



**REVISITING THE EFFICACY OF
BAIL PROVISIONS IN INDIA:
EMPIRICAL EXERCISE TO ASSESS
THE GROUND REALITIES OF BAIL
JURISPRUDENCE**

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Abstract

Bail is one of the foundational pillars on which the criminal jurisprudence rests. The object of bail is to remove the restrictive and punitive consequences of pre-trial detention of the accused which is made by delivering the accused to the custody of a third party(s) i.e. surety by way of furnishing of surety bonds or to one's own self by way of execution of personal bond only.¹ The paper tries to delve into deeper realms of knowledge that are associated with concept of bail and try to assess the on ground reality of how bail and its provisions affect the society at large. The paper therefore works on a dual agenda; which is not just limited to doctrinal research of the topic but also provides a detailed sample study which is reflective of how the provisions materialise in the society. The responses of the society and the realities faced by them is one such major aspect which needs attention; because the sample study

shows some disturbing factors suggestive of the fact that the current bail provisions need a reform.

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

I. Introduction

"No person shall be deprived of his life or personal liberty except according to the procedure established by Law".³

The concept has been in existence forever; be it the Mughal rules or the Britishers, bail were one concept which affected the lives of the local populace at large. The meaning of the word "bail" has been explained as a sum of money paid by or for a person who is accused of wrong doing, as security that he will appear at his trial, until which time he is allowed to be free.⁴

¹Prakash Chandra Agrawal, "Law relating to bail in India: A study of legislative and judicial trends International Journal of Law", International Journal of Law, 28, 28, 2016, <http://www.lawjournals.org/download/41/2-5-23-730.pdf>.

²National Crime Records Bureau, *Prisons Statistics* (Ministry of Home Affairs, 21st Edition, (2015)

https://ncrb.gov.in/sites/default/files/PSI-2015-%2018-11-2016_0.pdf.

³INDIA CONST. art. 21.

⁴ Investopedia, <https://www.investopedia.com/terms/b/bail-bond.asp> (last visited Feb. 20, 2021).



Bail is defined as “Procurer the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court.”⁵

"Bail is when a man is taken or arrested for felony, suspicion of felony, indicated of felony or any such case, so that he is restrained of his liberty. And, being by law bailable, offereth surety to those which have authority to bail him, which sureties are bound for him to the King's use in a certain sum of money, or body for body, that he shall appear before the Justices of Gaole-delivery at the next sessions & c."⁶

Historically, bail was a tool to ensure the appearance of the person accused of an offence at trial or to ensure the integrity of the process by preventing such a person from tampering with evidence or witness.⁷

Hon'ble Supreme Court in *Moti Ram v. State of Madhya Pradesh*, clarified that the definition of the term bail includes both release on personal bond as well as with

sureties. It is to be noted that even under this expanded definition, ‘bail’ refers only to release on the basis of monetary assurance-- either one’s own assurance (also called personal bond or recognizance) or third party’s sureties.⁸

Bail in its essence is a fine balance between the right to liberty of the person accused of an offence and the interests of society at large⁹. The detailed provision related to bail is given under Chapter-XXXIII of the Code of Criminal Procedure. Bail is given to offender in certain offences on the basis of classification of offence such as “bailable offence”, which means an offence which is shown 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 offense.¹⁰ Some of the common bailable offences are simple Hurt¹¹, Bribery¹², Public Nuisance¹³, death by rash negligent act¹⁴. Some of the Non-Bailable offences are Waging war¹⁵, Sedition¹⁶, Dowry Death¹⁷, rape.¹⁸

⁵ Rakesh K. Singh, “bail is rule, jail is exception”, The free press journal, (Feb. 20, 2021, 08:06 PM), <https://www.freepressjournal.in/analysis/bail-is-rule-jail-is-an-exception>.

⁶ Adv. Naveen Rao, “Bail or jail: A balance of absolute and limited judicial decision”, (2019).

⁷ “Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail”, Report No.268, “Law Commission Of India, Government Of India”, 1, (2017),

<https://lawcommissionofindia.nic.in/reports/Report268.pdf>.

⁸ *Moti Ram v. State of Madhya Pradesh*, AIR 1978 SC 1594.

⁹ “Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail”, Report No.268, “Law Commission Of India, Government Of India”, 3, (2017),

<https://lawcommissionofindia.nic.in/reports/Report268.pdf>.

