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ANTICIPATORY BAIL

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ABSTRACT

This article presents a comprehensive analysis of the doctrine of anticipatory bail through the lens of constitutional safeguards, focusing on the interplay between Article 21 of the Constitution, which guarantees personal liberty, and the State's power of arrest and incarceration. While the provision operates as a vital shield against malicious prosecution and the humiliation arising from arbitrary arrest, it simultaneously demands a careful balancing of individual freedom with the effective functioning of criminal investigations.

The paper traces the historical foundations of anticipatory bail to the recommendations of the 41st Law Commission of India, examining the legislative intent underlying its incorporation into criminal procedure. It further analyses the judicial evolution of the provision, highlighting the persistent tension between the judiciary's liberty-centric interpretation and the practical challenges faced by law enforcement agencies, particularly in cases involving influential accused persons and the risk of procedural misuse.

A significant segment of the study evaluates the statutory transition from Section 438 of the Code of Criminal Procedure, 1973 to Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023, and identifies categories of serious offences in which the grant of anticipatory bail is either restricted or cautiously denied. By synthesising landmark judicial precedents with recent legislative reforms, the article argues that despite the change in statutory framework under the BNSS, the core constitutional challenge remains unchanged—ensuring that the presumption of innocence is not subordinated to investigative convenience.

INTRODUCTION

Life without liberty is like a body without a spirit. The right to life and personal liberty is a fundamental right guaranteed to every person under Article 21 of the Indian Constitution. Legal maxim *ubi jus ibi remedium means*, where there is a right, there is a remedy it signifies that the law provides remedies to

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protect fundamental rights, and bail serves as one such remedy against unnecessary or arbitrary detention.

An accused person has a statutory right to bail when he is accused of a bailable offence under Section 480 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), earlier governed by Section 436 of the Code of Criminal Procedure, 1973 (CrPC). However, in non-bailable offences, bail is not a matter of right and may be granted at the discretion of the court under Section 481 of BNSS, earlier Section 437 of CrPC.

In cases involving non-bailable offences, the accused may either apply for regular bail after arrest or seek anticipatory bail prior to arrest before the Court of Session or the High Court under Section 482 of BNSS, earlier Section 438 of CrPC. The concept of anticipatory bail is inherent in the word “*anticipation*” itself, it is sought when a person has reason to believe that he may be arrested for a non-bailable offence. In such circumstances, the individual may apply for bail in advance to safeguard his personal liberty. Thus, anticipatory bail is essentially a pre-arrest legal remedy.

Anticipatory bail does not grant immunity from arrest or prosecution rather, it protects the accused from being detained in custody. It is not a shield against future criminal liability and cannot be invoked as a defence for future offences. Once a person is arrested, an application for anticipatory bail is not maintainable. Moreover, anticipatory bail does not confer blanket protection, it is granted subject to conditions that ensure the investigative process is not hampered and that the interests of justice are duly preserved.

HISTORICAL BACKGROUND

Anticipatory bail was not a part of the Code of Criminal Procedure from its inception. The provision was introduced on the recommendation of the 41st Report of the Law Commission of India (1969), which suggested a comprehensive revision of the Code of Criminal Procedure, 1898.

The Law Commission observed that the power of arrest was frequently misused by influential persons to harass or intimidate their rivals. It further noted that political opponents and public figures often lived under the constant fear of arrest on false or motivated charges merely for expressing views against those in power. Such misuse of the power of arrest resulted in unnecessary humiliation, harassment, and serious infringement of personal liberty.

To address these concerns and to protect individuals from arbitrary or mala fide arrests, the Law Commission recommended the incorporation of a provision for anticipatory bail. Acting upon this

recommendation, the legislature introduced Section 438 in the Code of Criminal Procedure, 1973, thereby providing a safeguard to persons who apprehend arrest on false or trumped-up charges.

