



Bail jurisprudence & under-trial prisoners: Issues & challenges

Dr. Kusum Chauhan¹, Sahil Verma²

¹ Associate Professor, Department of Law, Himachal Pradesh University, Shimla, Himachal Pradesh, India

² Research Scholar, Department of Law, Himachal Pradesh University, Shimla, Himachal Pradesh, India

Abstract

The concept of granting of bail to individuals at pre-trial and under trial stage is an ever-evolving legal process. Bail plays a primary role in the process of penology. The legal instrument of bail is dynamic in nature, as it transforms according to requirements of a particular country. As far as, Indian scenario regarding the concept of bail is concerned, it is in a dire need to be transformed, as its background is of a colonial era legal instrument. Hereby, it was designed with an imperialist mindset under the Indian British regime. With the passage of time, as India gained independence, judiciary played a consistent role in transformation of the jurisprudence related to bail. Indian judiciary, by way of judicial pronouncements, guidelines and judgements, considerably liberalised the concept of bail to a certain extent. Along with that, different dimensions of right to bail in limelight with rights of under-trial prisoners were outlined by Indian judiciary.

Accordingly, in this paper, an attempt has been made to identify the prevalent lacuna in present bail system, being practiced in Indian scenario. Role of judiciary in different aspects relating to liberalisation of Indian bail jurisprudence has been delineated. Moreover, different solutions to the concerned issues linked to Indian bail system have been traced, based on penological jurisprudential principles of 'innocent until proven guilty' and 'natural justice'.

Keywords: Bail, India, liberalisation, penology, judiciary, under-trial, prisoner, colonial, imperialist, jurisprudence.

Introduction

The concept of crime and punishment are interlinked. Punishment is a method of penological jurisprudence to prevent crime in the society^[1]. Initially, the methodology of infliction of punishment was based on the concept of retribution and deterrence. Lex Talionis (eye for an eye, tooth for a tooth) was the main governing principle behind the philosophy of punishment^[2]. The two basic objectives of the punishment in the initial phase, focused upon to make the criminal feel that he has committed a wrongful act, for which he has to be penalised and secondly, to create deterrence or abhorrence among the people by way of retribution. Thereafter, as punishment, crime and society are ever evolving and dynamic, concept of crime and punishment also underwent a drastic change. Human rights became a prominent factor in penological jurisprudence after the Second World War^[3]. Crime, in modern day society is being considered as a result of many factors and criminal is known to be as an individual in need of treatment^[4]. Hereby, for treatment of criminal, concept of reformation of offender through imprisonment became the main method of punishment. With the changing dynamics of the objective of punishment, population of under-trial prisoners rose to a drastic level within prisons^[5]. Henceforth, need was felt to device a legal provision, such as, granting bail to specified offenders at the pre-trial or under-trial stage. The concept of bail fulfils twin objectives. Former one is decongestion of prisons and latter one is criminal suspects or alleged offenders must only be kept in prison, if it is necessary^[6].

The evolution of the bail process in India could be established to the colonial rule. Due to its colonial era roots, the concept of bail was designed to suppress the local native Indian population. Thereafter, with the Indian independence in 1947, Indian Constitution was formulated, thereby, granting various rights to the Indian people. However, the concept bail is being applied and practiced even before the

Indian Constitution came into existence. Hereby, there is a dire need to refine the existing bail system for the betterment of under-trial prisoners. Indian judiciary, post independence period has considerably liberalised the right of bail for the betterment of penological jurisprudence. The concept of bail is dynamic, as its objectives have changed, since time of its evolution to the present day. It has been highlighted in 78th Law Commission Report, that there is a well eminent need to address the problems relating to the present system of bail being practiced in Indian penal system. The present bail system in India is still lacking in its basic objective to protect rights granted under Indian Constitution. It is resulting into infringement of basic principle of 'innocent until proven guilty.' Thereby, increasing under-trial prisoner population in Indian prisons, due to unrefined implementation of right to bail has led to establishing of opposite of the herein mentioned penological principle, as 'guilty until proven innocent'^[7]. Justice Krishna Iyer in his landmark judgement in State of Rajasthan v. Balchand^[8], observed that "jail should be an exception and bail should be the norm". Henceforth, there is a need of recognising the lacuna present in Indian bail system and to transform it into first line of defence in alignment with the judicial directives.

Concept of bail

In simple sense, the origin of term 'bail' is known to have been originated from verb of French origin 'bailer' meaning 'delivering or giving'. Regular bail is that kind of bail being given to the arrested person or to an individual in police custody, based on the gravity of his offence and discretion of the court^[9]. Bail is a legal provision, according to which an under-trial prisoner, detained person or an individual in custody is released on certain conditions, after arrangement of surety or bond or both. Hereby, the basic objective behind bail is that the person released, does not hamper the

process of justice and influences the witness. Along with that, prime purpose is to assure presence of the accused in the concerned court for the process of investigation, inquiry or trial within specified time. However, bail could not be itself withheld as a form of punishment. On the trial process being getting prolonged, prosecution cannot oppose the bail of the concerned under-trial prisoners, based on the logic that charges are serious in nature^[10]. Bail must be granted to a person, only after application of the proper test in context to probability of escaping for purpose of trial^[11]. Moreover, under-trial prisoner is an individual undergoing the process of trial and is inclusive in wider sense of persons being detained, undergoing judicial custody or remand^[12].

