The Need for Scientific Analysis of the Theory of Interest in Consideration of Bail

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Abstract

The concepts of crime and society are correlated. It must be noted that the notion of crime encompasses the concept of bail or provisional release. When a person is suspected of committing a crime and is detained by the court, she/he may be released on bail. However, the grant or denial of bail hinges on the equilibrium required between conflicting interests, that is the need for an individual's personal liberty and the interest of society.

Historically, the concept of bail and interest emerges from the clash between the state's power to restrict or deprive the liberty of a man — who may have allegedly committed a crime — and the presumption of innocence or guilt in their favour. In this regard, there have been a number of international as well as national cases, which contend that there should be an appropriate balance between preserving the right to liberty of the individual and the interest of the state in granting bail or provisional release. Hence, the law relating to bail is meant to balance these two conflicting interests viz. the presumption of innocence of the accused and the need to protect the society from the acts of those committing crimes.

Further, the law of bail is instituted under the right to personal liberty, under Article 21 of the Indian Constitution. This provides for a legal procedure that is guided by the tenets of natural justice. Therefore, the law relating to bail needs to be interpreted in synthesis with constitutional goals and mandates. In a constitutionally controlled criminal justice system, criminal jurisprudence has sought a balance between the liberty of the accused and the collective interest of the society. In this respect, this paper is an endeavour to study the need for a scientific analysis of the theory of interest in consideration of bail.

Keywords*: interest theory, bail, jurisprudence, personal liberty, society*

I. Introduction

The public perception of crime is constantly shifting. This perception principally hinges on societal advancement, which in turn rests on the intrinsic

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ethics and benefits that dictate people's mutual beliefs. The notion of crime encompasses the idea of it being a public wrong as opposed to being a private one, with the consequent intervention between the criminal and incapacitated party by an agency in lieu of the community as a whole. Thus, crime can be described as committing an act that is allegedly considered to be socially harmful, or treacherous, and the purpose of classifying a specific act as a crime depends on the civic injury that would result from its recurrent participation. Therefore, the agency of society takes steps towards its prevention by recommending an appropriate punishment for those committing such crimes.

The word 'crime' is derived from the Latin word *crīmen* that means 'charge' or 'offence'. Fundamentally, crime is a community fact; it is defined by the Waverly Encyclopedia as "An act forbidden by law and for performing which the perpetrator is liable to punishment".[3] Although the term 'bail' is not defined in the Criminal Procedure Code, it is used several times in the Criminal Procedure Code, and remains a pivotal concept of the criminal justice system in India. Further, it must be noted that the concept of bail[4] is in consonance with the fundamental principles enshrined in Part III and IV of the Constitution of India and the protection of Human Rights as prescribed under various international treaties and covenants. The Supreme Court of India defines bail as "a technique which is evolved for effecting the synthesis of two basic concepts of human value, viz., the right of an accused to enjoy his personal freedom and the public's interest on which a person's release is conditioned on the surety to produce the accused person in the court to stand the trial."[5]

When an individual is arraigned of or suspected of committing felony and the person is incarcerated or detained by the court, he *may* be released on bail. The use of the word 'may' here clearly indicates that the police officer or the court reserves discretion in granting bail. However, it must also be understood that bail in criminal proceedings has two aspects. This means that bail may be granted: (a) in connection with the proceedings for an offence, to a person charged with or convicted of the offence; (b) in connection with an offence, to a person who is under arrest for the offence or for whose arrest a warrant has

[3]DR SHIVANI VERMA, CRIMINOLOGY, PENOLOGY AND VICTIMOLOGY 15 (University Book House (P) Ltd. 2019).
[4] V K DEWAN, SUPREME COURT ON BAILS 29 (Asia Law House 2019).
[5] Kamalpati v. State of West Bengal, AIR 1979 SC 777 (India).

been issued. Hence, the concept of bail signifies a form of pre-trial release or the removal of restrictive and punitive consequences of the pre-trial detention of an accused.[6] The provisions relating to the grant of bail are enshrined in Chapter XXXIII under sections 436—450 of the Criminal Procedure Code.

Typically, offences are classified into bailable and non-bailable, as well as cognizable and non-cognizable offences. Cognizable offences are those offences that can be investigated by the police without seeking permission from a magistrate. On the other hand, non-cognizable offences are those cases in which the police have no authority investigate the offence without the order of the magistrate.

The officer-in-charge at a police station or magistrate, and even the Sessions Court and High Court, are all empowered under the Criminal Procedure Code to deal with bail; impose conditions on granting bail; and cancel bail as well as anticipatory bail. Here, it is important to briefly discuss the concept of an 'anticipatory bail'. It is a comparatively new concept as a result of the extension of the usage of the bail mechanism.[7] The provision deals with a situation where a person has a reasonable apprehension that she/he may be arrested on an accusation of having committed a non-bailable offence. Such a person can move an application in an appropriate court, which may grant her/him an anticipatory bail.

