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Right to Bail as a Constitutional Right

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ABSTRACT

A Bail is a judicial process that must be conducted impartially, judicially, and by statutory and constitutional prescripts. Bail is a right to liberty in criminal jurisprudence. It reflects the right of every person to liberty. Bail is also a fundamental right under Article 19 and Article 21 of the Indian Constitution bail refers to release from custody, whether the accused person is on personal bond or with sureties. The Right to Bail seeks to grant exemption to a person accused of any offense to carry out daily life work by releasing him from custody. In criminal jurisprudence, a person is presumed innocent until proven guilty. Indian courts have also taken a very liberal approach toward bail. The provision of anticipatory bail extends this bail right and entitles an accused to seek anticipatory bail before arrest. Offenses for bail are classified as "bailable" and "non-bailable." In a bailable offense, the claim for bail is made as a right; in a non-bailable offense, bail is not claimed as a right. It is the discretion of the court to grant or not to grant bail in non-bailable offenses. At the present moment, bail in India is a highly debatable issue. The aim of this paper has attempted to explore the various dimensions of the RIGHT TO BAIL within the constitutional framework.

Keywords: *Bail, Indian Constitution, Security, Investigation.*

I. INTRODUCTION

This research on the subject of the right to bail as a constitutional right attempts to examine the various aspects of the concept of bail. Rights should be respected by the courts, and the matter of exemption should be left to the courts at their discretion. The right to bail is inextricably connected to the information and awareness of the accused of his right to obtain liberation on bail. According to Article 22 of the Constitution of India, No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and to be defended by, a legal practitioner of his choice. The word 'bail' means to release a person by taking security for his appearance, under arrest or under some kind of restraint.There are two types of security, according to crpc,1973:- (i) security with sureties; and (ii) Recognize of the principal himself. To understand the subject

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of this paper, it is necessary to first know the purpose of bail. The purpose of bail is to ensure the attendance of the accused during the trial and if the accused is found guilty, their availability in the court to receive the sentence. The theory of bail is a fundamental part of criminal jurisprudence. When the person is arrested in a criminal case, the court has greater discretion to grant or deny bail, e.g., when the accused is charged with homicide, it is usually refused. This paper analyzes where the right to bail fits into the constitutional scheme in the context of criminal jurisprudence enshrined in Articles 20, 21, and 22 of the Constitution. Finally, the consequences of the incorporation of section 167 of Cr.P.C. with respect to bail and its nexus with necessary concern over the temporary loss of liberty of an individual as dictated by Article 21 of the Constitution shall be attempted to be analyzed.

II. MEANING AND DEFINITION OF BAIL

The term bail has not been defined in the Criminal Procedure Code 1973, nevertheless, but the word "bail" has been used in the Criminal Procedure Code 1973, through the terms "bail", "bailable" and "non-bailabe" have collectively been used approximately 102 times in Criminal procedure Code,1973. Section 2(a) of the Criminal procedure code defines a Bailable Offence as an offense that is shown as bailable in the first scheduled, made bailable in the first schedule, or bailable by any other law for the time being in the force.

The expression bail denotes security for the appearance of a prisoner for his release. Etymologically, the word is derived from the old French verb "bailer," which means to "give" to "Deliver" although another view is that its derivation is from the Latin term bajulare meaning "to bear a burden" sureties.

Ordinarily, it is a release of a person under arrest or detention subject to the condition that he shall appear on the date and time specified in the bond and that, in case of failure, he shall be liable to pay the amount under the term of the bond.

Justice William Blackstone defined it as "a delivery or bailment of a person to his sureties on their giving, together with himself, sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to jail". Thus, when a person is released on bail, the person will be produced by him before the court when so required. The person who is released on bail is also usually asked to execute a bond for his appearance at a later stage of the proceeding.

According to the Supreme Court of India, Bail is devised as a technique for affecting the synthesis of two basic concepts of human values, namely the right of an accused person to enjoy

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his freedom and the public interest, subject to which the release is conditional on the surety to produce the accused person in court to stand the trial.

In **Moti Ram V. State of Madhya Pradesh AIR 1978 SC,** the Supreme Court clarified that the definition of the term bail includes both releases on personal bonds and with sureties. It is to be noted that even under this expanded definition, bail refers only to release based on monetary assurance-either one‟s own assurance or third parties' sureties.

III. HISTORY OF BAIL

Since ancient times the system of bail has been practiced by different countries of the world in accordance with their local legal system; the traces of bail has been seen since the time of early civilization, but it is difficult to mention the exact date and time when for the first time bail was introduced or followed, but if we go through different ages of our world culture we could find the references of bail being practiced in different parts of the world since their initial time, the signs of bail can be seen since far back from the time of Greek empire followed by roman evolution and how it has developed since that time to present modern times, nowadays almost all the countries have the system of bail in their criminal procedure system.