¹⁰ The Code of Criminal Procedure, Section 2(a), No. 02, Act of Parliament, 1974 (India).

¹¹ The Indian Penal Code, Section 377, No. 45, Act of Parliament, 1860 (India).

¹² The Indian Penal Code, Section 171E, No. 45, Act of Parliament, 1860 (India).

¹³ The Indian Penal Code, Section 290, No. 45, Act of Parliament, 1860 (India).

¹⁴ The Indian Penal Code, Section 304A, No. 45, Act of Parliament, 1860 (India).

¹⁵ The Indian Penal Code, Section 121, No. 45, Act of Parliament, 1860 (India).

¹⁶ The Indian Penal Code, Section 124A, No. 45, Act of Parliament, 1860 (India).

¹⁷ The Indian Penal Code, Section 304B, No. 45, Act of Parliament, 1860 (India).

¹⁸ The Indian Penal Code, Section 376, No. 45, Act of Parliament, 1860 (India).



‘Bail’ connotes the process of procuring the release of an accused charged with certain offences by ensuring his further attendance in the court for trial and compelling him to remain within the jurisdiction of the court.¹⁹ It has already been decided by the Hon’ble Court in *Rashik Lal v Kishore*, that if a person is arrested for any bailable offences, his right to claim bail is absolute and the authority is bound to release him on bail.²⁰ In case of Non-bailable offences, it doesn’t mean that the bail shall not be granted to an offender. The bail in Non-bailable offence may be granted. But the bail in such cases is not a matter of right and the bail is left on the court’s discretion and it is given on the totality of the fact and circumstances of the case.²¹

In terms of categorisation of bail, it is categorised in three kinds such as “bail in bailable offences”, “bail in non-bailable offences”, and “anticipatory bail” (a bail in anticipation of arrest).²²

(I.I) STATEMENT OF PROBLEM

Even though the concept of bail is not novel and the people have usually adjusted themselves to the idea of it. The criminal justice system is so tainted that people not only fear punishments and fines but they are also averse to the idea of Bail, parole, etc. Their unawareness stems from the idea that once you get trapped in the legal chakravayuh (maze) then there is no coming back. The normal populace not just fears the law but it is so much averse and intimidated by the criminal justice system that they are not just

unaware but they also don’t wish to implore on these safeguards.

The paper deals with a major hypothesis which subscribes to the view that the provisions related to bail and the criminal jurisprudence in this area are not effective in practical terms. The provisions have a limited reach and are partially operative. In order to assess the present day situation the paper has incorporated empirical research to know the impact of these provisions in real-time basis.

The paper also strongly believes that there are certain variables which affect the implementation of these bail provisions and therefore it is imperative to conduct a cross-sectional study and find out the situation on ground. The assumed variables are income, education and cost incurred in procuring legal services; in comparison to this the paper shall evaluate their levels of awareness and also assess their opinions based on these realities.

(I.II) LITERATURE REVIEW

The topic which has been selected for the research has a plethora of existing research and there are ample texts on which one can rely. But the researcher methodology of the paper narrows the resources which are to be used for the paper. The researchers have stuck to basic texts which amplify the background of bail provisions. In addition to the same secondary sources like case laws and reports from government organisations also provide adequate data for the paper.

¹⁹ 1998, CrLJ 1726 (Mad).

²⁰ *Rashik Lal v Kishore*, (2009) 4 SCC 446.

²¹ *Shantilal v State of M.P.*, 1989 CrLJ 332 (MP).

²² *STATE OF RAJASTHAN v. BALCHAND*, AIR 1977 SC 2447.



The paper also contains a significant amount of primary data which is then corroborated with the secondary sources in order to justify the assumed hypothesis. The sources in the paper includes excerpts from Ratanlal&Dhirajlal, and has also perused The code of Criminal Procedure, 1973. B.B. Mitra on Code of Criminal Procedure also has helped us to understand the nuances of bail in more depth. We get the overview of current thinking on the bail by the law journal “Crime” and “Journal of Criminal law & Criminology” which is a monthly magazine. We get a critical analysis of data available from the National Crime Report Bureau (NCRB).

(I.III) OBJECTIVES

The paper works on four-pronged approach; namely:-

- A. To prepare a holistic document which serves as a manual to the reader regarding the bail provisions in India;
- B. It shall also consider the existing proposal for the reform in bail provision.
- C. To highlight the areas which are lack and are main reasons behind the ineffectiveness of the present-day criminal justice system;
- D. Collection of Data in order to understand the ground realities;
- E. And lastly, this empirical research shall also ensure sensitization and shall contribute in raising awareness levels of the people who are being surveyed.

