Right To Bail As A Constitutional Right

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ABSTRACT: Bail is the right to liberty in the criminal jurisprudence. It connotes the right to freedom of each and every person which is also a fundamental right under article 19 and article 21 of the Indian Constitution, in a true sense. Right to bail seeks to provide relaxation of the person accused of any offence to carry on with the daily task of life by getting release from the custody. Though there are several conditions requisite for claiming right to bail but in the criminal jurisprudence a person is presumed innocent unless proven guilty, the courts and constitution have taken a liberal approach in this individual's right. The anticipatory bail provision is an enlargement of this right to bail which enable a person to seek bail in advanced before arrest can be made if a person is accused of certain offence. The classification of offences as Bailable and non bailable further ease the availability of this right. In cases of bailable offences, the bail can be claimed as matter of right and it cannot be denied usually but in case of non bailable offences it cannot be claimed as matter of right however application for the same can be made in good faith and the leaning of courts to grant bail in most cases gives force to the importance of this right in the individual pretext. This article aims to justify the right to bail as constitutional right in the light of fundamental rights and constitutional philosophy.

Key Words: Bail, Indian Constitution, Security, Investigation

1. Introduction

This research on the topic of Right to bail as a constitutional right attempts to investigate the varied aspect of the concept of bail by the courts the rights must be respected and as a matter of concession left to the judicial discretion of the courts. The right to bail is inextricably connected to the information and awareness of the accused of his right to obtain liberate on bail. Article 22(1) of the Constitution says that no person who is not under arrest shall be denied the right to seek advice from and to be protected by legal practitioner of his/her choice. The concept of bail implies a type of previous restraint. The word BAIL means to free a person by taking security for his appearance who is under arrest, or under some kind of restraint.

There are two types of security according to section 436 of criminal procedure code read with form 45 of chapter 2 of that code:

(i) security with sureties; and
(ii) Recognize of the principal himself.

To understand the concept of RIGHT TO BAIL AS A CONSTITUTIONAL RIGHT, it is important to examine the object and meaning of bail. The object of bail is to secure the appearance of the accused person at the time of trial and in case if the accused person found guilty is available to receive sentence.

Remarked that the subject of bail:-

Gudikanti Narasinhulu V. Public Prosecutor¹

"belongs to the blurred area of criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion." ² "The issue is one of liberty, justice, burden of public treasury and public safety.

- The theory of bail is a fundamental part of criminal jurisprudence.
- When the person is arrest in criminal case, court have greater discretion to grant or deny bail, e.g., when the accused is charged with homicide it is usually refused.

Definition of Bail

In criminal procedure code there is no definition of bail, while the term 'Non-Bailable offence' and 'Bailable offence' is defined in section 2(a) of criminal procedure code. In law lexicon bail has been defined which

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¹ AIR 1978 SC 430
² JUSTICE KRISHNA IYER
saying that it is a security of the accused person for his appearance in the court. The constitution of India conferred that it becomes important to fit the concept of bail within the criminal justice system. When a specified amount of security is deposited on release of an arrested or imprisoned accused to ensure the accuse appearance in the court when order. In civil cases, before the trial accused has a right to be released on bail. In criminal cases, only on the discretion of court bail is allowed. In Cambridge dictionary- Bail is defined as an amount of money that a person who has been accused of a crime pays to a law court so that they can be released until their. The payment is a way of making certain that the person will return to court for trial.

**Meaning of Bail:** There is no meaning of bail in criminal procedure code. So to find the meaning of bail we have to check law lexicon and according to law lexicon the meaning of bail is treated as security to secure the appearance of the accused, after which he/she is released trial or interrogation.

1. Bail is a matter of right in a bailable offence.
2. Bail is a matter of discretion of court in a non-bailable offence.

**Anticipatory Bail:**
Under Indian criminal, section 438 of the criminal procedure code talks about the provision of anticipatory bail. In 41st report of law Commission of Indian recommended to incorporate the provision of anticipatory bail in procedure code. A person is allow in this provision to seek bail in anticipation of an arrest on accusation of have committed a non-bailable offence.

- Anticipatory bail is issued even before the person is arrested which is a direction to release a person on bail.
- Anticipatory bail can be granted by High Court, Session Court and Supreme court.

**How to get an Anticipatory Bail?**
For anticipatory bail you have to follow these 7 steps:
- To apply for anticipatory bail and pre-arrest notice immediately contact a good lawyer.
- Along with your lawyer draft a application of anticipatory bail and sigh it.
- Support your application with an affidavit.
- Must attach all the relevant documents along with a copy of FIR.
- In appropriate district court file the application.
- For the hearing of your application must send somebody with your lawyer in the court.
- The protection under anticipatory bail is available to you, till the end of the trial.

**Right to Bail (Section 167(2) Cr.P.C) and delay in investigation**
With the inclusion of Section 167(2) the investigation agency within the time limit of either 60 days or 90 days is required to file the charge sheet and complete the job of investigation as the case may be. In case if within the definite period the above is not completed a most valuable accrue to the accused. In that eventually the accused is entitled to be released on bail.

Under section 167(2) the whole object of providing a prescribed time period for the complete of investigation to the investigation agency was that the accused should accept expedition treatments at the hands of the criminal justice system, every person has a right to an expedition disposable of his case as it is implicit in Article 21.

Section 167 has been criticized with respect to the fact that the investigation agency only investigate the investigation aspects in prescribed time limits and does not go through the others segments of the criminal-justice-system, thus behind section 167 object of speedy trial stands frustrated.