The Code of Criminal Procedure 1898 originally did not have any provision corresponding to anticipatory bail. The history of this provision can be traced back to the event when the Joint Select Committee of Parliament suggested that bail should be made available in anticipation of an arrest, such as in case of frivolous proceedings, so that the liberty of an individual may not be unnecessarily put on the line. Subsequently, the Law Commission was inspired to take up the suggestion, which resulted in the drafting of a provision to provide bail in anticipation of an arrest. It was ultimately enacted as Section 438 of the Code of Criminal Procedure 1973.[8]

It is obligatory on part of the court to consider whether or not there is judicious ground for accepting it as accurate that the accused has committed an offence

[6]ADV. NAVEEN RAO, BAIL OR JAIL 2 (Prowess Publishing 2019)
[7]KANTI MANI, LAW RELATING TO ANTICIPATORY BAIL 9-10 (Kamal Publishers).
[8]THE LAW COMMISSION OF INDIA, 48TH REPORT para 31 (1972).

with which he is charged. With respect to the question of conceding bail, the available materials with the court are the charges levelled against the person; attendant facts, including the police report; facts quantified in the bail petition; and the grounds for opposing the grant of the petition. Although the grant of bail is a discretionary order, the situation calls for exercising such discretion in a judicious manner and not as a matter of sequence. An order for granting bail devoid of a cogent reason cannot be sustained. As a matter of course, the grant of bail is reliant upon the contextual facts of the substance being dealt with by the court; however, facts tend to fluctuate from case to case. While the placement of the accused in the society may be considered, it can be observed that this aspect by itself cannot be a guiding factor in the matter of granting bail. In fact, their placement in society ought to be coupled with other circumstances warranting the grant of bail. Above all, it is the nature of the offence that remains a primary consideration for the grant of bail — the more heinous the crime, the greater the chances of the bail being denied.[9]

It is a well-known fact that bail is a right, and jail is an exception. Whether it is during the pre-trial or post-conviction phase, bail jurisprudence remains a blurred area in the criminal justice system.[10] Here, it serves well to refer to Interest Theory that was first proposed by Jeremy Bentham. Although Bentham was rather critical of the idea of moral rights, he voted that rights could be useful in legal systems. He put forward the thought that when a person has a right to something, it entails that it is in her/his interest, or is to her/his benefit; hence another person has a duty towards the right-holder. In the same way, when someone violates the right of a person by not doing her/his duty to provide what the right entails to the other person, then it is deemed that she/he is acting in her/his own interest. Further, a person has a right to something against a second person, when the second person is bound by legal duty to provide something to the other person. Thus, by extension of this understanding, the bail mechanism can be explained using Bentham's Interest

[9] S. K MISRA, LAW OF CRIMINAL PROCEDURE CODE IN INDIA 401 (Allahabad Law Agency 2019).
[10] R K NAROOLA (et. al.), LAW OF BAIL vii (Oak Bridge Publishing Pvt. Ltd. 2020).

Theory, in that the right to bail is legally required to provide if a person has the opportunity to get bail.[11]

That said, there are questions of great importance to the community concerning the balance between an individual's personal liberty and the interest of the society. It is worthwhile to consider that the society enjoys immense curiosity in the grant or refusal of bail because every criminal offence is thought to be felony against the State. Therefore, the order of granting or refusing bail must reflect perfect equilibrium between the conflicting interests, namely, the sanctity of individual liberty and the interest of the society. The law of bail merges two conflicting interests, that is the need to protect the society from the threat posed by those committing crimes and the possibility of committing the same crime when they are released on bail, as well as adherence to the vital principle of criminal jurisprudence regarding the presumption of innocence in favour of the accused, based on conjecture, until she/he is proven guilty and the inviolability of individual liberty.[12]

II. Evolution of the Concept of Law of Bail

The history of bail can be traced back to the English Common Law. As far back as in 1689, while debating the landmark Bill of Rights, the English Parliament held that a bail must be reasonable — a principle that was later integrated into the Eighth Amendment to the United States Constitution.[13] The Eighth Amendment states that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[14] The essence of the amendment being that the federal government is prohibited from imposing harsh penalties or punishments on a person accused of committing a crime, irrespective of it being "the price for obtaining pretrial release or as punishment for crime after conviction."[15]

[11]Rowan Cruft, *Rights: Beyond Interest Theory And Will Theory?* , 23 LAW PHILOS., 347-397 (2004).
[12] Siddharam Satlingappa Mhetre v. State of Maharashtra, LNIND 2010 SC1174 (India).
[13] Caleb Foote, *The Coming Constitution Crisis in Bail*, 113 U. PA. L. REV., 968 (1965).
[14]NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org (last visited Sep. 17, 2021).
[15]*Id.*