How the Term “Anticipatory Bail” Is a Misnomer

The expression “anticipatory bail” is often described as a misnomer, as it does not strictly align with the traditional concept of bail under criminal jurisprudence. Ordinarily, bail is understood as a mechanism for securing the release of an accused person who is already under arrest or in custody. The term “bail” has historically been linked to the concept of bailment, which involves the temporary delivery of goods for a specific purpose while ownership remains with the bailor. Although this analogy cannot be applied literally to human liberty, it has been used to explain that an accused released on bail remains under the constructive custody of the court and is bound to appear whenever required. Wharton’s Law Lexicon defines bail as the “delivery of an accused person to sureties, upon their undertaking that he shall appear at a specified time and place to answer the charge.” This definition presupposes the existence of arrest or detention prior to the grant of bail. In the normal course, therefore, bail operates as a post-arrest remedy, balancing the temporary release of the accused with the assurance of his presence before the court through conditions and sureties.

Anticipatory bail, however, departs from this conventional framework. Under Section 438 of the CrPC and the corresponding provision under Section 482 of the BNSS, the court does not order the release of an accused from custody, but merely directs that in the event of arrest, the person shall be released on bail. Since no arrest has taken place at the time such an order is passed, the essential element traditionally associated with bail—custody—is absent. For this reason, anticipatory bail is not bail in its strict sense, but a pre-arrest protective direction issued by the court.

Thus, the term “anticipatory bail” is regarded as a misnomer because the court does not grant bail in anticipation, but rather ensures that bail will follow if an arrest is made. The remedy operates at a preventive stage and stands conceptually distinct from ordinary bail, even though it has come to be described using the same terminology.

2005 Amendment

Section 438 was substantially amended by Parliament in 2005 through the Code of Criminal Procedure (Amendment) Act, 2005. The amendment clarified and structured the procedure relating to the grant of anticipatory bail by inserting sub-sections (1A) and (1B).

Sub-section (1A) provides that when the Court considers granting interim anticipatory bail, it shall issue notice to the Public Prosecutor and the Superintendent of Police, giving them a reasonable

opportunity of being heard before the final order is passed. This ensures that the interests of the prosecution and the investigation are duly considered.

Sub-section (1B) empowers the Court to direct the personal presence of the applicant at the time of final hearing, if such presence is considered necessary in the interest of justice. The amendment, read along with judicial interpretation, also clarified that grant of anticipatory bail does not bar custodial interrogation, if such interrogation is required for the purpose of investigation and is conducted subject to the conditions imposed by the Court.

Overall, the 2005 amendment was introduced to strike a balance between the right to personal liberty and the need for effective criminal investigation. It aimed to prevent misuse of the provision by habitual offenders while ensuring that anticipatory bail remains a meaningful safeguard against arbitrary arrest.

JUDICIAL INTERPRETATION

The provision of anticipatory bail has largely evolved through judicial interpretation. Courts have repeatedly examined the scope of Section 438 CrPC and laid down guiding principles to ensure that the provision is neither misused nor rendered ineffective.

GURBAKSH SINGH SIBBIA V. STATE OF PUNJAB (1980)

The Supreme Court laid down important principles governing the grant of anticipatory bail under Section 438 CrPC:

1. The applicant must show a “reason to believe” that he may be arrested. Mere fear or vague apprehension is not sufficient. The applicant must disclose specific facts and circumstances enabling the Court to assess the reasonableness of such belief or the likelihood of arrest.
2. The High Court or the Court of Sessions must independently apply its judicial mind while deciding an application for anticipatory bail. The Court should not leave the matter to the discretion of the Magistrate under Section 437 CrPC.
3. Registration of an FIR is not a condition precedent for filing an application for anticipatory bail. An application can be moved even before an FIR is lodged, provided there is a reasonable apprehension of arrest.
4. Anticipatory bail may be granted so long as the person has not been arrested in connection with the offence concerned.

