sureties, in any Sum according to the Magistrate’s discretion, unless it shall appear that the Party is committed for such Matter or offences for which by law the Prisoner is not bailable. The English Bill of Rights (1689)\textsuperscript{31} states that “excessive bail has been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects. Excessive bail ought not to be required”. This was a precursor of the Eighth Amendment to the US Constitution.\textsuperscript{32}

The language of the English Bill of Rights was only one part of the bail system developed through many years of English law. As Caleb Foote\textsuperscript{33} has explained and this analysis recounts, English protection against unjustifiable detention contained three essential elements: first, offences were categorized as bailable or not bailable by statutes beginning with Westminster I which also placed limits on which judges and officials could affect the statute, second, habeas corpus procedures were developed as an effective curb on imprisonment without specific changes; and third, the excessive bail clause of the 1689 bill of rights protected against judicial officers who might abuse bail policy by setting

\textsuperscript{30} The Habeas Corpus Act, 1679 is an Act of Parliament in England during reign of King Charles II known as Habeas Corpus. Parliament to define and strengthen the ancient prerogative writs of Habeas Corpus which required a Court to examine the lawfulness of a person’s detention and thus prevent unlawful or arbitrary imprisonment.

\textsuperscript{31} The English Bill of Rights (1689) is an Act that the Parliament of England passed on December 16, 1689. The bill creates separation of powers, limits the powers of king and queen.

\textsuperscript{32} https://en.wikipedia.org/wiki/Bail

\textsuperscript{33} Caleb Foote, Elizabeth Josselyn Boalt Professor of Law, He was one of a prominent advocate for bail reform and was widely recognised for his book “Studies on Bail” in 1966.
excessive financial conditions for release. English law never contained an absolute right to bail. Bail could always be denied when the legislature determined certain offences were unbailable. Most of the history of bail law after Westminster I was an attempt to improve the efficiency of existing law and especially to grant the suspect a meaningful chance to satisfy bail conditions when he had committed those offences that the legislature had declared bailable.\textsuperscript{34}

Under the English Law the considerations to be taken into account by the crown Court or magistrate while granting bail are\textsuperscript{35}:

i. Nature or seriousness of offences. The more serious the offence charged the stronger the temptation to abscond is likely to be since the defendant who is liable, if convicted to receive a long sentence of imprisonment is more sensitive to run away than one facing a less serious charge. While the seriousness of the class of offence is an important factor, it is not necessarily conclusive.

ii. Character, antecedents and community ties of the defendant. The Court should next consider the defendant’s antecedents. These are valuable guidance but need to be interpreted with some care. If the defendant has abused the grant of bail in the past or is already in bail in respect of another charge, these facts should count strongly against him. Stability of the defendant’s background and employment is likely of considerable influence in determining whether he has a good bail risk. One aspect of the defendant’s community ties is the type of accommodation in which he lives. The fact that the defendant has no fixed abode is often advanced as good reason for opposing bail.

\textsuperscript{34} https://en.wikipedia.org/wiki/Bail.
\textsuperscript{35} M.R. Malik, Bail of Law & Practice, Fourth edition, pp. 258, 259.
iii. Defendant’s earlier record.

iv. Strength of the evidence of the defendant having committed the offence and other relevant matters.\footnote{lib.bvuict.in/moodle/pluginfile.php/184/mod_resource/content/0/Bail\%20and\%20Judicial\%20Discretion\%20-%\20A\%20Study\%20of\%20Judicial\%20Decisions\%20-%\20Navneet\%20Prabhakar.pdf}

\section*{2.4 BAIL IN UNITED STATES}

When the New World was in its infancy, crime was on the rise. In an effort to take control of the uncontrollable it was simpler to adapt the English criminal system rather than invent a new criminal system. Taking its queue from the British, over time America was able to create a criminal system that works to provide an affordable means of release from jail and a greater success of criminals playing by the rules.