While chronicling the historical journey of bail jurisprudence in India, it is observed that it was during the tenure of Lord Warren Hastings — the Governor of Bengal from 1773 to 1785 — that major changes were brought to the Indian legal system, which was in shambles at the time. Lord Hastings's interventions in introducing various reforms helped in engineering crucial developments in civil and criminal justice. The *Saddar Diwani Adalat* was instituted as the Supreme Court of Revenue in British India to try civil matters. In addition, the *Saddar Nizami Adalat*, or courts of criminal justice, was created to try *foujdari* in the country. In this system, two forms of bail were practised. One form was the *muchalka* — a personal bond whereby the accused was released on her/his recognizance, subject to such penal provisions as directed by the magistrate. The other was *zamanat* wherein a surety *(zamin)* or sureties would have to undertake to produce the accused on the days and dates desired by the magistrate and the police, failing which the surety would be forfeited.

Another landmark moment in the history of bail jurisprudence was when the British Government was transferred the direct rule and sovereignty over the territory of India from the East India Company through the Government of India Act, 1858. During this time, three major acts were introduced to define criminal law in India. These were the India Penal Code, 1860; the Indian Evidence Act, 1872; and the Code of Criminal Procedure, 1882.[16] However, after the culmination of the First World War in 1918, a new bill was prepared in 1921 with the idea of reforming the law to ensure there is a uniform law of criminal procedure across the territory of India. The bill was presented to the Select Committee of the British Parliament for review. It may be noted here that the original proposal was that an undertrial prisoner should be released on bail if the trial is not concluded within six weeks from the date of his appearance before the magistrate. However, when the subject was reviewed by the Select Committee, it was considered that the period should be increased to two months and that it should be counted from the first date that is fixed for taking evidence in the case.

The Select Committee suggested certain amendments that helped in cultivating an advanced understanding of the concept as well as scope of bail law under the Indian Law. This set the ball rolling for further contemplation on this subject.

[16]MADABHUSHI SRIDHAR, LAW OF FIR ARREST & BAIL 289 (Asia Law House 2020).

The Law Commission of India in its 41st Report considered the provisions relating to bail listed under the old Code of Criminal Procedure, 1898.[17] The recommendations proposed by the Law Commission in this report were duly considered by the Parliament at the time, and were incorporated into the new Code of Criminal Procedure, 1973, which replaced the old code. The principles outlined by the Commission were: (a) bail is a matter of right, if the offence is bailable; (b) bail is a matter of discretion, if the offence is non-bailable; (c) bail is not to be granted if the offence is punishable with death or imprisonment for life, however, the court reserves its discretion, albeit in limited cases, to order the release of a person; and (d) in relation to such offences, that is those punishable by death or imprisonment for life, the Sessions as well as the High Court should enjoy a wider discretion in the matter of granting bail.

The most significant reform that was introduced in the new Code of Criminal Procedure, 1973 was that it recognized and provided a legal basis for the grant of bail to a person — even before his arrest — who might be apprehensive and have grounds to believe that the law enforcement official could seek to interfere with her/his liberty. Here, it is important to note that while the Code of Criminal Procedure, 1973 did not define the word 'bail', but it defined the concepts of 'bailable offence' and 'non-bailable offence' under Section 2 (a).[18] Keeping this in view, the legislative, judiciary, and the enforcement machinery has attempted to strike a balance between the interests of the society and the need to protect the personal liberty of an individual or a group of individuals who are accused of committing a crime.[19]

The idea at the core of the concept of bail and interest is the clash between the State's power to restrict and deprive the liberty of a man who may have allegedly committed a crime and the presumption of innocence or guilt in her/his favour. In the year 2000, the Supreme Court elaborated on the concept of bail in context of the case of Sunil Fulchand Shah v. Union of India.[20] The factors to be borne in mind while considering an application for bail are whether there is any *prima facie*, or reasonable grounds, to believe that the

[17]THE LAW COMMISSION OF INDIA, 41st LAW COMMISSION REPORT para 39.5 and 39.7 (1969).
[18]DISTRICTS ECOURTS, https://districts.ecourts.gov.in (last visited Sep. 17, 2021).
[19]R K NAROOLA (et. al.), LAW OF BAIL xxiii-xxiv (Oak Bridge Publishing Pvt. Ltd. 2020).
[20]AIR 2000 SC 1023: 2000 AIR SCW 582: 2000 CrLJ 1444 (India).

accused has committed the offence; the nature and gravity of the accusation; the severity of the punishment in the event of conviction; the danger of the accused absconding or fleeing, if released on bail; the character, comportment, means, and position of the accused; the likelihood of the offence being repeated; a genuine apprehension of the witness being persuaded otherwise; and the danger, of course, of justice being thwarted by the grant of bail.