(I.IV) RESEARCH QUESTIONS

Age Group

The researchers have bifurcated the age group into 4 parts in order to assess the survey in a much more detailed fashion. The age group would help us realise the target audience and would facilitate the research by showing how the current provisions related to bail materialise on ground.

Residential Profile

The researchers have also not limited the research to a particular area; as we strongly believe that the residential profile of any affected person is directly correlated to the implementation of bail provisions. The vicinity plays a very vital role in determining the execution of these criminal provisions.

Gender

The paper also strongly hypothesises that the gender/sex of a particular individual makes them more prone to get arrested and therefore it was inevitable for us to incorporate the same as a research question.

Educational Qualifications

Another vital aspect is the educational background of an individual and how it is assumed that there is a strong nexus between illiteracy and crime. The profiling shall assist the paper in configuring the target audience’s behavioural patterns and shall facilitate more accurate answers.

Occupational Profile

Occupational profiling is one of the most important parameters to adjudge the vulnerability of an individual from being arrested. The occupational stratification is



stringent in India which results in arbitrary attitudes of the enforcement agencies towards individuals which are not considered that much valuable in the society. The profile also reflects on the amount of money they spend on active litigation and which eventually determines the course of legal action.

Have you or anyone known to you has been detained by police or any other enforcement agencies?

This serves as a litmus test; because if the answer to this question is positive then only that individual can be inducted into the survey otherwise they shall be made aware about the provisions of bail so as to fulfil the awareness campaign which is an offset of the exercise.

Were you able to understand the preliminary documents presented by the police in the court of law?

The question here assesses the basic knowledge of an individual and also the options given in for the same help to evaluate the mindset as well as the approachability of an individual in court-related matters.

Was there a provision for a bail bond to discharge yourself/ your relative from the custody?

This is another litmus test as to how much awareness the individual possesses with respect to their arrest and the provisions of the bail are of utmost importance; and if a person is not aware of the same, then it might be construed that the knowledge with respect to their arrest was limited.

Do you belong to Below Poverty line segment?

One of the major parameters was that if a person belongs to a marginalised section of the society and the same is assumed to be a very strong factor for arrest. The economic vulnerability of an individual is hypothesized as a primary factor for arrest.

The amount you incurred in the whole judicial process?

This is a reflective question as it reflects the agony and monetary constraints suffered by an individual in an ongoing legal process. This also shows that there is no clear-cut pay structure when it comes to legal expenses, and the same fluctuates with the individuals' residential profile.

Are you aware that there are provisions of free legal aid and assistance from the state government?

This question has two objectives, Firstly, it assesses the awareness level of the individual and secondly it also aims at educating the surveyed audience about the provisions of bail.

Do you think that the court of laws is accessible to people who don't have a background of legal education?

This question tries to judge the mindset of the surveyed audience by knowing what they feel about the whole legal process and how they perceive such institutions. This reflects the sentiments of the masses and shows how much trust they instill in the whole procedure.



Are you aware of the conditions prescribed in the bail bond?

This is the question which again aims to evaluate the awareness of the individual in the whole process.

Did you face any trouble post execution of your bail bond from any of the following agencies?

The question helps the researcher in knowing the practical difficulties faced by the individual on account of interference from police, court or third parties. This question tries to assess the efficacy of the provisions.

Are you aware of any types of bail provisions? If yes then please name them.

The individual here is questioned about the knowledge that he/she holds with respect to the bail provisions and the same shall be taken as a valid parameter to assess their familiarity.

Are you aware that there are constitutional safeguards present against arbitrary arrest?

The question serves as a valid parameter to know the level of familiarity and how much the individuals are aware of their rights. The paper strongly assumes that the target audience is not aware of the same.

Do you think there is a nexus between poverty and arrest?

The paper also aims to delve into the nexus between poverty and arrest; therefore tries to know the public sentiment as it is frequently projected that people with less resources are

prone to arbitrary behaviour from the police agencies.