In 1275, Parliament passed the Statute of Westminster to remove some of the temptation from sheriffs. The statute specifically listed which crimes were bailable offences and which were not. Once this was enforced, there were no changes made to the system for hundreds of years.

While there were further issues posed in relation to the right to bail and a trial, the most valuable law to date, after almost 200 years, was instituted by the U.S. Congress in the form of the Bail Reform Act of 1966\footnote{The bail reforms Act of 1966, Magistrates were required to release those accused violating Federal Law without requiring any financial bond unless it was determined from the facts of a given case that additional conditions of release were necessary.} of USA. It stated that a defendant facing trial for a non-capital offence should be released “on his personal recognizance” or on personal bond. However, if the court had reason to believe the defendant would skip town, the judge could choose a more restrictive alternative like limiting the defendant’s travel and executing an ‘appearance bond’ that would be refunded when the defendant appeared in Court.
Finally, the federal justice system joined in by adding the ‘safety of the community’ as a factor to be considered when imposing bail and thus the Bail Reform Act of 1984\textsuperscript{38} was passed. This newer version added guidelines stating that a person can be detained without bail if he:

- Poses a risk to the community.
- May intimidate jurors or witnesses, or otherwise obstruct justice while out on bail.
- Commits a violent or drug-related crime, an offence carrying a penalty of death or life in prison, or committing any felony while already having a serious criminal record.

These are the basic concepts of bail as we know it today, but they may vary from Court to Court. The ultimate goal of the bail system is that people accused of certain crimes and meeting specific criteria are entitled to be released from jail as they await their day in Court.\textsuperscript{39}

The History of Bail in the U.S. grew out of a long history of English statutes and policies. During the colonial period, Americans relied on the bail structure that had developed in England hundreds of years earlier. When the colonists declared independence in 1776\textsuperscript{40}, they no longer relied on English law, but formulated their own policies which closely paralleled the English tradition. The ties between the institutions of bail in the United States is also based on the old English system. In attempting to understand the meaning of the American constitutional bail provisions and how they were intended to supplement a larger statutory bail structure, knowledge of the English system and how it developed until the time of American independence is essential.

\textsuperscript{38} Bail Reform Act of 1984 requires Courts to detain prior to trial arrestees charged with certain serious felonies if the government demonstrates by clear and convincing evidence after an adversary hearing that no release conditions will reasonably assure, the safety of any other person and the community.

\textsuperscript{39} http://www.bail.com/bail-history/

\textsuperscript{40} The United States Declaration of Independence is the statement adopted by the second continental congress meeting at the Pennsylvania State House (now known as Independence Hall) in Philadelphia an July 4, 1776.
Bail law came to the U.S. through English tradition and laws. Even before the adoption of the U.S. Constitution and Bill of Rights, a judiciary Act in 1789\textsuperscript{41} guaranteed a right to bail in all non-capital cases. For a person charged with a capital offence where death is a possible punishment, bail was discretionary, depending upon the seriousness of the offence. Bail is not meant to act as pre-trial punishment or as a fine. Modern bail laws reflect an intentional emphasis on non-monetary methods to ensure a defendant’s appearance at trial. This is meant to avoid discrimination against poor defendants. Bail may or may not be required in misdemeanour cases, depending upon the circumstances and seriousness of the offence. More serious misdemeanour cases and felonies often require a bail determination. Bail may come into play at three stages of a criminal proceeding:

- During the pre-trial period
- Pending imposition or execution of sentence
- Pending appeal of a conviction or sentence

2.4.1 The Bail Reform Act of 1984\textsuperscript{42}

While pre-trial services programs found their footing in the wake of the 1966 Act, a new debate over the administration of bail began to emerge. “The 1970s ushered in a new era for the bail reform movement, one characterized by heightened public concern over crime, including crimes committed by persons released on a bail bond. Highly publicized violent crimes committed by defendants while released pretrial prompted calls for more restrictive bail policies and led to growing dissatisfaction with laws that did not permit judges to consider danger to the community in setting release conditions.” The Bail Reform Act of 1966 had only narrowly addressed public safety. Under the Act,

\textsuperscript{41} The Judiciary Act of 1789, officially titled, “An Act of Established the Judicial Courts of the United States”, was signed into law by President George Washington on Sept. 24, 1789.