The bail system as it functions today is a source of great adversity to the poor. This is because the system is discriminatory when we examine from the perspective of the socio-economic standing of the accused. In a country where a significant part of the population lives in abject poverty, the concept of bail poses deep questions about whether the law of bail upholds the right to life and personal liberty. This is because with most poverty-stricken families subsisting on low wages and fragmented land holdings, it is extremely difficult for the members of the family to secure bail in the event a person from such a family is arrested for the commission of a crime. As a result, what follows is scores of undertrials languishing in Indian jails for want of justice when they could have been out on bail.

In this way, the bail system has often been deemed as unfair and biased against the poor owing to their limited financial capacity to even afford bail. Hence, if we want to eradicate the negative effects of unequal access to the fundamental right to personal liberty and pledge a fair and just handling of the administration of justice to the poor, it is imperative for the bail system to be methodically transformed. Such transformation of the criminal justice system will make it possible for the underprivileged to acquire pre-trial release — as easily as the privileged class — without jeopardizing the interest of justice.

III. The Concept of Bail from the Perspective of Human Rights

The aim of justice rests on the core idea of a fair trial. With the concept of fair trial at the heart of an efficient justice system, there is an important aspect in its ambit that needs to be considered — that is the fair representation of parties in the trial. Hence, the presumption of innocence of the accused till proven guilty should be essentially taken into consideration. The safeguard of personal liberty should not be eclipsed by the veil of wrong assumptions. In fact, the international criminal justice system also focuses on the granting of bail as an essential requirement in the process of criminal justice, from the perspective of

human rights. This can be attributed to the fact that provisional release and release during breaks from trial has become increasingly common in international criminal tribunals. Further, these tribunals have laid stress on human rights jurisprudence for justifying the reasonableness of the period of detention.[21]

Detention prior to conviction is a serious infringement of the rights of a defendant and has many repercussions in real life. Further, detention obstructs human rights as well as to be presumed innocent, to liberty, and to ensure a fair and speedy trial. As one of the Judges of the Supreme Court of Canada mentioned, when bail is denied to an individual who is merely accused of a criminal offence, it is the presumption of innocence that is necessarily infringed upon in such a situation.

Generally, when the defendant poses no risk of flight or danger to the community, she/he should be released on bail during the trial in such a situation. Keeping in view the International Convention on Civil and Political Rights (ICCPR), the European Court of Human Rights (ECtHR) expressed the normative as well as functional reasons in context of the need for a more transparent and protective provisional release regime centered on human rights.[22] Therefore, it is incumbent upon the solicitors of the rights of the accused to pursue the purpose of international criminal laws in such proceedings, and this should include the right to provisional release or the right to bail.[23] German scholar and Chair for Criminal Law, Criminal Procedure, and International Law at the Friedrich-Alexander-University Erlangen-Nuremberg, Christoph Safferling stated that human rights can only be protected by means of human rights. If human rights are to be protected via criminal prosecution, the applied justice system itself must be totally compatible with human rights. Inculcating a high regard for human rights also bodes well for transitional justice by providing a boost to actual fairness and promoting respect for the rule

[21]James Miernik & Rosa Aloisi, *Is Justice Delayed at the International Criminal Tribunal*, 91 JUDICATURE 276-281 (2008).

[22]Mark Findlay*, Internationalized Criminal Trial and Access to Justice*, 2 INT'L CRIM. L. REV., 237-38 (2002).

[23]Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trails and the Province of International Criminal Justice*, 20 DUKE J. COMP & INT'L.L., 247-67 (2010).

of law. What Safferling intends to convey with this that the justice system cannot be tangential to the idea of human rights because at the end of the day, the court of law seeks to protect and promote human rights. Hence, "A human rights enforcement system that is itself not compatible with human rights loses a great deal of impact and persuasiveness."[24]

The international human rights law does not recognize the right to bail or provisional release pending trial. Rather, it recognizes the right to have a court decide the lawfulness of a defendant's detention right after her/his arrest.[25] The decision about the defendant's detention or release brings to fore a key question about the relationship between criminal law and human rights law. Based on the various international as well as domestic cases of criminal law, it can be contended that the emphasis on the human rights perspective binds the international as well as domestic courts in a way to uphold the objective of promoting respect for human rights and the rule of law.

All major international human rights instruments as well as the statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal Rwanda (ICTR), and International Criminal Court (ICC) proclaim the presumption of innocence. For example, Article 6(2) of the European Convention on Human Rights (ECHR) expresses the presumption of innocence as, "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law." Further, it must also be noted that in the *Manual on International Criminal Defence* published by the UNICRI (United Nations Interregional Crime and Justice Research Institute), ADC-ICTY (Association of Defence Counsel practising before the International Courts and Tribunals), ODIHR OSCE (OSCE Office for Democratic Institutions and Human Rights), it was observed that the concept of presumption of innocence and the burden of proof are two of the most vital and

[24] Caroline L. Davidson, *No Shortcuts on Human Rights: Bail and the International Criminal Trial*, 60 AM. U. L. REV. 1, 11 (2010), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1601 & context=aulr&httpsredir=1&referer=

[25] The ICCPR provides, "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceeding before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful."