5. Once a person has been arrested in respect of an offence, he cannot seek anticipatory bail for that offence and must apply for regular bail.
6. The normal rule is that an order granting anticipatory bail should not be limited to a fixed period of time, unless special circumstances justify such limitation.

SIDDHARAM SATLINGAPPA METRE VS STATE OF MAHARASHTRA

The Supreme Court, in this case, laid down important principles governing the grant of anticipatory bail in cases involving non-bailable offences-

1. This landmark judgment explains the scope and object of anticipatory bail and emphasizes the protection of personal liberty guaranteed under Article 21 of the Indian Constitution.
2. The Supreme Court held that anticipatory bail provides protection against arbitrary arrest and the humiliation that often accompanies it, and therefore, the provision must be interpreted liberally and not narrowly.
3. The Court further observed that arrest is not mandatory in every non-bailable offence and that an accused should be arrested only when custodial interrogation is necessary.
4. It was also made clear that no two cases can be treated alike and that each case must be decided on its own facts and merits. Relevant considerations include whether the accused is likely to hamper the investigation by intimidating witnesses or tampering with evidence, the possibility of absconding, previous criminal antecedents, and whether the case appears to be motivated or mala fide.
5. Overall, the Court sought to strike a balance between the requirements of effective police investigation and the fundamental right to personal liberty, reinforcing the principle that bail is the rule and jail is the exception.

SUSHILA AGRAWAL VS STATE (NCT OF DELHI) 2020

In this case Supreme Court cleared several doubts relating to anticipatory bail, especially regarding how long it lasts and how it operates in practice.

1. The Court observed that anticipatory bail does not have a fixed or automatic time limit. Once granted, it normally continues till the end of the trial, unless the court itself decides to restrict its duration for valid reasons.

2.It was further clarified that an accused person is not required to surrender or apply for regular bail after the filing of the charge sheet, so long as anticipatory bail is in force.

3.The Court also made it clear that grant of anticipatory bail does not obstruct the investigation. If the police require custodial interrogation for a limited purpose such as recovery of a weapon under Section 27 of the Indian Evidence Act they may approach the court to seek temporary cancellation or relaxation of the bail for that specific purpose.

4.Lastly, the Court reiterated that anticipatory bail is not a matter of right but a discretionary relief. While granting it, the court may impose reasonable conditions and must maintain a balance between the personal liberty of the accused and the need for a fair and effective investigation.

DHANRAJ ASWANI VS. AMAR S. MULCHANDAND 2024

In this judgment, the Court examined the maintainability of an anticipatory bail application filed by a person already in custody in another case

1.The Court held that a person can still apply for anticipatory bail even if he is already in custody in connection with another offence.

2. It was observed that there is no bar under Section 438 of the CrPC or Section 482 of the BNSS that prohibits such an application.

3.The Court clarified that an accused is entitled to seek anticipatory bail so long as he has not been arrested in the concerned offence. Once he is arrested in that particular case, the remedy of anticipatory bail is no longer available and he must follow the regular bail procedure.

4.Therefore, custody in one case does not deprive a person of the right to seek anticipatory bail in another case.

CRITICAL ANALYSIS OF JUDICIAL APPROACH

While the Supreme Court has consistently championed a liberty centric approach to pre-arrest bail, the ground reality remains far more complicated. In theory, the law is flexible; in practice, that very flexibility often translates into judicial inconsistency. Despite the heavy lifting done by the Constitution Benches in Gurbaksh Singh Sibbia and Sushila Aggarwal which made it clear that bail shouldn't have an arbitrary "expiry date" lower courts frequently sidestep these principles. It is not uncommon to see local benches still imposing rigid timelines or practically forcing an accused to surrender once a charge-sheet is filed, a move that directly contradicts the spirit of the higher judiciary.