(I.V) RESEARCH METHODOLOGY

The paper has maintained a cross-sectional approach by perusing Doctrinal as well as Empirical tools to reach to its conclusion. The whole research has three facets; firstly it aims to provide a background study on the bail provisions in India, secondly, it aims to assess the practical realities with respect to how these provisions are executed and lastly, it aims to serve as an awareness campaign by educating the surveyed audience on the issues related to bail and their constitutional rights. The findings of the paper are also not presented in the traditional format as the same have been reflected in the form of pie-charts and diagrams to point out real-time impacts of these provisions. The paper has complied with *Bluebook 20th edition* for the purposes of citations.

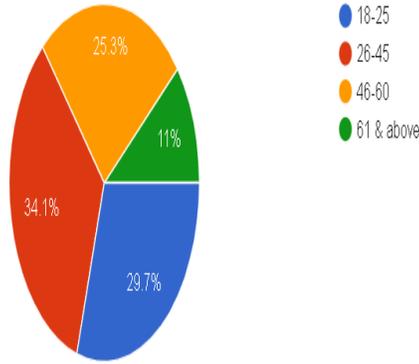
(II) FINDINGS

Age Group

The target group survey displayed huge diversity in terms of the age profile and the experiences that they have had with respect to arrest. The majority of the surveyed individuals who had any sort of experience with respect to arrest were from the age group of 26-45. This age group is also the bread-winner of the households and they are directly responsible for the economic upkeep of the family. This shows the adverse impacts that a household faces on account of arrest and it also shows that the majority of this age group is in conflict with the laws.

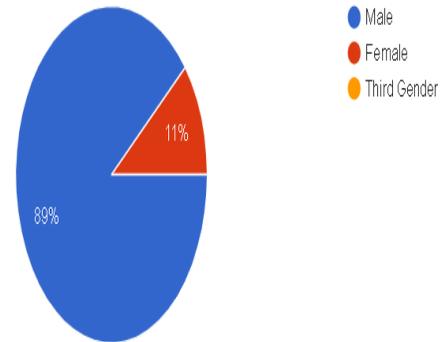


Age Group



The gender profile surely reiterates the gender-inequality in arrest cases as well; as the males are more prone to arrest. The data on third gender could not be derived and it shows the lack of representation on their behalf.

Gender



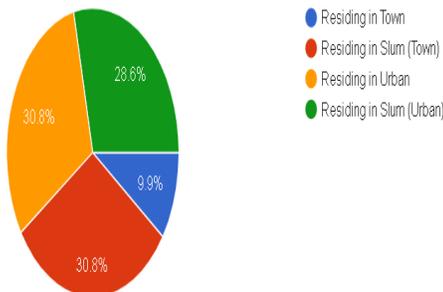
Residential Profile

The residence is specifically made a criteria in assessing the impact of such provisions. But our hypothesis that the majority of people affected by arrest would be in Urban slum was proven wrong as the data shows that there was parity with respect to arrest ratios in both Urban and Town- based slums. This also proves that crime and locality hold no nexus and people are affected irrespective of their location.

Educational Qualifications

The educational qualifications so play a major role in commission of offences and the arrest. We find that the majority of arrests happen in the less educated individuals and it keeps on decreasing gradually. The hypothesis that crime and education hold nexus is hereby found to be true.

