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**EXPLORING THE INTERSECTION OF BAIL AND
CONSTITUTIONAL LAW: SAFEGUARDING RIGHTS AND
ENSURING JUSTICE**- Ameesh Khan & Shilpa Mehrotra¹**ABSTRACT**

Life, Liberty and property rights of a person are basic rights guaranteed under the Constitution of India in various forms. These rights are so important that the Constitution of all the countries have recognised them. The significance and sweep of Article 21 makes it clear that the deprivation of liberty is a matter of grave concern permissible only when the law authorizing it just, fair and reasonable, even handed and geared to the community good³. A social system which abides by the rule of law, where it is imperative that the personal liberty of the individual be subjected to the least regulation and reasonable restriction." No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter"

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I. INTRODUCTION

The instinct of liberty and freedom, possessed by human being has not only been recognised but also protected and preserved universally by almost all the civilized nation. A man by virtue of being human being possess inalienable human rights which become operative with their birth. Since these rights are birth rights therefore inherent in all the individual.

In the case of *Maneka Gandhi v. Union of India* Justice Bhagwati expressed its importance in following words,

"These rights represent the basic values cherished by the people of this country since the Vedic times and they are calculated to protect the dignity of the individual and create condition in which every human being can develop his personality to the fullest extent. They weave a pattern of the guarantee on the basic structure of human rights and impose negative obligations on the State not encroach on individuals liberty in its various dimensions."

The extent to which human right are respected and protected is an important measure of society's civilisation. The right to enjoy one's personal freedom is provided by Constitution of all the countries. The human rights jurisprudence has reached a stage where one could easily say that the Indian Constitution recognises the fundamental right to human dignity. The fundamental dignity directly flows from Article 21 of the Indian Constitution. The right to personal liberty is guaranteed in Articles 21 and 22 of the Constitution irrespective of political beliefs, creed, class or religion of any person. Against this background an attempt has been made hereunder to address the Constitutional issues relating to law of bail.

II. PERSONAL LIBERTY AND BAIL

The right to life and personal liberty is undoubtedly the most fundamental of all rights. All other rights depend on the pre-existence of life itself for their operation and add quality to the life. As human rights can only belong to living beings, one might expect the right to life itself to be, in some way, primary, because none of the other rights would have any value or utility without it. There would have not been fundamental Rights worth

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noting if Article 21 had been read in its original sense. The right to life and liberty is enshrined in Indian Constitution under article 21. According to article 21, no person shall be deprived of his life or personal liberty except according to procedure established by law. Right to life in Article 21 of the Constitution does not mean merely the physical act of breathing. Similarly it does not mean animal like existence. It has a much wider scope which encompasses right to live with human dignity. Initially the expression 'personal liberty' meant to freedom from physical restraint of person by incarceration or otherwise. But later on personal liberty included all varieties of rights other than those which are already included in the several clauses of Article 19. Even the expression 'procedure established by law' which was originally interpreted by the Supreme Court as State made or enacted law and not as law embodying the principles of natural justice, has undergone significant changes by later Supreme Court's decision. In the case of *Makhan Singh v. State of Punjab* it has been held that in order to be a valid law, it must be enacted by competent legislature as well as does not violate other fundamental rights declared by the Constitution. Further in a case it has been held that a procedure which is arbitrary, oppressive or fanciful, is no procedure at all and that a procedure which is unreasonable, violates article 14.

It would be pertinent to refer to decision in the case of *Kartar Singh and Ors. vs. State of Punjab*,⁴ wherein Justice K. Ramaswamy, speaking for the Court discussed the importance of life and liberty in the following words;

"The foundation of Indian political and social democracy, as envisioned in the preamble of the Constitution, rests on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Article 21 of the Constitution protects right to life which is the most precious right in civilized society. The trinity i.e., liberty, equality and fraternity always blossoms and enlivens the flower of human

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diginity. One of the gift of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Article 19 conjointly assured by Art.20(3),21 and 22 of the Constitution and Art.19 ensures freedom of movement Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality.