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3 BLACK LAW DICTIONARY 4TH EDITION, Pg. 177.
4 CAMBRIDGE DICTIONARY.
5 From the book of Criminology and Criminal justice system by DR. N. Maheshwara Swamy.
Cases:

*Achpal Ramswaroop & Another v. State of Rajasthan*

The two-judge bench of the supreme court heavily relied on its verdict in the case of *Uday Mohanlal Archarya v. State of Maharashtra*, which elaborated on the law on the point as to the rights of an accused who is in custody pending investigation and where the investigation is not completed within the period prescribed under section 167(2) of the code.

In *Uday Mohanlal* case, the supreme court held that on the expiry of the said period of 90 days or 60 days, as the case may be, an indefeasible right accrues in favour of the accused for being released on bail on account of default by the investigating agency in the completion of the investigation within the period prescribed and the accused is entitled to be released on bail, if he is prepared to and furnishes the bail as directed by the magistrate.

**Right to Bail and Article 21’s Right to Personal Liberty**

An arrest or detention is a grim restriction on freedom of one personal in the constitution. Deprivation of one’s liberty is the meaning of arrest. An arrest implies to take a person into custody to answer a criminal charge for the intention of holding or detaining him. Indian constitution provides protection against illegal detention or arbitrary arrest under section 21 of Indian Constitution. It says that except the authority of law no person can be detained in custody.

Indian Constitution and other secondary laws provides that a person can be released on bail and the person can enjoy his personal freedom even during the investigation of the crime in order to protect the liberty of a person. Pretrial detention of accused means obligation of what amounts to punishment previous to determination of guilt. It further affects his family and employment or business and his life and liberty obstructs in preparing the defense etc. for an temporary release of an accused on surety the system of bail provides. To produce the accused on date of trial the surety in bound on the accused. In preserving the personal liberty on a person bail is a important factor. In technical sense, to obtain his release from imprisonment, it is a security given for appearance of accuse, it is a temporary release of an accused from detention. Under code of criminal procedure, 1973 the term bail has not defined, but bailable and non-bailable offences are define in the code.

Under the code of criminal procedure, 1973 the provision of bail have been laid down. Before the guilt is proved, bail is a traditional rights to freedom, it prevents infliction of punishment before conviction. Law provides that if within 24 hours, if the investigation cannot be completed fixed by section- 57 of the code of criminal procedure, then magistrate have to sole the case. Under Section 167(2) of the code of criminal procedure, magistrate has the power to authorize the detention of an accused in such cases where the magistrate think fit for a term not exceeding 15 days on the whole.

In case of *Mantoo Mazumdar v. State of Bihar* Supreme court held that of the expiry of the said period, The accused shall be released on bail if he is prepared to and does furnish bail.

**The Legal Position in India**

There is no definition of Bail in the code of criminal procedure,1973 although the terms bailable and non-bailable is define under section- 2(a) of the code of criminal procedure ,1973.

Bailable offences are those which are mention in first schedule and which is bailable in any other law, and non-bailable offences means any other offences.

- Section 436 and Section 450 laid down the provision for the grant of bail and bonds in criminal cases.
- In criminal procedure code the amount of security which is paid by the accused to secure his release is mentioned. The court has the discretion to put a monetary cap on the bond.
- According to the 78th report of the law commission as on April 1 1977, the population of total prison of 1,84,164 a many as 1,01,083 (roughly 55%) were under trial.
- One of the reason for this is, the large scale poverty amongst the majority of the population in India.
- This is the precise reason why most of the under trial languish in jail instead of being out on jail.

**Judicial Trend:**

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6 AIR 14 September, 2014.
7 AIR 29 March, 2001
8 AIR 27 February, 1980
9 Legal service india.com
An overview of the following cases highlights the adverse conditions of with regards to bail system in India.

In the case **state of Rajasthan v. Balchand** the accused was convicted by the trial court. When he went on appeal the high court, it acquitted him. The state went on appeal to the Hon’ble Supreme court under Art. 136 of the constitution through a special leave petition. The accused was directed to surrender by the court. He then filed for bail. It was then for the first time that Justice Krishna Iyer raised his voice against this unfair system of bail administration. He said that though while the system of pecuniary bail has a tradition behind it, a time for rethinking has come. It may well be that in most cases an undertaking would serve the purpose.

In the case **Maneka Gandhi v Union of India** Justice Iyer once again spoke against the unfair system of bail that as prevailing in India. No definition of bail has been given in the code, although the offences are classified as bailable and non-bailable. Further Justice P.N. Bhagwati also spoke about how unfair and discrimination the bail system is when looked at from the economic criteria of a person this discrimination arises even if the amount of bail fixed by the magistrate isn’t high for some, but majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even if its small amount.

**Conclusion**

This paper has attempted to investigate the various aspect of right to bail within the constitutional framework. It is a prime implication to note that the concept of bail arises from an assumption, of the accusatorial system, of “innocent till proven guilty”. As such individual personal liberty which is of fundamental rights under article 21 of the constitution, cannot be concession until he or she is convicted and thus proven responsible.

However, as was brought to light, in famous **Hussainara Khatoon and others v. home secretary state of Bihar** case, personal liberty as in commission within the domain of the criminal justice system remains the appreciated privilege of the rich.

Thus the law bails must maintain to allow for enough discretion, in all cases, to stop a miscarriage of justice and to give way to the humanization of criminal justice system and to sensitize the same to the needs of those who must otherwise be destined to languish in jail for no more responsibility other than their incapability to pay for legal advice to advise them on bail matters or to supply the bail amount itself.

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10 AIR 1977 SC 2447
11 AIR 1978 SC 571.
12 1979 AIR 1369, 1979 SCR (3) 532.