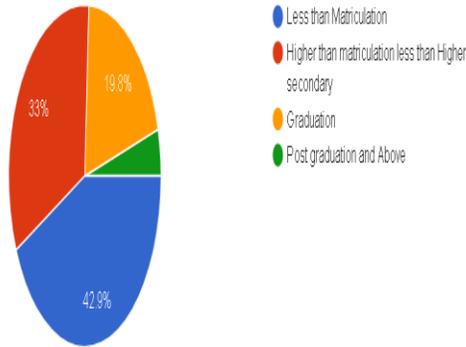
Residential Profile



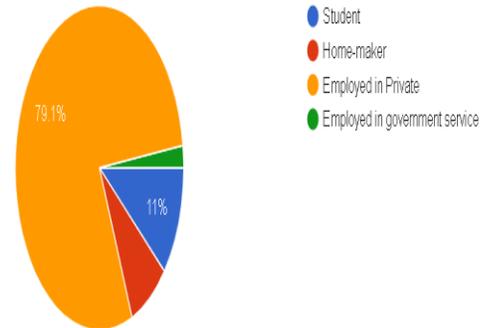
Gender



Educational Qualifications



Occupational Profile



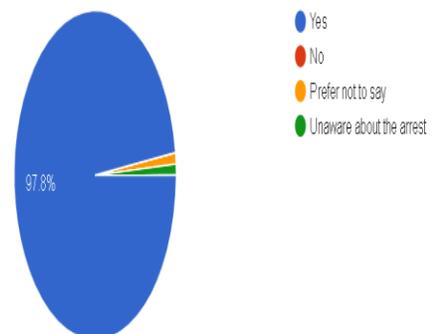
Occupational Profile

The occupational profile on the other hand depicts that the majority of the people who are employed outside of the public sector are prone to arrest and the second major category is that of students. It is interesting to note that students are getting into more and more anti-social behaviour which makes them prone to arrest. The student category despite having desired education fails to uphold the law and acts in an opposite manner than expected. The above mentioned parameter of educational qualifications is in direct conflict due to the high arrest ratio of students. Majority of the students who are arrested belong to an adolescent age and are properly aware of the crimes that they are committing; this makes it more difficult to ascertain whether education improves the quality of life or empowers anti-social elements to commit offences in a better manner.

Have you or anyone known to you has been detained by police or any other enforcement agencies?

This Question shows the number of participants who were involved in the exercise and it has specifically chosen people having an arrest experience as a preferable prerequisite for the same.

Have you or anyone is known to you has been detained by police or any other enforcement agencies?

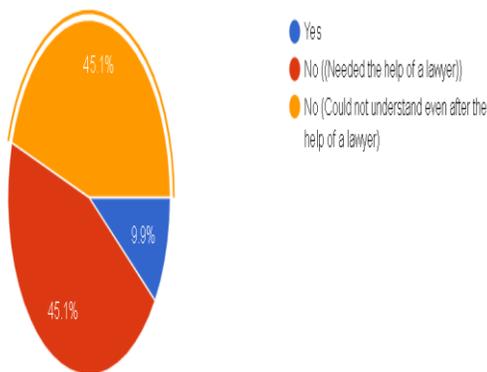




Were you able to understand the preliminary documents presented by the police in the court of law?

The data clearly shows the helplessness of the common public as the people who can easily understand the preliminary documents related to their arrest are very few in number. And around 90.2% of the target audience is unable to understand the legal documents which are related to their arrest.

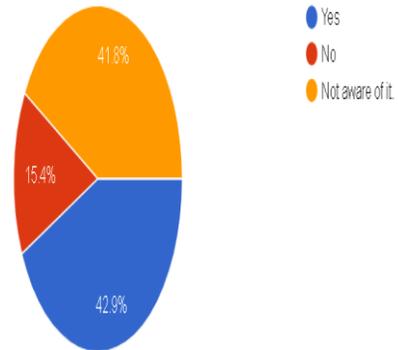
Were you able to understand the preliminary documents presented by the police in the court of law?



Was there a provision for a bail bond to discharge yourself/ your relative from the custody?

The surprising fact that 41.8% of the participants are not even aware of the concept of bail-bonds, shows the level of inefficiency of the system. This shows that many people are still devoid of their basic rights and this proves the assumption which asserts that there are many individuals which are still not able to access justice.

Was there a provision for a bail bond to discharge yourself/ your relative from the custody?

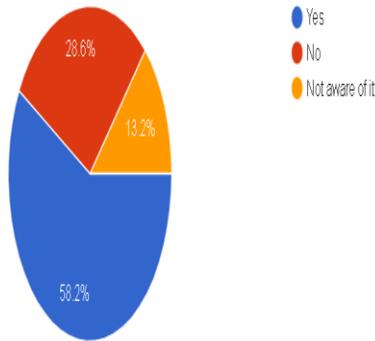


Do you belong to the Below Poverty line segment?

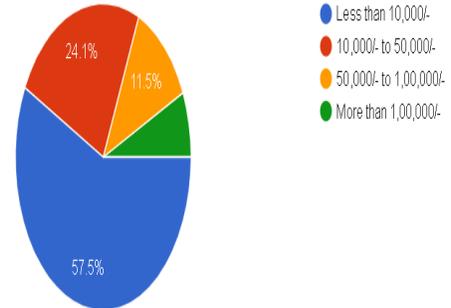
The majority of the people which have been interviewed belong to the Below Poverty Line and therefore it establishes a nexus amongst poverty and crime. But this should not be held as a concept to excuse these people from their criminal liabilities. Rather there needs to be a deep investigation with respect to the reasons which cause emergence of such realities. 58.2% of the surveyed population belongs to the economically weaker section but then there needs to be adequate safeguards to ensure that the costs they incur in court-complexes do not snatch their sources of income and push them into a vicious cycle of crime.