Usually, bail is a kind of asset or property given by the court as security for consideration of release from being arrested or to avoid being jailed, as an identification that the accused or suspect will be present on the day of hearing or trial and where if he fails to appear before the court on the given day then his property may be sized or forfeit the bail.

The amount deposited shall be returned at the end of the trial if the accused compels with all the conditions imposed by the respected and was present at every hearing regardless of whether the accused has been found guilty or set free (or acquittal). Where the surety bond has been taken, the cost or fee paid for that bond shall not be refunded.

It is a matter of the court whether to grant bail or not; in some countries, bail is allowed very commonly, and in some countries, it is very hard to get bail. If the court finds that the accused will not appear in court if he is allowed bail and there is a chance that he will abscond in such cases, the court may not allow bail.

The concept of Bail can trace back to 399 BC when Plato tried to create a bond for the release of Socrates. The modern bail system evolved from a series of Laws originating in the middle ages in England. 8During the Mughal rule, the Indian legal system is recorded to have an institution of bail with the system of releasing an arrested person on his furnishing a surety. The use of this system finds reference in the 17th Century travelogue of Italian traveler Manucci

whom himself was restored to his freedom bail from imprisonment for a false charge of theft. The then ruler of Punjab granted him bail, but the kotwal released him only after he furnished a surety. Under Mughal law, an interim release could be actuated by the consideration that if the dispensation of justice got delayed in one's case, then a compensatory claim cloud is made on the judge himself for losses sustained by the aggrieved party. 9During the British Raj in India, criminal courts used two well-understood and well-defined forms of bail for the release of a person held in custody. These were known as Zamanat and Michalka. Its latest reflection is the improved version of the provisions relating to bail in the code of criminal procedure, 1973, which was preceded by the adoption of the constitution 1950.

IV. TYPES OF BAIL

Depending upon the sage of the criminal matter, there are commonly three types of bail in India:

1. **Regular bail-** Regular bail is generally granted to a person who has been arrested or is in police custody. A bail application can be filed for regular bail under sections 437 and 439 of CrPC.
2. **Interim bail**- This type of bail is granted for a short period, and it is granted before the hearing for the grant of regular bail or anticipatory bail.
3. **Anticipatory bail-** Anticipatory bail is granted under section 438 of CrPC either by the session court or High Court. An application for the grant of anticipatory bail can be filed by the person who discerns that the police may arrest him for a non-bailable offense.

V. LAW COMMISSION - 41ST REPORT:

After taking stock of that law's entire position, the Commission has made its recommendations in the 41. Report. These recommendations were considered and incorporated by the Parliament during the production of the new Criminal Procedure Code, 1973, to replace the earlier. Regarding the bail provisions, the Judicial Commission reaffirmed the need to protect the fundamental and general principles in relation to bail and the proposed changes in the operational aspects of the system. According to the Commission, the general principles on the subject are: Bail/Security is a matter of Right if the offense is bailable. Bail/Security is a question of discretion, where the offense is non-bailable.

Bail/Security Bail shall not be granted if the offense is punishable with death or life imprisonment for life, but the Court, at its discretion in limited cases, to order a person. The Commission also stated that, even in respect of the offense or offenses, both with the death or

life in prison for life, the meetings and the High Court had wider discretion on granting a guarantee or bail.

VI. RIGHT TO BAIL AND RIGHT TO PERSONAL LIBERTY(ART 21):

The right to bail is concomitant of the accusatorial system, favoring a bail system that ordinarily enables a person to stay out of jail until a trial has found them guilty. In India, bail or release on personal recognizance is available as a right in bailable offenses not punishable with death or life imprisonment and only to women and children in non-bailable offenses punishable with death or life imprisonment. The right of police to oppose bail, the absence of legal aid for the poor, and the right to speedy reduce to a vanishing point the classification of offenses into bailable and non-bailable and make the prolonged incarceration of the poor inevitable during the pendency of investigation by the police and trial by a court.

Fact that undertrials formed 80 percent of Bihar's prison population, their period of imprisonment ranging from a few months to ten years; in some cases wherein the period of imprisonment of the undertrials exceeded the period of imprisonment prescribed for the offenses they were charged with- these appalling outrages were brought before the Supreme Court in **Hussainara Khatoon v. State of Bihar AIR 1979 SC**. Justice Bhagwati found that these unfortunate undertrials languished in prisons not because they were guilty but because they were too poor to afford bail. Following **Maneka Gandhi v. Union of India AIR 1978 SC**, he read into fair procedure envisaged by Article 21 the right of speedy trial and sublimated the bail process to the problems of the destitute. He thus ordered the release of persons whose imprisonment had exceeded the period of imprisonment for their offenses. He brought into focus the failure of the magistrates to respect section 167(2) of Cr.P.C., which entitles an undertrial to be released from prison on expiry of 60 days or 90 days as the case may be.