\textsuperscript{42} Supra note 38.
persons charged with capital offences or awaiting sentence or appeal could be detained if the court found that “no one condition or combination of conditions will reasonably assure that the person will not flee or pose a danger to any other person or the community.” Nevertheless, judges were not authorized to consider danger to the community for any other bailable defendants.

After Congress passed the District of Columbia Court Reform and Criminal Procedure Act of 1970\(^{43}\), the first bail law in the country to make community safety an equal consideration to future Court appearance in bail bond setting, many states drafted bail laws that also addressed future dangerousness and preventative detention. In 1984, Congress addressed the issue in the federal courts with its passage of the Comprehensive Crime Control Act of 1984. Chapter I contained the Bail Reform Act of 1984, codified at 18 U.S.C. Sections 3141-3156, which amended the 1966 Act to include consideration of danger in order to address “the alarming problem of crimes committed by persons on release”.\(^{44}\) The 1984 Act mandates “pre-trial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the Court. Unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.” The Act further provides that if, after a hearing, “the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.” The Act creates a rebuttable presumption toward confinement when the person has committed certain delineated offenses, such as crimes of violence or serious drug crimes.

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2.5 AMERICAN LAW

Under the American Law, an accused charged with a non-capital offence in the Federal courts has the traditional right to be released upon bail or recognisance during the pendency of his trial. The United States Code, title 18, Section 1341, Federal Code Annotated provides for the granting of bail by any court, judge or magistrate authorised to commit offenders but specifically makes an exception in capital cases. There is also another Federal Statute, viz., title 18, United States Code, Section 3041, Federal Code Annotated, which grants the right to an accused to be admitted to bail or recognisance upon an amount to be determined by a United States Commissioner, court, judge or justice Rule 46(a)(1) of the Federal Rules of Criminal Procedure lays down that a person arrested for an offence not punishable by death shall be admitted to bail and that a person may be so admitted to bail by any Court or judge authorised by law to do so in the exercise of discretion giving due weight to the evidence and to the nature and circumstances of the offence.\(^45\)

The American Law takes into account following considerations.

i. Place the person in custody of a designated person of organization agreeing to supervise him.

ii. Place restriction travel, association or place of abode of the person.

iii. Requiring the execution of bail bond with sureties or the deposit in cash in lieu thereof

iv. Requiring the execution of an appearance bond in a specified amount and deposit in registry of the Court in cash or other security as directed’

of a sum not to exceed 10% of the amount of the bond, such deposit to be returned on the performance of the condition of the release.\textsuperscript{46}

Every individual is protected by the American federal Constitution in the United States, from being detained or held unlawfully. The principle of \textit{habeas corpus}\textsuperscript{47} is applied by the judges where one’s right is violated in regard to detention. In America arrest or detention of a federal suspect is ordered or allowed only in special cases where the accused is danger to the witness or the judges/jurors. The oppose to pre-trial detention of the accused comes from a thought that if the accused is held in jail before his conviction then, at the time of judgment comes and the accused found not guilty than what about his liberty which is being stopped during his detention it cannot be returned back to him. There is no way to returned back to him. There is no way to restore the days already spent in jail. The reason of oppose to pre-trial is that if the accused is kept in jail then he cannot prove his defence as he cannot try together evidence for his defence.

