



# IMPACT OF BAIL POLICIES ON JUSTICE AND SOCIETY

**Aryan Dev Uniyal**

Student  
Law College, Uttaranchal University

The instinct of liberty and freedom, possessed by human being has not only been recognized 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*<sup>1</sup> 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 to encroach on individual's liberty in its various dimensions."

The extent to which human rights 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.

## I. 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

---

<sup>1</sup> AIR 1978 SC 597

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 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.<sup>2</sup>

It would be pertinent to refer to decision in the case of *Kartar Singh and Ors. vs. State of Punjab*,<sup>4</sup> 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 dignity. One of the gifts 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

---

<sup>2</sup> (1994) 3 SCC 569

fellow citizens."<sup>3</sup>

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 case 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 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.

In the case of *Gudikanti Narasimhulu v. Public Prosecutor, High court Andhra Pradesh*<sup>4</sup> it has been observed by Hon'ble Supreme Court that:

"Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. The significance and sweep of Article 21 of the make the deprivation of liberty a matter of grave concern and permissible only when the law authorising it is reasonable, even-handed and geared to the goals of community good, and State necessity spelt out in Article 19..... Reasonableness postulate intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interests of justice to the individual involved and society affected."

## (A) Personal Liberty versus Social Security

The right to life and personal liberty is not absolute and it must be at par with social security in order to make itself just, fair and reasonable to everyone. The society has a vital interest in grant or refusal of bail because criminal offence is the offence against the State. The conflicting interests, namely Sanctity of individual liberty and the interest of the society must be

<sup>3</sup> M.P. Jain, Indian Constitutional Law 1190( Lexis Nexis Butterworths Wadhwa ,Sixth Ed)

<sup>4</sup> 1978 CrLJ 502

balanced in order of granting and refusing bail. The law of bails dovetails two conflicting interests namely, on the one hand, the requirements of shielding the society from the hazards of those committing crimes and potentiality of repeating the same crime while on bail and on the other hand absolute adherence of the fundamental principle of criminal jurisprudence regarding presumption of innocence of an accused until he is found guilty and the sanctity of individual liberty.<sup>5</sup>

Though liberty of a individual is valuable one and the Court should always protect such liberties of individual but this protection can not be considered absolute in every situation, it stands qualified depending upon the exigencies of the situation. Thus protection must be made available to deserving ones. It is the society that needs protection from the criminals since they are capable of spreading terror and so as to disrupt the tranquility and peace of society.

There are two aspects, i.e. negative and positive, of the modern definition of 'liberty'. The former contemplates certain actions, conducted in compliance with one's own volition and will, the effect of which does not interfere with the interest of others and therefore prohibited from intervening with others. The latter postulates the responsibility of an individual or group to take such actions for the interest or gain of another individual or group. Thus, under various cases, freedom requires both action and constraints on the part of a individual or group. In other words, liberty is an action, the result of which is limited to the doer, whereby the intervention of others in such action is prohibited, and when the action of the doer adversely affects others, it is a restraint, requiring interference from the individual or group bound by duty. Therefore in order to protect the interest of the society, exercising interference and restrain by the state, on the doer, shall be liberty of the society.

Thus, certain restrictions or limitations, on the exercise of personal liberty, by the State are necessary elements, in the interest of liberty of a well-ordered society or societal interest. The Supreme Court in the case of Kartar Singh v. State of Punjab has also held that unlimited and unqualified liberty cannot be said to be in favour of societal interest.

## II. 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

<sup>5</sup> Siddharam Satlingappa Mhetre v. State of Mahaashtra

innocence of an accused.<sup>6</sup>

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) 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."

In this case the Supreme Court also mentioned that in United States of America speedy trial is one of the constitutionally guaranteed right. The Court also took note of the fact and referred to Article 3 of the European Convention of Human Rights which states that everyone arrested or detained shall be entitled to trial within a reasonable time or to release pending trial. On the question of the right to a speedy trial, Justice Bhagwati stated that the undertrial prisoners languish in jail because they are downtrodden and weak, and not because they are guilty.

In *Abdul Rehman Antulay v. R.S. Nayak* the Supreme Court laid down guidelines for speedy trial for all the courts in the country:

Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in favor the accused to be tried speedily. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in such circumstances;

Right to speedy trial flowing from Article 21 encompasses all the stages namely the investigation, inquiry, trial, appeal.

Revision and Re-trial; The accused should not be subjected to undue or unnecessary detention prior to his conviction; The worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; Undue delay may result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise;

---

<sup>6</sup> Asim Pandya, *Law of Bail Practice and Procedure* 24 (LexisNexis, New Delhi, 1st edn., 2013)

However, it cannot be ignored that it is usually the accused who is interested in delaying proceedings. Delay is a known defense tactic. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Moreover, non-availability of witnesses, disappearances of evidence by lapse of time, work against the interests of prosecution.

Court developed jurisprudence of unreasonable delay because unreasonable delay in trial can violate the Right of Speedy trial but the real question was how it can be identified whether such delay is proper or not. The solution of this problem was given in *P. Ramachandra Rao v. State of Karnataka*<sup>7</sup>, where it was observed that whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors ;

(1) Length of delay, (2) the justification for the delay, (3) the accused assertion of his Right to Speedy Trial, and (4) prejudice caused to the accused by such delay."

It is the Constitutional obligation of State to dispense speedy justice, more so in the field of criminal law, and paucity of funds or resources is no defense to denial of right to justice emanating from Arts. 21, 19, and 14 and the preamble of the Constitution as also from Directive Principles of State Policy.

## a. 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 would 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.<sup>8</sup> This 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 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

<sup>7</sup> Ibid

<sup>8</sup> *Hoskot v. State of Maharashtra* AIR 1978 SC 1548

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.

## Article 22: Right Against Arbitrary Arrest And Detention

Article 22 of the Constitution provides as follows:

- "(1) 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.
- (2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.
- (3) Nothing in clauses (1) and (2) shall apply—
- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention."

Thus it is Constitutional mandate that no arrested person shall be detained in custody without being informed, as soon as may be, of the grounds of such arrest nor shall he be denied the right to consult and to be defended by a legal practitioner of his choice. This is the fundamental right of the arrested person. The right to be informed of the ground of arrest is a precious right of the accused person. This right enable him to move to the court and make expeditious arrangements for his defence. This right is also provided in Criminal Procedure Code 1973 under section 50 and section 50A. However these sections have not conferred all the rights which is given under Art. 22 of the Constitution. According to section 50 of Criminal Procedure Code 1973 the arrested person must be informed about the ground of his arrest while section 50A impose obligation on police officer or person making arrest to intimate about the arrest and place of detention to any friend, relative or other person to whom arrested person nominate. This section also imposes duty on police officer to inform about the arrested person's right. The mandate of Article 22(2) is to give right to accused to consult and defended by legal practitioner of his choice.