"pervasive principles" that are at the core of all criminal justice proceedings. The observation is summed up with the thought that the burden of furnishing proof lies with the Prosecution, "and is a burden which never shifts to the accused."[26]

This is echoed by the European Court of Human Rights (ECtHR) that has clearly stated that the burden of proof must be on prosecution, and not defense, in order to establish a solid ground for detention. In such matters, shifting the burden of proof onto the detained person is tantamount to overturning the rule of Article 5 of the European Convention on Human Rights (ECHR) — a provision that makes detention an exceptional departure from the person's right to liberty and one that is only permissible in exhaustively and strictly defined cases.[27]

In context of a decision relating to a provisional release, domestic jurisdiction requires a balance to be established between the right of the individual as well as the right to liberty and the interest of the state. Upon examining the case of Schiesser v. Switzerland,[28] we find that the ECtHR held the opinion that to comport with Article 5(3), the law official determining the release or detention of the accused must review the circumstances militating for or against detention and decide — by referring to legal criteria — whether there are reasons to justify detention or order for release.

Likewise, in upholding the provision reserved under the Bail Reform Act, which allows for detention based on danger to the community, the United States Supreme Court found it significant that the provisions did not give the judicial officer unbridled discretion in making the decision for detention, since Congress had specified the considerations relevant to that decision. On the other hand, the Supreme Court of Canada struck down provisional release that gave courts excessive discretion. This was centered on the belief that any bail provision that confers open-ended judicial discretion to refuse bail should be deemed unconstitutional. Further, it was substantiated that the fundamental

[26]UNICRI ET. AL., MANUAL ON INTERNATIONAL CRIMINAL DEFENCE ADC-ICTY DEVELOPED PRACTICES 5 (UNICRI, 2011).
[27]Iljkov v. Bulgaria, 2001 – IV Eur. Ct. H. 85(2001).
[28]34 Eur.Ct.HR (Series A) at 14,31 (1979).

principle of justice demands that an individual cannot be detained by virtue of a vague legal provision.

Finally, this was corroborated by the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), both of which provide that those who have been unlawfully arrested or detained have an enforceable right to compensation.

IV. Need for Viewing the Law of Bail through the Lens of Theory of Interest

When we look into the analysis presented by Rudolph von Ihering, we find that the real force that moves man to action is interest. According to Ihering, action without interest is an absurdity because it is not practical. Further, Montesquieu opines that "law in general is human reason …" and the scope of reason, with its diversity of conditions, is generally responsible for making man perform certain actions in life. Taking this thought further, it can be said that in any culture, it is only the legally protected interests that define the sphere of existing law. When the concept of interest came into being — that is the way people think when it comes to the realities of living — there emerged the discipline of law as it exists today, with a modern outlook. As a result, the progress and development of human beings was recognized as the principal goal of law. Hence, human progress came to be regarded as the goal of law.[29]

When the *Jurisprudence of Interests* was published, as part of the 20th Century Legal Philosophy Series, it chronicled the progress that had been made in legal theory since the turn of the century.[30] In his *Survey of* Interests, Roscoe Pound noted that the theory of interest lucidly details that social interest has had a notable shift of outlook across the world. Earlier, the concept of interest was seen as an undertaking of the legal order, which required adjusting of the exercise of free wills to one of satisfying wants, of which free exercise of the will is but one.[31] Now, in the present scenario, the theory of interest mainly consists of claims, demands, or desires, which human beings — either singly or in a group or in associations or relations — seek to satisfy. Further, it must be

[29]Philipp Heck*, Philosophy of Law* 4 (1921).
[30]Herbert D. Laube, *Jurisprudence of Interests*, 34 CORNELL L. REV. 291 (1949).
[31]Roscoe Pound*, A Survey of Social Interests*, 57 HARV.L.REV.1 (1943)

taken into account that it also requires the adjustment of relations and the ordering of conduct through the force of a politically organized society.

Moreover, according to Pound, there needs to be an alignment of competing interests and values without which there cannot be any fruitful development in the concept of public policy, which is vital for the healthy development of the society. In this regard, it can be said that the Jurisprudence of Interests is "a method of legal science" and, therefore, of rational thought. Taking the point further on the idea of rational thought, Philipp Heck said that it is the jurist and judges who should evaluate and balance the interest involved. This means that a method ought to be outlined to legislators or the judge, according to which she/he should evaluate and draw the standards, which would further help with the evaluation.