Under the American law, an accused charged with a non-capital offence in the federal Courts has the traditional right to be released upon bail or recognizance during the pendency of his trial. The United State Code, title 18, Section 1341, Federal Code Annotated, title 18, Section 1341 provides for the granting of bail by any Court, judge or magistrate authorised to commit offenders but specifically makes an exception in capital cases.\textsuperscript{48}

\section*{2.5.1 The Presumption of Innocence}

Perhaps no legal principle is as simultaneously important and misunderstood as the presumption of innocence. Technically speaking, it is the principle that a

\textsuperscript{46} lib.bvuict.in/moodle/pluginfile.php/184/mod_resource/content/0/Bail\%20and\%20Judicial\%20Discretion\%20\%20Study\%20of\%20Judicial\%20Decisions\%20-%20Navneet\%20Prabhakar.pdf

\textsuperscript{47} A writ requiring a person under arrest to be brought before a judge or into Court, especially to secure the person’s release unless lawful grounds are shown for their detention.

person may not be convicted of a crime unless and until the government proves guilt beyond a reasonable doubt, without any burden placed on the defendant to prove his or her innocence. Its importance is emphasized in the Supreme Court’s opinion in *Coffin v. United States*\(^{49}\), in which the Court wrote: ‘a presumption of innocence in favour of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law’. In Coffin, the Court traced the presumption’s origins to various extracts of Roman law, which included language similar to the ‘better that ten guilty persons go free’ ratio articulated by Blackstone.\(^{50}\) The importance of the presumption of innocence has not waned, and the Court has expressly quoted the ‘axiomatic and elementary’ language in just the last few years.

### 2.5.2 The Practical Administration of Bail in England and America

As American law governing release on bail bonds was being established, cultural differences between the colonies and England also led to changes in the administration of bail. As discussed previously, under the Anglo-Saxon system of laws persons accused of committing serious offences, persons with lengthy criminal histories, and those caught in the act of committing an offence were often summarily executed. For less serious crimes, the Anglo-Saxon system provided for pretrial release. This was partly due to the fact that the magistrates tasked with hearing these cases travelled from county to county, and were often only present in a particular locality a few months of the year. Because most persons were released, jails were rarely necessary, and those that did exist were primitive.\(^{51}\)

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\(^{49}\) 156 U.S. 432 (1895).

\(^{50}\) In Criminal Law Blackstone formulation (also known as Blackstone’s ratio). “It is better that ten guilty person escape than that one innocent suffer” as expressed by English jurist William Blackstone in his Seminal work, commentaries on the Laws of England published in 1760.

\(^{51}\) https://www.pretrial.org/download/pji-reports/PJI-History%20of%20Bail%20Revised.pdf
Under the Anglo-Saxon system of pretrial release, the sheriffs relied on a surety, or some third party custodian who was usually a friend, neighbor, or family member, to agree to stand in for the accused if he absconded. As the system evolved, with penalties for most crimes payable by fine, sureties were allowed to pledge personal or real property in the event the accused failed to appear. Before the Norman invasion, the pledge matched the potential monetary penalty perfectly. After the invasion, however, with increased use of corporal punishment, it became frequently more difficult to assign the amount that ought to be pledged, primarily because assigning a monetary equivalent to either corporal punishment or imprisonment is largely an arbitrary act. The accused threatened with loss of life or limb had a greater incentive to flee than the prisoner facing a money fine, and judicial officers possessed no sure formula for equating the amount of the pledge or the number of sureties with the deterrence of flight. At the same time, the growing delays between accusation and trial increased the importance of pre-trial release and the opportunities for abuse and corruption. The determination of whom to release became a far more complicated issue than calculating the amount of the bond. The colonies faced these same complications, with some additions. As noted by author Wayne H. Thomas, junior first, unlike English law, the Judiciary Act of 1789 and the Constitutions of most states provided for an absolute right to have bail set except in capital cases. Second, the absence of close friends and neighbours in frontier America would have made it very difficult for the court to find an acceptable personal custodian for many defendants, and, third, the vast unsettled American frontier provided a ready sanctuary for any defendant.