Do you belong to Below Poverty line segment?



The amount you incurred in the whole judicial process?



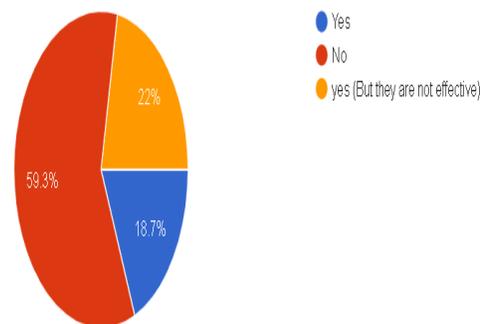
The amount you incurred in the whole judicial process?

Majority of the people who were interviewed have incurred less than 10,000/ INR in the whole judicial process. This can be explained by the reasoning that the majority of the people who are subject to arrest belong to the Below poverty line and an inference can be drawn that they are availing the facilities of free legal aid to some extent. But even though 10,000/- is the lowest variable in the question; but it should not be forgotten that many households in India struggle to earn a fraction of that amount. So we found out that the expenses should be curtailed to an extent by capping the payment of legal fraternity through a generic pay structure that mandates lawyers to not charge above a certain extent for their services.

Are you aware that there are provisions of free legal aid and assistance from the state government?

The data collected is clearly indicative of the fact that most of the participants were not aware of the provisions of free legal aid and assistance from the state government. We are of the opinion that the residential profile of the candidates from slums (Towns and Urban) comprise of such people who are unaware of these provisions.

Are you aware that there are provisions of free legal aid and assistance from the state government?

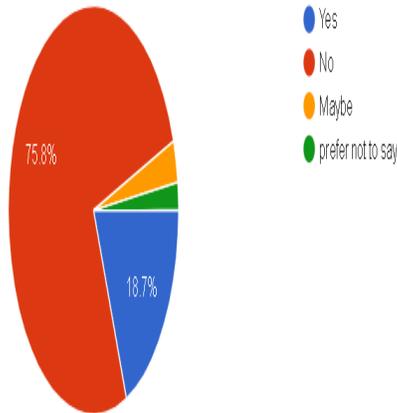




Do you think that the court of laws is accessible to people who don't have a background of legal education?

The blatant response of 75.8% of the sample audience makes this a fact that people are still not feeling that courts are accessible to them. The sheer fact that a majority of population irrespective of their residential profile or education background feels that the courts are not accessible is a matter of great concern for the government and the legal machinery at work.

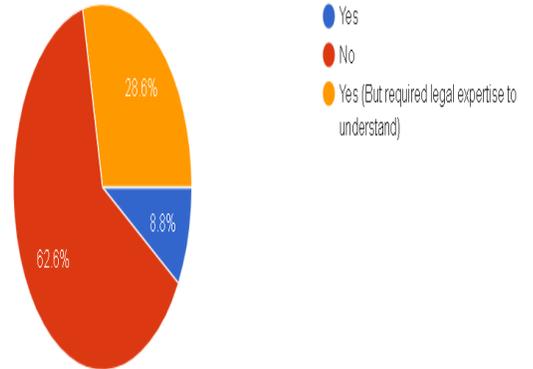
Do you think that the court of laws is accessible to people who don't have a background of legal education?



Are you aware of the conditions prescribed in the bail bond?

This again is a testament to the fact that many people who have been arrested are not even aware of the basic facts which are related to their arrest. And this depicts that there should be much more robust system at play which ensures that at least such basic factual information is transmitted to the arrested individuals in the interest of justice.

Are you aware of the conditions prescribed in the bail bond?

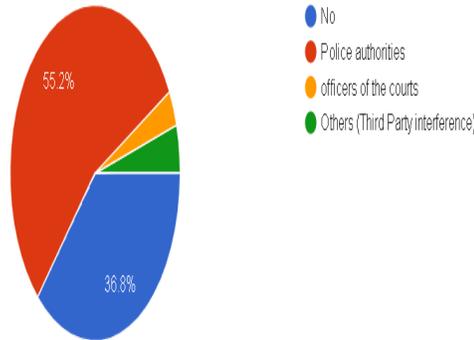


Did you face any trouble post execution of your bail bond from any of the following agencies?