As we dig deeper into the philosophy of law, we understand that jurisprudence of interests is a doctrine of legal philosophy, dating from the early 20th century. It explains that a written law must be interpreted in order to reflect the interest it seeks to promote. With this, the concept of jurisprudence of interests also accorded Legal positivism has progressed to the stage of jurisprudence of interests from that of jurisprudence of concepts. It is understood that when it comes to the jurisprudence of interests, law is essentially interpreted in terms of the purpose that it seeks to accomplish. This doctrine is typified by the idea of obedience to law, and subsumption as the resolution of conflict of interest in the concrete and in the abstract, whereby the interests necessary in society — as materialized in that law — should prevail.[32]

Since the law operates by means of general rules, it is essential for specific individual interests or demands to be generalized before they can be recognized as legal rights. Further from here, when these interests or demands are generalized, they transform to become the social interest in an individual's life. Thus, for example, the non-discriminatory treatment in granting bail to an accused — who is under a cloud of doubt and mistrust — becomes a recognized legal right subsumed under the social interest of an individual's demand for fair opportunity in the representation of his case during the trial. This results in the balancing of the social interest in general security and in an individual's life. That said, the police officers, prosecutors, and judges must

[32]en.wikipedia.org/wiki/jurisprudence of interest (last visited 28 Jul. 2021 at 15.18pm).

choose to sacrifice one's interest at the expense of another. It is also true that any rational justification for their decision must be made in terms of an ideal with more substance than the principle of "satisfy as many desires as possible". However, there are many cases in which a compromise can be worked out between conflicting demands, where each demand is partially fulfilled, as a result of which there is balance or harmony of interests.[33]

To conclude, it can be observed that Pound's theory of interest is typified by a tension between the idea of human development and the necessity for taking public opinion into account. In criminal justice administration, human development is expressed as a recommendation for preventive justice, which also includes the grant of bail and public opinion as a demand for an effective administrative organization.[34]

V. Examining the Law of Bail in the Juvenile Justice System

When we examine the law of bail in context of the Juvenile Justice System, we find that the principle of 'Best Interest' has been laid down as one of the fundamental principles under rule 3 of the Juvenile Justice (Care and Protection of Children) Rule 2007. According to this, the principle of best interest of the juvenile in conflict with law will be of primary consideration in all decisions taken within the context of administration of juvenile justice.[35] It is further mentioned that juveniles who are detained, under arrest, or awaiting trial ("untried") are to be presumed innocent until proven guilty and should be treated as such. Further, it demands that detention before trial shall be avoided to the extent possible and limited to exceptional.

VI. The Accusatorial System and Right to Bail

The grant or refusal of bail is a very delicate issue and certainly needs a serious examination when the court decides against the accused person. Even the Code of Criminal Procedure, 1973 speaks in favour of the grant of bail because the liberty of a person is of great importance. Moreover, it is the fundamental right of every citizen and is guaranteed under the Constitution of India. Now, based

[33]Percy H. Winfield, *Public Policy in the English Common Law*, 42 HARV. L. REV., 76-92 (1928).

[34]BENJAMIN N. CARDOZO, THE GROWTH OF LAW 60 (Yale University Press 1924).

[35]DR. SHIVANI VERMA, CRIMINOLOGY, PENOLOGY AND VICTIMOLOGY 530-531 (University Book House (P) Ltd. 2019).

on the provisions under law and the judgments delivered by various High Courts and also the Supreme Court of India, the consensus arrived at is that keeping in view the interest of the society, and as per the theory of interest, the inclination of the order should be in favour of bail and not jail. The core thought behind setting the accused at liberty is simply that her/his fundamental right to life and liberty should not be unnecessarily curtailed.

The idea of law stems from the need to punish for deviance, transgressions, and violations. That said an individual's personal liberty as well as security and order in society remain paramount considerations. Therefore, a case that involves the misuse of liberty — which is established by the test of balance of probabilities — and if there exists reasonable apprehension of the accused interfering with the process of justice, only then the cancellation of bail will be considered. This is also because cancellation of bail is considered to be a draconian order compared to that of the rejection of bail. The grounds for cancellation of bail in situations, where, "… (a) the accused misuses his liberty by indulging in similar criminal activity, (b) interferes with the course of the investigation, (c) attempts to tamper with evidence or witnesses, (d) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (e) there is likelihood of his fleeing to another country, (f) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (g) attempts to place himself beyond the reach of surety, etc."[36] If the courts are satisfied that the accused person will participate in the trial and will not abscond or tamper with the evidence, the bail will invariably be granted by the court.[37]

When we examine the case of Surinder Singh @ Shingara Singh v. State of Punjab,[38] the court held that in discretionary matters, such as grants or refusal of bail, it would be impossible to lay down any invariable rule or evolve a one-size-fits-all formula. Therefore, the court must exercise its discretion while duly regarding the relevant facts and circumstances, which includes the interest of the individual and also of the society at large.