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52 Norman Conquest of England was the 11th century invasion & occupation of England by an army of Norman, Breton and French soldiers led by Duke William II of Normandy Later Styled William the Conqueror.
53 http://www.austinbailbonds.net/faq/
54 http://www.pretrial.org/.
wanting to flee. Commercial bonds, never permitted in England, were thus a useful device in America.\textsuperscript{56}

\subsection*{2.5.3 Australia}

In Australia it is mandatory provision to grant bail to the accused those found committing offence for which the maximum imprisonment is six months. While considering the admission of bail there are some things which are needed to be taken in to consideration while reviewing the granting or denying of bail.

In Australia for the consideration of bail there required certain conditions those are background of the accused and his ties with the community and at the same time to see whether the accused has any criminal record or any of his family members are involved in any criminal activities, or whether the accused has previously failed to appear in Court to answer the bail. The circumstances including the nature and seriousness of the offence, the strength of the evidence, and the severity of the probable penalty, the community protection and welfare, the accused’s likelihood of committing an offence while on bail. It is the duty of the surety who takes the guarantee of the accused to produce him before the Court on the date fixed by the Court for the appearance of the accused. The sum paid by the sureties is forfeited if the accused does not produce himself before the court on the given date, it is the responsibility of the surety to secure the appearance of the accused. There are some strict laws which has been amended in regard to bail in cases of domestic violence, it is one of the rule that any person against whom an offence of domestic violence is alleged and who has previously failed to comply with a condition of bail imposed for the protection and welfare of the alleged victim of the offence loses the presumption in favour of bail. Instead, such an individual is not

\textsuperscript{56} Supra note 54.
entitled to bail unless the court can be satisfied that the accused will comply with such bail conditions in the future.\textsuperscript{57}

2.5.4 Canada

In Canada any person accused of criminal offence has the right of bail as his constitutional right, he cannot be denied bail, unless where it is found that there is imminent danger to the society because of his release on bail or where there is possibility that he will abscond bail or if the government will lose the public confidence in administration of justice if the accused is granted bail. The bail in Canada has its origin from British legal system. For the first time in the year 1869 the legislation in regard of bail was adopted later it was amended in 1960 and bail was made as a right and later it was revised by bail reform act. This act gave wide powers to police to release a person accused before producing him in court, this act laid the responsibility to give justice to the accused. The constitution of Canada specified that any person charged with an offence has the right not to be denied reasonable bail without just case. In Canada there is no system of direct arrest the suspected person is sent a notice to appear in court on a given date through summons and on failure to comply with the summons then the warrant of arrest is issued. If the police officer in charge is of opinion that there is no need of arresting the accused to be produced in court or for secure his appearance in such situation he can issue the suspected a notice of appearance instead of arresting him.\textsuperscript{58}

2.6 HISTORY OF BAIL UNDER INDIAN LAW

Historical genesis the ethos and injunctions of ancient Hindu jurisprudence required inter alia, an expedient disposal of disputes by the functionaries responsible for administration of justice. No laxity could be afforded in the

\textsuperscript{57} shodhganga.inflibnet.ac.in/bitstream/100603/70509/18/08_chapter-202.pdf at p. 2.
\textsuperscript{58} Ibid. at p. 4.
matter as it entailed penalties on the functionaries.\textsuperscript{59} Thus, a judicial interposition took care to ensure that an accused person was not unnecessarily detained or incarcerated. This indeed devised practical modes both for securing the presence of a wrongdoer, as well as to spare him of undue strains on his personal freedom.\textsuperscript{60}

\textbf{2.6.1 During Moghul Rule}

The Indian legal system is recorded to have an institution of bail with the system of releasing an arrested person on his furnishing a surety. The use of this system finds reference in the seventeenth century travelogue of Italian traveller Manucci.\textsuperscript{61} Manucci himself was restored to his freedom from imprisonment on a false charge of theft. He was granted bail by the then ruler of the Punjab, but the Kotwal released him on bail only after Manucci furnished a surety.\textsuperscript{62} Under Moghul law, an interim release could possibly be actuated by the consideration that if dispensation of justice got delayed in one's case then compensatory claims could be made on the judge himself for losses sustained by the aggrieved party.\textsuperscript{63}