"The term personal liberty used in Article 21 has been given a liberal interpretation. it does not only mean the liberty of the body i.e. freedom from physical restraint or freedom from confinement within the bounds of a prison in other words it means not only freedom from arrest or detention from false imprisonment or wrongful confinement, but means much more than that. The term personal liberty is not used in a narrow sense but has been used in Article as a compendious term to include within it all those variety of rights of a person which go to make up the personal liberty of man. Liberty of an individual has to be balanced with duties and obligations towards his fellow citizens."

Article 21 provides protection to all the persons whether he is arrested or detained. The purpose behind article 21 is to restrain encroachment upon personal liberty by an appropriate authority, except in accordance with the law .

with the provisions thereof. Personal liberty of the person who is incarcerated, to a great extent, curtailed by punitive detention. Bail is an important part of criminal justice system which is based on important rule of presumption of innocence i.e, a person is innocent unless proven guilty. Therefore, it is believed that incarceration amounting to punishment before guilt is proved, deprives personal liberty without just cause. Thus if bail is refused, it has serious implications for the personal liberty of the accused. The Code of Criminal Procedure (1973), for the convenience of criminal justice system, has classified the offences into two categories, viz., bailable and non-bailable offences. According to the Code the accused is entitled to get bail in all bailable offences as a matter of right, but in the case of non-bailable offences, it is left to the discretion of the Court either to grant bail or not. So the Courts must exercise this discretionary power on the basis of well settled principles with regard to the circumstances of each cases and not in an arbitrary manner. While granting bail Courts must keep in view the constitutional values and the basic human rights. Therefore, refusal to grant bail without reasonable ground would amount to deprivation of personal liberty under Article 21. Whenever the liberty of the

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subject is involved whether under penal law or a law of preventive detention, it is the bounden duty of the court to satisfy itself that all the safeguards provided by law have been scrupulously observed.

III. RIGHT TO SPEEDY TRIAL

One of the fundamental objectives of the criminal delivery justice system is the speedy disposition of criminal acts, since long delays can defeat justice. Therefore, speedy justice is said to be one of the essentials of organised society. It is often advocated that a case should be resolved as early as possible but it is also said that basic norms which ensure justice cannot be ignored because it is a common popular proverb that 'justice rushed, justice burried'. There should also be a fair compromise between basic requirements and speedy trial, as the primary aim of the legal system is to provide complete justice for all. If the trial is delayed and accused is incarcerated in jail during the pendency of such delayed trial, then it will be a case of imposing punishment upon the accused before his conviction and sentence after trial. On the other hand, an exercise of judicial discretion to enable the accused to secure bail in such cases would be just and fair. It can be stated that the right to a speedy trial is extension of the right to liberty, security and protection from arbitrary detention. This is a prerequisite to the right to be presumed innocent unless proved guilty. This right is indispensable and is not conditional on the convicted person's request or invocation of that right. Such accused persons are entitled to be brought before the Court without unreasonable delay in order to allow the Court to decide if they are justified in initial detention and whether the accused person must be released on bail. It has been said that an accused is entitled to speedy trial. Law therefore insists a quick judicial system to determine guilt or innocence of an accused.²

In India to have speedy justice is a fundamental right which flows from Art.21 of the Constitution. Prolonged delay in disposal of the trials and thereafter appeals in criminal cases, for no fault of the accused, confers a right upon him to apply for bail. Jurisprudence of speedy trial is founded on the basic idea that innocent (suspected)

²AsimPandya, Law of Bail Practice and Procedure 24 (LexisNexis, New Delhi, 1st edn., 2013)

persons should not be persecuted for an unreasonable time by the legal system and victims should get justice as soon as it can be provided by the legal system.

In the case of *Hussainara Khatoon v. State of Bihar* the Apex Court held that there can not be doubt that a speedy trial, and speedy trial means reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Art. 21. The Supreme Court observed as follows "There is also one other infirmity of the legal and judicial system which is responsible for this gross denial of justice to the undertrial prisoners and that is the notorious delay in disposal of cases. It is a bad reflection on the legal and judicial system that the trial of an accused should not even commence for a long number of years. Even a delay of one year in the commencement of the trial is bad enough; how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice."