[36]VK DEWAN, SUPREME COURT ON BAILS 593 (Asia Law House 2019).
[37]JANAK JAI RAJ, BAIL LAW AND PROCEDURES, WITH TIPS TO AVOID POLICE HARASSMENT 12-13 (Lexis Nexis Universal Law Publishing 2019).
[38](2005) 7 SCC 387: 2005 CrLJ 4119: AIR 2005 SC 3669 (India).

In Kalpesh Dineshchandra Jariwala v. State of Gujarat,[39] the court sought to achieve an appropriate balance between the personal liberty of the petitioner as well as the interest of the society. In the case, it was admitted by the petitioner that all 12 transactions were relating to the petitioner, his family and relatives, with the total amount coming to Rs. 2.70 crores. After the petitioner handed over his properties worth Rs. 2.11 crores, as well as paid cash totaling Rs. 30 lakhs, the court had effectively recovered Rs. 2.40 crores from the petitioner. Therefore, it was understood that the principal amount of the Bank that was due to be recovered from the petitioner had been retrieved — and this was in accordance with the settlement and consent award passed by the Board of Nominees Court. This event satisfied the public at large because the Bank had recovered the amount that was necessary to repay depositors and maintain the statutory liquidity of the banking institution. As a result, it was observed that a clear balance had been achieved between the personal liberty of the petitioner and the interest of the society. With no further apprehension on the part of the prosecution, it was ordered that the petitioner be released on regular bail and not be detained in jail any further.

Another notable aspect of the aforementioned case was that it was observed that there were thousands of cases pending in Surat Court, and these were not going to be decided until some time back then. Therefore, it was ruled by the court that in the event that bail is not granted to Shri Chudawala — one of the accused in the case — it would entail subjecting him to pre-trial punishment. In such a situation, the paramount principle upheld by the court was that of enforcing the idea of protecting the personal liberty of the accused and granting them bail.[40]

However, when we consider the case of State of Madhya Pradesh v. Kajad,[41] we find that Section 34 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 was in question. In this case, the court observed that a person who is accused of an offence, which is punishable for a term of imprisonment of five years or more, will generally not be released on bail. The negation of bail is the rule and its grant is an exception under section 37 (1) (b)

[39]Kalpesh Dineshchandra Jariwala v. State of Gujarat, 2003 CriLJ 2401, (2003) 1 GLR 706
[40]V.K. DEWAN, SUPREME COURT ON BAILS 596 (Asia Law House 2019).
[41]2017 SCC 673: AIR 2001 SC 3317: 2001 CrLJ 4240.

(ii) of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985. This is because offences committed under the Narcotic Drugs and Psychotropic Substances (NDPS) Act is against the interest of the society; hence a liberal approach in the matter of bail under the Narcotic Drugs and Psychotropic Substances (NDPS) Act is thought to be uncalled for.

Again, in the case of State of Maharashtra v. Bharat Shanti Lal Shah,[42] the court observed that the objective of Maharashtra Control of Organised Crime Act (MCOCA) is to prevent organized crime, and, therefore, there is reason to deny the consideration of grant of bail if the accused has committed a similar offence once again after being released on bail. However, the same consideration cannot be extended to a person who commits an offence under some other Act. This is owing to the reason that the interest of the person committing an offence under the Maharashtra Control of Organised Crime Act (MCOCA) is different from the interest of the person committing an offence under any other Act.

However, the cancellation of bail is a difficult ground for the justice system to navigate. In Aslam Babalal Desai v. State of Maharashtra, it was ruled that even though the rejection of bail stands as a valid provision in the law of bail, the cancellation of bail should not be casually evoked because it directly interferes with the right to liberty of an individual.[43] Keeping this in view, the right to life and liberty has been upheld by the court as long as there has been no evidence found against the misuse of liberty. Even in cases where an opposing party might bring up the misuse of liberty granted to the other party, these grounds are not accepted towards the cancellation of the bail order. For the court to take an accused into custody who has already been enlarged on bail is an action of an extraordinary nature, and hence can only be carried out in exceptional circumstances.

In Rankanidhi Panda v. State of Orissa[44], it was weighed in by the court that the materials presented were not sufficient to rule in favour of misuse of liberty granted to the other party. In fact, in such a scenario, even the aspect of questioning the legality of the bail granted by the police to the opposite parties during investigation cannot be of any use to the petitioner. This is because at

[42](2008) 13 SCC 5: AIR 2009 SC (Supp) 1135: 2008 AIR SCW 6431.
[43]V K DEWAN, SUPREME COURT ON BAILS 594 (Asia Law House 2019).
[44]Rankanidhi Panda v. State of Orissa, 1997 II OLR 34 (India).

this stage the case was already in the Court of Session and the opposite party had been granted bail by the Court. An extension of this situation is one where the application for the cancellation of bail comes after three months of having granted the order for bail. In such a case, it was ruled by the court that with the opposite party having been granted personal liberty for about eight months, the court did not feel inclined to cancel the bail.[45]

Having examined the cases outlined above, there is an important observation that can be made here. A crucial issue relating to bail is that of the bail application required to be deposed the same day. In Mahendra Pal Singh v. State of Uttar Pradesh,[46] the court held that the magistrate should dispose of the application the same day and in special cases on the next day. Keeping in view the interest of the individual as well as society, courts have often made the observation in their judgments that the bail applications should be normally heard on the same day, as it involves the life and liberty of the accused who is presumed innocent until proven guilty. Courts should take into account the question of personal liberty of the accused, an issue that has been put on the highest pedestal in the Constitution of India.