The advent of British rule in India saw gradual adaptation of the principles and practices known to Britishers and was prevalent in the common law. The gradual control of the East India Company’s authority over Nizamat Adalats and other Fouzdary Courts in the mofussil saw gradual inroads of English criminal law and procedure in the then Indian legal system. At this juncture of history, criminal courts were using two well understood and well defined forms of bail for release of a person held in custody.\textsuperscript{64} These were known as zamanat and muchalka. A release could be affected on a solemn engagement or a

\begin{footnotesize}
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\item \textsuperscript{59} Kautilya Arthashastra, IV, Ch. 9.
\item \textsuperscript{60} Asim Pandya Law of Bail Practice and Procedure, Second Edition, 2015, Lexis Nexis.
\item \textsuperscript{61} Niccolao Manucci (19 April, 1638-1717) was an Italian Writer and Traveller. He worked in the Mughal Court. He worked in the service Dara Shikoh, Shah Alam, Raja Jai Singh.
\item \textsuperscript{62} William Irvine, II Mog/III India 198 (J 907). Manucci's travel account of the mid seventeenth century was originally published in Italian and was translated later by William Irvine.
\item \textsuperscript{63} J.N. Sarkar, Muthal Administration in India, 108 (1920).
\item \textsuperscript{64} http://shodhganga.inflibnet.ac.in/bitstream/10603/70509/8/08_chapter%202.pdf.
\end{itemize}
\end{footnotesize}
declaration in writing. It was known as muchalka which was an obligatory or penal bond generally taken from inferiors by an act of compulsion. In essence, it was a simple recognisance of the principal of bail. Another form of judicial release was a security with sureties known as zamant, in which the zamin (surety) became answerable for the accused on the basis of a written deed deposited by him with the trying court. With discretionary powers vested in courts under the doctrine of Tazeer in Mohammedan criminal law, a decision on the issue of grant or refusal of bail or the mode of release, did not pose much difficulty. However, the form and contents of the British institution of bail were statutorily transposed by the passing of Code of Criminal Procedure in 1861, followed by its re-enactment in 1872 and 1898 respectively. In the changed context of an independent Republican India, administrators of law and justice are mandated to function in a manner that the constitutional equilibrium between the ‘freedom of person’ and the ‘interests of social order’ are maintained effectively. Ushering of democratic social order necessarily required updating and streamlining of the then existing laws. As a necessary corollary to the above, the Law Commission of India directed its attention towards the existing procedural code and provisions governing the system of bail.65

2.7 BAIL UNDER THE CRIMINAL PROCEDURE CODE, 1973

The word ‘bail’ has not been defined in the Code of Criminal Procedure although the Codes of 1898 and 1973 have defined the expression ‘bailable offence’ and ‘non-bailable offence’ respectively in Section 4(1)(b)66 and Section 2(a).67 In the latter section the expression ‘bailable offence’ has been defined to mean an offence which is shown as bailable in Schedule I, or which is made bailable by any other law for the time being in force, and the expression ‘non-bailable’ has been defined to mean any other offence.

The concept of bail implies a form of previous restraint.\textsuperscript{68} So the meaning of the term ‘bail’ is to set free a person who is under arrest, detention or is under some kind of restraint by taking security for his appearance. Section 436 of the criminal procedure code, read with Form 45 of schedule II of that code contemplates two kinds of security.\textsuperscript{69}

(a) Security with sureties.