IV. THE RIGHT TO FREE LEGAL AID

It is equally important to ensure that the accused has the required resources to engage a lawyer for his defence if the right to counsel is essential for fair trial. There is no need for a thorough understanding of the legal process to appreciate how an indigent accused faces the possibility of denial of a fair trial in a criminal case because he has no equal access to the legal resources available to the opposite side. It has now been accepted, with the incorporation of Article 39-A to the Constitution, that it is the responsibility of the State to provide free legal assistance to a indigent people.

In a view of the insertion of Article 39-A to the Directive Principles of the Constitution which specifically asks the State to work for providing free legal aid," the Procedure established by law" under Article 21 could further mean that legal aid is available to the indigent accused and when there is no such provision for making available legal aid to an accused person who is too poor to engage a lawyer then that procedure can not be a procedure established by law.³This Article, however, merely contains the Directive Principle of State policy, i.e. it imposes a duty on the State to grant free legal aid, but it

³*Hoskotv.StateofMaharashtraAIR1978SC1548*

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does not constitute an obligation enforceable by a court of law and does not confer a fundamental right on the accused person to receive free legal aid. The right to legal aid is not expressly recognised under the Indian Constitution as a fundamental right. However, in recent years it has come to be known as implicit in Article 21 of the Constitution by the virtue of judicial decisions in various cases.

This constitutional obligation to provide free legal aid also arise when the accused is produced for the first time before a magistrate. Accused's personal liberty is jeopardized as soon as he is arrested and produced before the magistrate. This is the stage when he gets the first opportunity to apply for bail and get released as to resist remand to police custody. At this stage accused needs legal assistance and representation. Since no procedure can be said to be reasonable ,just and fair if legal aid and representation is denied to him, therefore it is the constitutional obligation of State to provide free legal services to indigent accused not only at trial stage but also when the accused is produced first time before the magistrate for remand from time to time.

CONCLUSION

In our socio-political order, liberty occupies a position of pride. Who knows, more important than the founding fathers of our Constitution, whose freedom under authoritarian rules was limited by the British rulers. Article 21 of the Constitution provides that, except in accordance with the procedure provided by statute, no person shall be deprived of his personal liberty. Therefore, it follows that a person's personal freedom may be curbed by a mechanism defined by statute. The object of Article 21 is to prevent infringement of personal freedom by the executive save in accordance with law and provisions of the directive. It is therefore imperative that, before a person loses his or her life or personal liberty, the proceedings must be strictly followed by the statute and must not be discontinued, and detriment to the person concerned. But in case if there is violation of right to personal liberty The Court must exercise its Constitutional power of judicial review to determine whether there is violation of right to personal liberty and if it is a statute allowing deprivation, whether the proceedings are very rational, fair and just, and not arbitrary, whimsical and inventive.

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The liberty of a person is of great importance and is a fundamental right under the Constitution of India. As a consequence of the Supreme Court's verdict in several cases the problem of bail has come to be intimately connected with some of the Constitutional rights of the accused relating to procedure, legal and speedy trial. Therefore, difficulties to enforce these rights into practice should be overcome by taking suitable legal, judicial, administrative and other measures. One approach to deal with the problem is to rationalize the law of bails and bring it into conformity with the cardinal principles of human rights jurisprudence as contained in international human right instruments and the epoch making judgments of the Apex Court in the area of human rights of the accused. Looked from this perspective the law of bails has to dovetail two conflicting claims namely, freedom of the individual and the societal need to prosecute the law breakers. The bail legislation should address the two contradictory conditions of society as a whole. Shielding the nation from the misadventures of the individuals supposedly involved in the crime and the presumption that the accused is innocent until he is found guilty. The following courts are meant to be governed by the maxim 'Bail is the rule and jail is an exception,' but that exception is also subject to the exception that the conditions on bail should be viewed not only for the benefit of the accused, but also for the benefit of the prosecution as well as for the benefit of society at large, which may also be affected directly or indirectly with the commission of offence.

Although the provisions of bail in the Code of Criminal Procedure aim at blending these conflicting demands, there is still ample scope for liberalization of the law. As it is evident from the review of the law of bails made in the preceding Chapters, bail in a bailable offence is a matter of right and there is no difficulty for the police officer or the judicial officer to release the accused on bail.

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