In Mantoo Majumdar v. State of Bihar[7], the Apex Court again upheld the undertrial's right to personal liberty and ordered the release of the petitioners on their bond and without sureties as they had spent six years awaiting their trial in prison. The court deplored the delay in the police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of the undertrials remanded by them to prison. The Court deplored the delay in the police investigation and the mechanical operation of the remand process by the magistrates insensitive to the personal liberty of undertrials and the magistrate's failure to monitor the detention of the undertrials remanded by them to prison.

In **Kadra Pahadiya AIR 1982 SC,** the Supreme Court observed that the Hussainara judgment had not brought about any improvement and reiterated that-

…..in Hussainara Khatoon, it was held that the right to a speedy trial is implicit in the rights enshrined in Article 21, and the Court, at the instance of an accused, who was denied this right, is empowered to give instructions to the State Governments and to other appropriate authorities to secure this right of the accused.

To make this right meaningful in Bihar, the Supreme Court passed orders to ensure institutional improvement to make the speedy trial a meaningful reality. The Court, therefore, indicated the remedy in the event of denial of the accuser's right to personal liberty enshrined in Article 21, namely that the Supreme Court may be approached to enforce the right, and the Supreme Court, in pursuance of its constitutional power may direct the State Government and other appropriate authorities accordingly. Thus order requests High Court to furnish the Supreme Court with the number of Sessions Courts in Bihar, the norms of disposals fixed by the High Court; the steps, if any, taken to ensure compliance with those norms, and considering the number of pending sessions cases, the adequacy of several session court in Bihar. Regarding prisoners awaiting commitment, Court might suo motu consider granting bail in accordance with the above mentioned principle laid down in Hussainara.

The travails of illegal detainees languishing in prisons, who were uniformed, or too poor to avail of, their right bail under section 167 Cr.P.C. was further brought to light in letters written to justice Bhagwati by the Hazaribagh Free Legal Aid Committee in **Veena Sethi v. State of Bihar(1982)** 2 **SCC** and **Sant Bir v. State of Bihar(1982) 3 SCC**.The court recognized the inequitable operation of the law and condemned it- "The rule of law does not exist merely for those who have the means to fight for their rights and very often for perpetuation of status quo… but it exist also for the poor and the downtrodden… and it is solemn duty of the court to protect and uphold the basic human rights of the weaker section of the society. Thus having discussed various hardships of pre-trial detention caused, due to unaffordability of bail and unawareness of their right to bail, to undertrials and as such violation of their right to personal liberty and speedy trial under Article 21 as well as the obligation of the court to ensure such right. It becomes imperative to discuss the right to bail and its nexus to the right of free legal aid to ensure the former under the Constitution- in order to sensitize the rule of law of bail to the demands of the majority of poor and to make human rights of the weaker sections a reality."

VII. RIGHT TO BAIL AND RIGHT TO FREE LEGAL AID –ARTICLES 21 AND 22 READ WITH ARTICLE 39A

Article 21 of the Constitution is said to enshrine the most important human rights in criminal jurisprudence. The Supreme Court had for almost 27 years after the enactment of the

Constitution taken the view that this Article merely embodied a facet of the Diceyian concept of the rule of law that no one can deprived of his life and personal liberty by the executive action unsupported by law. If there was a law which provided some sort of procedure, it was enough to deprive a person of his life and personal liberty. However **Maneka Gandhi v. Union of India AIR 1978 SC**marked a watershed in the history of constitutional law and Article 21 assumed a new dimension wherein the Supreme Court for the first time took the view that Article 21 affords protection also against legislation (and not just executive action) and no law can deprive a person of his/her life or personal liberty unless it prescribes a procedure which is reasonable, fair and just it would be for the court to determine whether the procedure is reasonable, fair and just ; if not, it would be struck down as invalid.

In Hussainara Khatoon's case the Apex Court, inter alia, observed that the undertrials languishing in jail were in such a position presumably because no action application for bail had been made on their behalf either because they were not aware of their right to obtain release on bail or on account of their poverty they were unable to furnish bail. The present law of bail thus operates on what has been described as a property oriented approach. Thus the need for a comprehensive and dynamic legal service programme was left in order to revitalize the bail system and make it equitably responsive to needs of poor prisoners and not just the rich.