(b) Recognisance of the principal himself. The word ‘bail’ more appropriately applies to the former and this is the meaning given to the word in practice and in the criminal procedure code, as distinct from the recognisance of the principle himself.\textsuperscript{70} Therefore in view of the definition of the word ‘bail’ the person must be under some sort of restraint and the order to release on bail would set free such person under arrest, detention or under some kind of restraint by taking security for his appearance.\textsuperscript{71} Section 441 of the code of criminal procedure and the form of bail and security bond given in the schedule of forms clarifies the position of the surety who does not guarantee the payment of any sum of money by the person accused who is released on bail, but guarantees the attendance of that person. He is a surety for attendance and not a surety for payment of money. His contract and the contract of the person released on bail are independent of each other. The simple fact is that the surety promises to pay a certain sum of money if the person accused does not appear at some time and place as required by law.\textsuperscript{72}

\begin{footnotesize}
\begin{enumerate}
\item \textit{Redhif Staliman v. Emperor}, 15 Cal WN 736: 10 IC 958.
\item \textit{Abdul Aziz v. Emperor}, AIR 1946 ALL 116:47 Cr LJ 528 :ilr (1946) all 238.
\end{enumerate}
\end{footnotesize}
After having taken stock of the entire position, the Law Commission has made its recommendations in the 41st Report. These recommendations were considered and incorporated by Parliament while fabricating the newer Code of Criminal Procedure, 1973 with the purpose of replacing the earlier one. In relation to provisions governing bail, the Law Commission reiterated the need to preserve the basic and broad principles in regard to bail and suggested modifications in the operational aspect of the system.  

According to the Law Commission, the broad principles on the subject are:

(i) bail is a matter of right if the offence is bailable,

(ii) bail is a matter of discretion if the offence is non-bailable,

(iii) Bail is not to be granted if the offence is punishable with death or imprisonment for life but the court has discretion in limited cases to order release of a person. The Law Commission also stated that even in respect of offences punishable with death or imprisonment for life, the session’s court and the High Court ought to have even a wider discretion in the matter of granting bail.  

The matrix of the new law with adherence to above basic principles, the law commission proceeded to suggest changes which concerns ‘interests of public’ in the upkeep of law and order. Accordingly, the commission suggested that avenues of freedom by way of release on bail be denied to those who had earlier abused it by not appearing before a court or by absconding themselves. But the commission did not accept the proposal that those who once had been

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74 Ibid.
accused of having committed serious offences punishable with death or imprisonment for life, if they are accused again of having committed any other serious offence, the grant of bail may be refused. The rationale for this approach lie on the assumption that persons accused of serious offences may again commit serious offences during his release on bail. Since such proposal did put an undue restriction on the power to grant bail, the Law Commission rightly countered it by stating that in cases where liberty was likely to be abused, the answer lay in cancellation of the bail itself.\textsuperscript{75}

2.8 LAW COMMISSION OF INDIA 48th REPORT

2.8.1 Anticipatory Bail

Para 31 of the 48th law commission discussed in short on the bill recommended by the 41st law commission report. It discussed on the provision of grant of anticipatory bail. The present commission agreed with the addition of the provisions in the bill, but added that the power should be exercised in very exceptional cases. Further the commission was of the view that in order to ensure that the provision is not put to abuse at the instance of unscrupulous petitioners the final order should be made only after the notice of to the public prosecutor. The initial order should only be an interim one. Further the relevant section should make it clear that the direction can be issued for reasons to be recorded, and that if the Court is satisfied that such a direction is necessary in the interest of justice. The commission further added “it will also be convenient to provide that notice of the interim order as well as of the final orders will be given to the superintendent of police.”\textsuperscript{76}

2.9 THE LAW COMMISSION OF INDIA 154th REPORT

The chapter VI of the 154th Law Commission Report dealt again with the issue of bail, anticipatory bail and allied issues like sureties commission discussed

\textsuperscript{75} lawcommissionofindia.nic.in/reports/Report268.pdf
that “The Law relating to bail is contained in Sections 436 to 450 of chapter XXXIII of the Code of Criminal Procedure, 1973. The law of bails, which constitutes an important branch of the procedural law dovetails two conflicting interests namely, on the one hand the requirements of shielding the society from the hazards of those committing crimes and on the other, the fundamental principle of criminal jurisprudence namely, the presumption of innocence of an accused till found guilty”.