VII. The Importance of Life and Personal Liberty with Regard to Bail

The most critical aspect of criminal practices and law in India is the question of bail. This largely stems from the extensive delays in the completion of the judicial process, right from the time of the initial arrest to the ultimate decision in the matter. The concept of bail as the rule and its refusal as an exception has gained acceptance and judicial approval in India for this additional reason; however, in practice, it appears that bail is not easily available in the country.

Time and again, it has been emphasized that the broad principle and the philosophy guiding the grant or refusal of bail is the apparent conflict of interest of an accused under custody, or likely custody, and the interest of the society in terms of safety and its concern for the maintenance of law and order. In India, this has an additional connotation — in view of the fact that the completion of the investigation, trials, and then the hearing of appeals goes on for years on end, this lays solid ground and sound reasoning for the grant of bail.

[45]State of Orissa v. Jagannath Patel, 1992 CriLJ 1818 (India).
[46]1990 ACC 18.

Another important aspect of bail in India is that of bail pending trial, and bail pending an appeal. The first aspect is of utmost importance because around 70% of the prisoners in jail are under trials, some with petty offences alleged against them and often unable or unwilling to post appeal.[47] This begins at the appellate stage, when the case comes on record, and the prosecution having been believed, the accused is sent to jail. Therefore, a convict in custody must seek his bail from the appellate court. However, in case of serious offences, courts are wary of granting bail. But in case of lesser offences, the accused is ultimately bailed out. The difficulty arises, however, when the appeals are long delayed — sometimes for decades — and the convicts continue to languish in jail. At the end of the day, there is no particular guideline and no definite precedent that can bind a judge to the decision that he makes with regards to granting or refusing bail. It is largely a matter depending on the predilection of the judge, with the most significant principle being the background of the judge. Therefore, it can be concluded that the lack of consistency in bail jurisprudence is the most vexing question before judges and lawyers alike. Further, it cannot be emphasized enough that bail jurisprudence is a basic but highly important structure of criminal jurisprudence.[48]

VIII. Conclusion

Thus, the constitutional jurisprudence of bail — under the umbrella of the right of personal liberty under Article 21 of the Constitution — provides a procedure established by law, which is just, fair, and reasonable, and is in line with the tenets of natural justice. This means that the law relating to bail cannot be read in isolation; it should, in fact, be read in line with the theory of interest along with the constitutional goals and mandates. A vital and perplexing facet of the issue of bail is the question of situations wherein bail should be granted and then those where it should be denied.

The word ‘bail’ conjures up images of grief-stricken people languishing in unhygienic and unsanitary conditions in Indian jails. The reality is far more serious and challenging, both for courts and the law and order machinery on the

[47]Hussainara Khatoon & ORS. v. Home Secretary, State of Bihar, 1979 AIR 1369, 1979 SCR (3) 532.

[48]SALMAN KHURSHID, ET. AL., TAKING BAIL SERIOUSLY THE STATE OF BAIL JURISPRUDENCE IN INDIA 53 (Lexis Nexis 2020).

whole. The solution to this situation demands for the implementation of legal provisions guided by the theory of interest in enabling decision-making with regard to the granting of bail.

Following the observations made in this paper, it appears that the journey of the law of bail in India remains 'antiquated' in nature. It is oppressive and weighed against the poor and weak. It is important to note that the Supreme Court in its diagnosis found that one of the root causes of long pre-trial incarceration is the unsatisfactory and irrational rules for bail, which merely insist on the financial security of the accused and their sureties. As a result, many of the under trials are unable to provide any financial security owing to them being poor with little or no access to financial resources. Consequently, they suffer in prison for long time periods while awaiting their trial.

In recent times, there has been growing discontent among the different sections of the public towards the system of grant of bail. Although it is a uniform and reasonable provision in theory, it does not prove to be so in practice; rather, it has a crude effect on under trials. Hence, the system of grant of bail has come under severe criticism from the society in general. Therefore, the bail system as it is practised in India needs to be studied in greater detail and a major revamp needs to be brought in to reform the system. This can only be possible when a specific act is legislated while keeping in mind the balance of interest of the individual and the interest of the society.