This disconnect highlights a deep-seated tension between constitutional ideals and procedural habits. Especially in high-stakes cases, a de facto "presumption of guilt" often creeps into the courtroom, leading judges to deny bail for offences where the statute itself doesn't mandate arrest. Furthermore, the investigative agency's demand for "custodial interrogation" is too often treated as a trump card. When courts grant these requests without requiring specific, recorded justifications, the scale tips away from personal liberty and toward administrative convenience. Now, with the BNSS removing old state-level bars, we have entered an era where judicial discretion is everything. Without a set of concrete, uniform guidelines, we risk a system where the protection of Article 21 depends more on a judge's personal philosophy than on the letter of the law

LIMITATIONS ON ANTICIPATORY BAIL IN CERTAIN OFFENCES

While anticipatory bail is a discretionary remedy aimed at protecting personal liberty, courts have consistently exercised heightened caution in certain categories of offences owing to their gravity, societal impact, or the statutory scheme governing them. The following offences commonly attract restrictions or reluctance in the grant of anticipatory bail:

Sexual Offences Involving Minors:

Section 438(4) of the Code of Criminal Procedure, 1973 and Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 expressly bar the grant of anticipatory bail to persons accused of aggravated forms of rape, including offences punishable under Section 376(3), Sections 376AB, 376DA and 376DB of the Indian Penal Code, 1860, as well as under Section 65 and sub-section (2) of Section 70 of the Bharatiya Nyaya Sanhita, 2023. These provisions primarily deal with sexual offences against minors.

PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012 (POCSO ACT)

Given the vulnerability of child victims and the object of the legislation to ensure stringent protection, courts generally adopt a strict approach, making the grant of anticipatory bail rare and exceptional. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989:

The Act places restrictions on anticipatory bail to prevent the abuse of power against members of Scheduled Castes and Scheduled Tribes. Although judicial interpretation has recognised limited exceptions, courts remain cautious while entertaining pre-arrest bail applications under this statute.

UNLAWFUL ACTIVITIES (PREVENTION) ACT, 1967 (UAPA)

Offences relating to terrorism and threats to national integrity under the UAPA involve serious considerations of national security, due to which anticipatory bail is seldom granted.

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act):

In cases involving commercial quantity of narcotic substances, courts exercise extreme restraint in granting anticipatory bail due to the stringent statutory framework and the presumption against bail embedded in the Act.

PREVENTION OF MONEY LAUNDERING ACT, 2002 (PMLA)

Economic offences under the PMLA are treated as grave crimes affecting the financial system of the country, and anticipatory bail is granted only after strict judicial scrutiny.

National Security Act, 1980 (NSA):

As the NSA deals with preventive detention rather than ordinary criminal prosecution, anticipatory bail does not ordinarily apply. However, courts remain conscious of constitutional safeguards while examining related challenges.

OTHER SERIOUS OFFENCES

Courts also adopt a restrictive approach in cases involving human trafficking, organised crime, heinous offences, or situations where there is a reasonable apprehension of the accused absconding or tampering with evidence.

It is important to note that even in these categories, the denial of anticipatory bail is not automatic and ultimately depends on the facts and circumstances of each case.

THE DUAL NATURE OF ANTICIPATORY BAIL: SHIELD OR SHELTER?

Anticipatory bail is often described as a double-edged sword, and for good reason. At its core, it acts as a vital safety net for personal liberty, protecting citizens from the trauma of arbitrary or politically

motivated arrests. In a legal climate where criminal law is sometimes weaponized to settle personal scores, this provision (formerly Section 438 CrPC, now under Section 482 of the BNSS) upholds the constitutional promise of dignity. It ensures that an individual's reputation isn't destroyed by a hollow FIR before they even have a chance to defend themselves. However, the problem arises when these protections are granted mechanically. When a court overlooks the specific "ground reality" of a case, anticipatory bail can inadvertently cripple an investigation. A suspect who knows they are protected from arrest is far less likely to cooperate during interrogation. More dangerously, it gives them a window of opportunity to reach out to witnesses, scrub digital evidence, or otherwise muddy the waters of justice before the police can even file a chargesheet.