The Code of Criminal Procedure has not defined the term “bail” the “terms bailable offence” and “non-bailable offence” have been defined”. Bail in actual essence means security for the appearance of the accused person on giving which he is released while investigation or trial is pending. The Supreme Court in Moti Ram v. State of Madhya Pradesh has held that bail covers both releases on one’s own bond, or without securities.

The Code has classified all offences into “bailable” and “non-bailable” offences. Under Section 2(a) “bailable offences” are those which listed as bailable in the First Schedule or which is made bailable by any other law for the time being in force and “non-bailable offence” means any other offence. The Code does not provide any criteria to determine whether any particular offence is bailable or non bailable. It all depends on whether it has been shown as bailable or non-bailable in the First Schedule. An examination of the provisions of the Schedule would reveal that the basis of the classification is based on divergent considerations. However, the gravity of the offences. Usually the offences with three or less than three years of punishment have been treated as non-bailable offences. But this being not a hard and fast rule as there are exceptions to their. A person accused of a bailable offence is entitled to be released on bail as a matter of right if he is arrested or detained without warrant. But if the offence is non-bail able, depending upon the facts and circumstances of the case, the Court may grant bail on its discretion. The scope

77 The 154th Law Commission Report.
78 1979 SCR (1) 335.
of discretion varies in inverse proportion to the gravity of the crime. The courts have formulated the following guidelines for grant of bail in non-bailable offences.

- The enormity of the charge.
- The nature of the accusation.
- The severity of the punishment which the conviction will entail.
- The nature of the evidence in support of the accusation.
- The danger of the accused person absconding if he is released on bail.
- The danger of witnesses being tampered with.
- The protracted nature of the trial.
- Opportunity to the applicant for preparation of his defence and access to his counsel.
- The health, age and sex of the accused the nature and gravity of the circumstances in which the offence committed.
- The position and status of the accused with reference to the victim and the witnesses and, the probability of the accused committing more offences if released on bail, etc.

With the above provisions there arose a very important question which the law commission took seriously as poverty is a big problem in our country.

“Does the bail system discriminate against the poor?”

“The bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier
persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of bail is fixed by the magistrate is not high, for a large majority of those who are brought before the Courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount.

The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In many cases the poor accused are fleeced of his moneys by touts and professional sureties and sometimes even has to incur debts to make payment to them for securing his release in the other he deprived of his liberty without trial and conviction and this leads to grave consequences, name–

(1) though presumed innocent he is subjected to the psychological physical deprivations of free life.

(2) he loses his job, if he has one, and is deprived of an opportunity to work to support himself and his family with the result that burden of his detention falls heavily on the innocent members of the family,

(3) he is prevented from contributing to the preparation of his defence.

(4) The public exchequer has to bear the cost of maintaining him in the jail.79

2.10 LAW COMMISSION OF INDIA 203rd REPORT

This Report deals with Section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005. This Section provides for a direction from the Court of competent jurisdiction, viz. the High Court or the Court of Session, for grant of bail to person apprehending

79 The 154th Law Commission Report, chapter VI, para 5.
arrest in the event of his arrest. This is popularly known as ‘Anticipatory Bail’, that is to say, bail in anticipation of arrest.

The Code of Criminal Procedure (Amendment) Act, 2005 has a provision vide Clause 38 to amend Section 438 to the effect that–

(i) The power to grant anticipatory bail should be exercised by the Court of Session or High Court after taking into consideration certain circumstances.

(ii) If the court does not reject the application for the grant of anticipatory bail, and makes an interim order of bail, it should, forthwith give notice to the public prosecutor and superintendent of police and the question of bail would be re-examined in the light of the respective contentions of the parties.

(iii) The presence of the person seeking anticipatory bail in the court should be made mandatory at the time of hearing of the application for the grant of anticipatory bail subject to certain exceptions.

In this chapter researcher discussed in detail the origin and history of the concept of bail in different countries and in India. The concept and history of bail in India started from Moghul reign to current practice. In this chapter the recommendations of the law commissions of India, which now enforced by different amendments in our Criminal Procedure Code, 1973.