(28) Concentrating on the above points, progress can be shown in computerization. Cyber offences shall also be kept under watch constantly securing information from police. My critical view of system shall be used for progress. It is a long away to go in showing progress in all branches in the department and computerization has umpteen benefits and has to be taken advantage. Indian National Language *i.e.* Hindi and mother tongues of States and linguists minorities and languages as mentioned in eighth schedule in Constitution have to be developed. Lot of progress has been made in Tamilnadu and other States in computerization of Courts. Mother tongue has been given top priority. High Court cannot forget the articles mentioned by me supra are Articles 343, 348, 350, 351, 350-A, 350-B or 349 and eighth schedule wherever Constitution has exhaustively dealt with mother tongue and usage of other languages. The Government has already notified the languages to be used in Courts with the concurrence of High Court. It is in the fitness of things High Court has to order computerization in Court languages keeping in view of its constitutional obligation and the High Court being zealous guardian of Sovereign, Socialist, Secular Democratic Republic and Articles of the Constitution of India.

RIGHT TO BAIL AS A CONSTITUTIONAL RIGHT

By

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Introduction

Krishna Iyer, J., remarked that the subject of bail :

> "…..belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of public treasury all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process."

It is precisely this much needed jurisprudence of bail which is discussed in the course of this paper in the light of the personal liberty of a person and the value of that personal liberty under our constitutional system. This study attempts to explore the varied dimension of the concept of bail – as a right that must be respected by the Courts and as a matter of concession left to the judicial discretion of the Courts.

The right to bail is inextricably linked to the knowledge and awareness of the accused of his right to obtain release on bail; this is further linked to Article 22(1) of the Constitution which provides that no person who is arrested shall be denied the right to consult and to be defended by legal practitioner of his/her choice. It is however remains an issue to be examined whether this provision carries with it the right to be provided the services of a legal practitioner at State cost, particularly in the light of Article 39A of the Constitution which directs the State to provide free legal aid - but is this an obligation on the part of State, enforceable in a Court of law.

Where does the right to bail fit into the constitutional scheme in the context of criminal jurisprudence contained in Articles 20, 21 and 22 of the Constitution ? How may these human rights of accused as conferred by the Constitution be balanced against the growing

crime rate and the need to protect society from criminals ? Thus the law of bails

> "…. has to be dovetail two conflicting demands, namely, on one hand, the requirements of society for being shielded form the hazards of being exposed to the misadventures of a person alleged to have committed a crime; and on the other, the fundamental canon of criminal jurisprudence *viz.*, the presumption of innocence of an accused till he is found guilty."

Thus, another fundamental issue to be focused on, in the course of this paper, is the recognized trend in the criminal justice system from the presumption of innocence to presumption of guilt. The truth behind this statement and its consequent impact on pretrial procedures such as attainment of bail is also sought to be studied in the light of the relevant Cr.P.C. provisions, where necessary. 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.

Why Bail ?

Before actually determining the place of bail within human rights framework as conferred by the Constitution, it is important to examine the object and meaning of bail, such that an analysis of these fundamental objects and change therein may reveal a change. The object detention of an accused person is primarily to secure her/his appearance at the time of trial and is available to receive sentence, in case found guilty. If his/her presence at the trial could be reasonably ensured other than by his arrest or detention, it would be unjust and unfair to deprive the accused of his liberty during pendency of criminal proceedings.

Thus it is important to note the relevant provisions enshrined in the Universal Declaration of Human Rights :

Article 9 – No one shall be subjected to arbitrary arrest, detention or exile.

Article 10 – Everyone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11(1) – Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

There are thus several reasons which have been enumerated as to why bail ought to be allowed to prevent pre-trial detention.

Definition

There is no definition of bail in the Criminal Procedure Code, although the terms 'bailable offence' and 'non-bailable offence' have been defined in Section 2(a) Cr.P.C. Bail has been defined in the law lexicon as security for the appearance of the accused person on giving which he is released pending trial or investigation. What is contemplated by bail is to "procure 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."

Thus having discussed the object and meaning of the concept of bail, it becomes important to fit this concept within the criminal justice jurisprudence as conferred by the Constitution of India.

Right to Bail and Article 21's Right to Personal Liberty

The right to bail is concommittant of the accusatorial system which favours a bail system that ordinarily enables a person to stay out of jail until a trial has found him/her guilty. In India, bail or release on personal recognizance is available as a right in bailable

offences not punishable with death or life imprisonment and only to women and children in non-bailable offences 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 vanishing point the classification of offence 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.