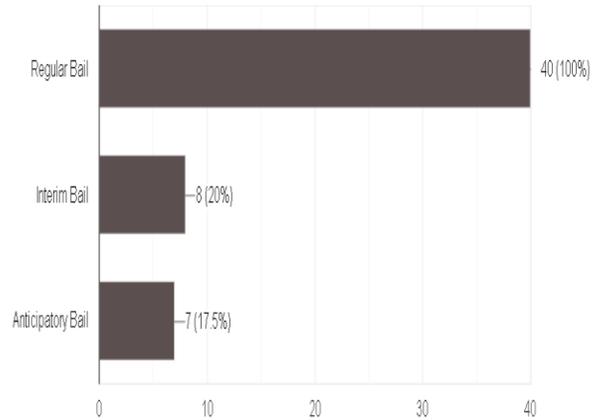
There was a lot of hesitation when this question was posed in front of the population irrespective of the residential profile or the occupations they were engaged in. The majority of the participants faced direct as well as indirect troubles from the police authorities and these reasons caused great trouble to the arrested people; especially their families. This further erodes the trust that people have in the system and instills fear into the minds of people who are arrested.



Did you face any trouble post execution of your bail bond from any of the following agencies?



Are you aware of any types of bail provisions? If yes then please name them.



Are you aware of any types of bail provisions? If yes then please name them.

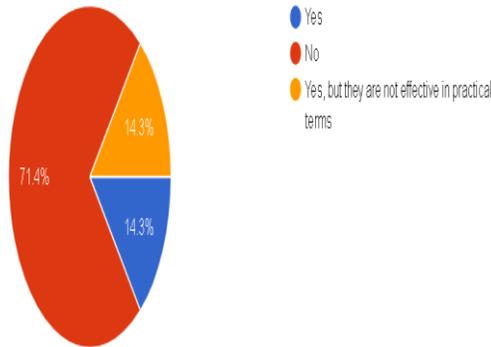
The survey also tried to test the basic knowledge of the participants by asking them basic questions like this; so as to assess how well-versed they are with the provisions. To our surprise most of the participants were knowing the regular bail and the other two were also known to a significant chunk of the participants was also aware of interim as well as anticipatory bail. This proves that even though the arrested people are not aware about the provisions initially but the whole process ends up educating them about the same.

Are you aware that there are constitutional safeguards present against arbitrary arrest?

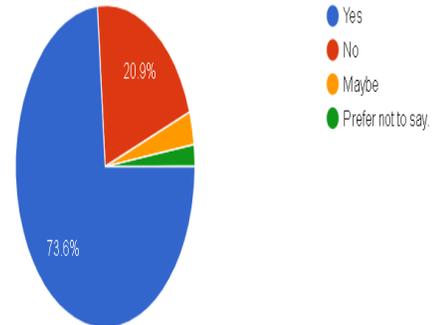
Even though many of the participants know what bail is; but they are not aware of the constitutional safeguards against arbitrary arrest. And 71.4% of the participants simply had no idea about these safeguards. In such scenarios the researchers made the participants aware of their fundamental rights against arbitrary arrest.



Are you aware that there are constitutional safeguards present against arbitrary arrest?



Do you think there is a nexus between poverty and arrest?



Do you think there is a nexus between poverty and arrest?

This last question was posed to understand the public sentiment with regards to how the legal machinery works and what are the primary reasons they think which are behind such pathetic reality. Most of the participants said that poverty and arrest have a close nexus and this might be true because most of the participants which were interviewed belonged to marginalised sections. Thus it materialised into such a sentiment which tries to shift the burden to the system itself; while looking at this dataset we should not forget that not all the arrests are arbitrary and not all the people who suffer from the system are innocent.

(III) CONCLUSION

After considering all the findings in this paper; the researchers can conclude that there is an acute lack of awareness amongst the participants and the same are vulnerable on account of such deprivation. Secondly, we are also of the view that the normal populace refrains from criminal litigation and rather fears the court of law. This fear and apprehension of the populace arises from improper implementation of the bail provisions; the people are afraid of court and therefore are very selective when it comes to give their opinion on the same. The applicability of the court has to be expanded in order to accommodate the people and there should be a major revamp in the criminal law as many times individuals are dragged to the court over petty issues and even sometimes the loopholes in these provisions are used to serve vendetta against each other.

The researchers are of the opinion to re-design criminal code and provide adequate safeguards to the people. They also opine to eradicate certain offences which are petty in nature and serve no purpose in today's time;



therefore, the new code should rely on revised principles of criminal jurisprudence.