In the Indian Constitution there is no specifically enumerated constitutional right to legal aid for an accused person. Article 22(1) does provide that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his choice, but according to the interpretation placed on this provision by the Supreme Court in Janardhan's case**(Janardhan Reddy v. State of Hyderabad, AIR 1951 SC**)this provision does not carry with it the right to be provided the services of legal practitioners at state cost. Also Article 39-A introduced in 1976 enacts a mandate that the state shall provide free legal service by suitable legislations or schemes or any other way, to ensure that opportunities for justice are not denied to any citizen by reason of economic or other disabilities – this however remains a Directive Principle of State Policy which while laying down an obligation on the State does not lay down an obligation enforceable in Court of law and does not confer a constitutional right on the accused to secure free legal assistance.

However the Supreme Court filled up this constitutional gap through creative judicial interpretation of Article 21 following Maneka Gandhi's case. The Supreme Court held in **M.H. Hoskot v. State of Maharashtra AIR 1978SC** and **Hussainara Khatoon's case** that a procedure which does not make legal services available to an accused person who is too poor to afford a lawyer and who would, therefore go through the trial without legal assistance cannot

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be regarded as reasonable, fair and just. It is essential ingredient of reasonable, fair and just procedure guaranteed under Article 21 that a prisoner who is to seek his liberation through the court process should have legal services made available to him. The right to free legal assistance is an essential element of any reasonable, fair and just procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.

Thus the Supreme Court spelt out the right to legal aid in criminal proceeding within the language of Article 21 and held that this is….

"a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided of course the accused person does not object to the provision of such lawyer."

VIII. RIGHT TO BAIL (SECTION 167(2) CR.P.C) AND DELAY IN INVESTIGATION

With the incorporation of section 167(2) Cr.P.C. the investigating agency is required to complete the job of investigation and file the charge-sheet within the time limit of either 60 or 90 days as the case may be. In case the above is not completed within the definite period a most valuable right accrues to the accused. The accused is, in that eventuality, entitled to be released on bail.

It would be seen that the whole object of providing for a prescribed time limit under section 167(2) Cr.P.C. to the investigation agency to complete the investigation was that the accused should receive expeditions treatments at the hands of the criminal justice system, as it is implicit in Article 21 that every accused has right to an expeditions disposable of his case. Section 167 has been criticized with respect to the fact that the prescribed time limit relates only to the investigation aspect and does not touch other segments of the criminal-justice-system, thus the object (of speedy trial), behind section 167 stands frustrated. Moreover section 167(2) is seen to paradoxically serve as a way of grant of liberty to some dangerous criminals who would otherwise not be able to get it under our system (for example they may not be otherwise entitled to bail by virtue of nature and gravity of offence.) thus the utility of section 167 Cr.P.C. may be thus questioned in the light of above, as to whether it really serves the purpose enshrined in Article 21 of the Constitution, particularly in the light of viewing the criminal justice system as whole not confined solely to investigation- it therefore follows that to achieve the right to speedy trial (as enshrined in section 163(2) Cr.P.C.) it is important to overhaul the system in its entirety and not parts of the system in isolation.

 [ISSN 2581-5369]

IX. CONCLUSION

In this paper an attempt has been made to explore the various dimensions of the right to bail within the constitutional framework. Innocence is presumed until proven guilty. The concept of bail is derived from the above notion. According to Article 21 of the Constitution, personal liberty of a person is also a fundamental right. Therefore, until the person is convicted, the production of bail is permitted to ensure his appearance in the trial.

Persons who are ill, unable to furnish surety, have been imprisoned for more than the maximum punishment for the offense charged or are deprived of the knowledge of the right to bail should be provided with information about their right to bail.

However, to ensure one's right to a speedy trial and, thus consequently minimum infringement on the accused's right to personal liberty, an overhaul of the criminal justice system is called for. A mere emphasis on investigation machinery by prescribing a time limit as per section 167(2) Cr.P.C. will not suffice to attain the desired object. Moreover, it is interesting to note that on the lapse of the prescribed period, bail as of right accrues to the accused, even if he is accused of a grave, heinous non-bailable offense and in other circumstances would have been refused to bail. Thus the backlash of section 167(2), as well as its possible effectiveness, ought to be considered in the light of its object of ensuring a right to a speedy trial under Article 21 of the Constitution.

Thus the law of bails must continue to allow for sufficient discretion, in all cases, to prevent a miscarriage of justice and give way to the humanization of the criminal justice system, and to sensitise the same to the needs of those who must otherwise be condemned to languish in prisons for no more fault other than their inability to pay for legal counsel to advise them on bail matters or to furnish the bail amount itself.

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 [ISSN 2581-5369]

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