A persistent criticism of this provision is its apparent "class bias." We often see economically powerful individuals, white-collar offenders, and politicians rushing to the High Court for pre-arrest protection, effectively buying themselves immunity from the rigors of custodial questioning. In these high-stakes cases, the "shield of liberty" often looks more like a "shelter for the influential." This tension is perhaps most visible in matrimonial and dowry-related disputes. While courts are frequently flooded with exaggerated or "all-family" FIRs, the blanket grant of bail in such sensitive cases can leave genuine victims feeling abandoned by the state. Judgments like *Arnesh Kumar v. State of Bihar* and *Rajesh Sharma v. State of Uttar Pradesh* show that the judiciary is well aware of this tightrope walk. These rulings discourage the "arrest-first-and-investigate-later" culture while urging magistrates to keep a sharp eye out for misuse. Ultimately, anticipatory bail cannot be a "one-size-fits-all" remedy. For it to truly serve justice, courts must move beyond a superficial reading of the FIR. It must remain a tool to protect the innocent from power not a loophole that allows the powerful to undermine the integrity of a criminal investigation.

REFORMING ANTICIPATORY BAIL: THE WAY FORWARD

For anticipatory bail to truly serve justice rather than subvert it, the legal system must move beyond the prevailing mechanical approach. With the transition from Section 438 of the CrPC to Section 482 of the BNSS, there is a clear opportunity to shift from paper-thin scrutiny of petitions to a more substantive evaluation of the FIR. Courts should not grant protection merely because a petition is well-drafted; they must assess whether a prima facie case exists and whether the State's demand for custodial interrogation is genuinely justified.

In cases involving heinous or serious offences, blanket anticipatory bail should give way to time-bound orders. Such an approach would subject the accused to periodic judicial review and prevent pre-arrest protection from becoming a permanent shield to evade investigation. Equally important is the need for stricter and more toothier consequences for the breach of bail conditions. If an accused intimidates witnesses, tampers with evidence, or ignores summons, the response must be immediate and statutory—not merely a distant threat of cancellation.

In matrimonial disputes, where the risk of exaggerated or vindictive allegations is particularly high, a formal pre-verification mechanism is essential. A structured and time-bound police inquiry prior to arrest can help filter out false complaints while ensuring that genuine victims are not denied protection or lost in procedural delays.

Ultimately, the objective must be to protect individuals from arbitrary arrest without paralysing the investigative process. Personal liberty is a constitutional right, but it cannot be allowed to evolve into a loophole through which the influential undermine the integrity of the criminal justice system.

CONCLUSION

Anticipatory bail occupies a central place in India's criminal jurisprudence and remains essential to a system that values personal liberty. The underlying principle of bail flows from the presumption of innocence, which continues to operate until guilt is established by a court of law. As Justice V.R. Krishna Iyer famously observed, "bail is the rule and jail the exception," underscoring that deprivation of liberty before conviction must be justified by compelling reasons.

Pre-arrest protection assumes particular significance in a society where arrest itself often carries social stigma. The mere fact of being taken into custody is frequently equated with guilt, exposing an accused to public humiliation and irreversible damage to reputation even before the trial begins. In this context, anticipatory bail acts as a safeguard against unnecessary incarceration and the psychological and social consequences that accompany it. At the same time, the concerns surrounding the misuse of this provision cannot be ignored. As discussed earlier, anticipatory bail has, in several instances, been invoked by white-collar offenders, economically influential individuals, and political actors as a means to delay or evade accountability. This reality places a heightened responsibility on courts to exercise their discretion carefully. The task before the judiciary, therefore, is not to dilute the provision but to apply it with balance. Courts must weigh the personal liberty of the accused against the legitimate interests of investigation and the victim's right to justice. Anticipatory bail must continue as a

protective instrument within criminal law—but one guided by judicial prudence, factual scrutiny, and a conscious effort to prevent its misuse.