The fact that undertrials formed 80 per cent of Bihar's prison population, their period of imprisonment ranging from a few months to ten years; some cases wherein the period of imprisonment of the undertrials exceeded the period of imprisonment prescribed for the offences they were charged with these appalling outrages were brought before the Supreme Court in *Hussainara Khatoon v. State of Bihar*. Justice *Bhagwati* found that these unfortunate undertrials languished in prisons not because they were guilty but because they were too poor to afford a bail. Following *Maneka Gandhi v. Union of India*, 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 period of imprisonment had exceeded the period of imprisonment for their offences. 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* the apex Court once again upheld the undertrials right to personal liberty and ordered the release of the petitioners on their own bond and without sureties as they had spent six years awaiting their trial, in prison. The Court deplored the delay in 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 police investigation and the mechanical operation of the remand process by the Magistrate's 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*, 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 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.

In order to make this right meaningful in Bihar, the Supreme Court proceeded to pass orders to ensure institutional improvement in order to make 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 in order 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 requesting 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 number of Session Court in Bihar. In regard to prisoners awaiting commitment, Court might *suo motu* consider granting of 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* and *Sant Bir v. State of Bihar*. 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."

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 be 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* 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 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 wee 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 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* 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 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."

Right to Bail (Section 167(2) Cr.PC) and Delay in Investigation

With the incorporation of Section 167(2) Cr.PC 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.PC to the investigation agency to complete the investigation was that the accused should receive expeditious treatments at the hands of the criminal justice system, as it is implicit in Article 21 that every accused has right to an expeditious disposal 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.PC 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 a whole not confined solely to investigation-it therefore follows that to achieve the right to speedy trial (as enshrined in Section 163(2) Cr.PC) it is important to overhaul the system in its entirety and not parts of the system in isolation.

Conclusion

This paper has attempted to explore the various dimensions of the Right to Bail within the constitutional framework. It is of prime significance to note that the very concept of bail arises from a presumption, of the accusatorial system, of 'innocent till proven guilty'. As such an individual's personal liberty which is a fundamental right under Article 21 of the Constitution, cannot be compromised until he/she is convicted and thus proven guilty. Thus he/she is allowed to furnish security (in the form of bail) to secure the accused's presence for trial while enabling him/her to retain his/her personal liberty.

However, as was brought to light, in famous *Hussainara Khatoon* case, personal liberty as operating within the domain of the criminal justice system remains the cherished prerogative of the rich. While those who can ill afford legal Counsel to inform them to their right to bail. (*i.e.* in non-bailable offences – Section 2(a) Cr.P.C) and consequently are unable to pay the amount, are relegated to languish in prisons, often for terms longer than the period of punishment prescribed for the offence they are charged with. This in order to extend the fundamental right of personal liberty under Article 21 of the Constitution, to even the economically weaker sections of the population (who form a majority of the prison population), the right to free legal aid must be made a constitutional right. Thus the decision in the same case, also in *M.H. Hoskot v. State of Maharashtra* making legal aid a constitutional mandate under Article 21 is welcome in paving the way towards upholding human rights in criminal jurisprudence.

However in order 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 in its entirety is called for. A mere emphasis on investigation machinery by prescribing a time limit as per Section 167(2) Cr.PC will not suffice to attain the desired object. Moreover it is interesting to note that on lapse of the prescribed period bail as of right accrues to the accused, even if he is a accused of a grave, heinous non-bailable offence and in other circumstances would have definitely 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 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 to give way to the humanization of 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.

LAW AND DISABILITY NATIONAL AND INTERNATIONAL PERSPECTIVE

By

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"*We know that equality of individual ability has never existed and never will, but we do insist that equality of opportunity still must be sought.*" — Franklin D. Roosevelt

Introduction

People with disabilities are excluded from the mainstream of society and experience difficulty in accessing fundamental rights. There is, furthermore, a strong relationship between disability and poverty. Poverty makes people more vulnerable to disability and disability reinforces and deepens poverty. Particularly vulnerable are the traditionally disadvantaged groups in India. Disability tends to be couched within a medical and welfare framework, identifying people with disabilities as ill, different from their non-disabled peers, and in need of care. This changing ethos has taken place within an international context which finally gave rise, in 1971, to the Declaration on the Rights of Mentally Retarded Persons and entered into a transition in international legal development and finally to the 2008, United Nations Convention on the rights of persons with disabilities.