Accordingly, in *Vaman Narain Ghiya v. State of Rajasthan*^[13], Indian Supreme Court, while interpreting the philosophy behind right to bail, stated that: -

- a. Right to bail has its own legal philosophy;
- b. It plays a vital role in justice delivery mechanism;
- c. Concept of bail finds its genesis, in between, restriction of liberty of alleged individual and liberalisation of human rights jurisprudence;
- d. An individual is not subjected to detention, based on the objective of imposing irrelevant punishment on assumption of his guilt.

Bail as a concept, originated in England, as a matter of necessity. Historically, justice delivery mechanism was not refined. As a result of it, there was delay in the trial process due to delayed presence of justices who were travelling from place to place. Many accused under-trial prisoners died due to inhuman conditions prevalent in English prisons. Thereafter, objective of obtaining provisional release from custody was held important in English justice system. Providing of provisional release to under-trial prisoners from custody led to the genesis of the concept of bail. Sheriffs in England made certain ad-hoc arrangements regarding release on cognizance, personally or on assurance of third party with bond or without it. Granting of bail in 1275 by sheriffs was standardised. Later on, in 1360-61 the power of granting bail was transferred to the justices. Conditions regarding the release of prisoners before trial were specified under Statute of Westminster in 1275. It resulted into limiting the power of sheriff's, regarding determination of sufficient amount of surety. According to statute, assuming of personal responsibility in context to accused person's appearance by surety or third party, penalty of which was one's own forfeiture of property, was a big deterrent in granting bail. Along with that, Habeas Corpus Act, 1679 under Section 6 outlined certain regulations regarding release of persons on bail, stating that "committed for high treason or felony plainly expressed in warrant shall not on petition be indicted, as herein mentioned". Thereafter, Bill of Rights in 1689 granted a right against the 'excessive bail'. Afterwards, the institution of granting or denial of bail became a complete judicial discretionary function subjected to certain limitations until 1976. It was in 1976 when the English Bail Act was passed. It refined the concept of right to bail to a greater extent^[14].

As far as, Indian scenario is concerned, the concept of bail was formulated under the Code of Criminal Procedure, 1898. It was implemented under colonial British regime with an objective of achieving its colonial interests and suppressing the local Indian native population. The Code of Criminal Procedure was amended in 1973. However,

position regarding refinement of the present bail system remained the same. Thereafter, Bharatiya Nagarik Suraksha Sanhita, 2023 replaced the Criminal Procedure Code, 1973. Accordingly, provisions relating to bail and bail bonds have been covered under Chapter 35, but the prime purpose of right to bail and its liberalisation has not been achieved to reasonable extent. The basic framework, based on dual difference between offences that are bailable and offences that are non-bailable has been maintained, irrespective of changing needs of justice delivery mechanism. Hereby, Section 480 (3) of Bharatiya Nagarik Suraksha Sanhita, 2023 entails some conditions to be imposed by the trial court, while granting of bail, as following:-

- a. Attendance by the accused in court according to the conditions of the bail bond;
- b. Any other offence of like nature shall not be committed by the accused;
- c. Accused should not try to influence witness or hamper the process of justice related to the concerned case;
- d. Tampering of evidence shall not be done by the alleged accused individual, while on bail.

Along with that, Section 479 of Bharatiya Nagarik Suraksha Sanhita, 2023 has tried to streamline the process of granting bail to under-trial prisoners undergoing prolonged incarceration, evaluated as hereunder:-

- a. Release of first time offenders, if they have undergone one third period of detention, out of maximum period of imprisonment being specified for the alleged offence;
- b. Bail can be granted on the report of jail superintendent;
- c. Otherwise, bail shall not be granted to an under-trial prisoner if an investigation, inquiry or trial is pending in multiple offences or cases.

Furthermore, based on the functional and timeline point of view, bail is categorised into following types:-

- a. Regular bail- Bail granted to a person by the concerned police authorities in cases of bailable offence. As far as non-bailable offences are concerned, it is granted by the concerned court, based on certain conditions^[15];
- b. Interim bail- It is direction given by the court regarding release of a person on bail for a short timeframe till the application for demanding of regular or anticipatory bail lies pending in front of concerned court;
- c. Anticipatory bail- It is provided to an individual apprehending arrest^[16].
- d. Temporary bail- Bail granted for limited timeframe based on reasons, such as, medical condition, family function, tragedy or taking care of family^[17].

Moreover, judiciary has clearly established by way of many judicial pronouncements that right to bail is being enshrined under right to life in Article 21 of the Indian Constitution. Hereby, in *Sheikh Javed Iqbal @ Asfaq Ansari v. State of Uttar Pradesh*^[18], it was observed by the Supreme Court that Article 21 of Indian Constitution is overarching and sacrosanct. Moreover, in *V. Senthil Balaji v. The State Represented by Deputy Director and Ors*^[19], Supreme Court granted bail and observed that prolonged incarceration of an under-trial, followed by a "clean acquittal" results into violation of right to speedy trial granted under the Article 21 of Indian Constitution^[20]. Thereafter, in *Manish Kumar Sisodia v. The Directorate of Enforcement*^[21], the court once again mentioned the

governing principle that 'bail is a rule and jail is an exception' and prolonged incarceration during trial without bail could lead to 'process becoming punishment'. It was observed that right to fair and speedy trial flows from right to life under the Article 21 of the Indian Constitution. Along with that, in *Prem Prakash v. Union of India* through Directorate of Enforcement, Supreme Court clarified that principle "bail is the rule and jail is an exception" is only a paraphrasing of Article 21 of the Indian Constitution. It was observed that denial of bail & putting a person under incarceration for unlimited timeframe in hope of completion of trial in a faster pace would result into deprivation of fundamental right to life and liberty^[22]. Noticeably, in *Bikramjit Singh v. State of Punjab*^[23], it has been expressed by the Supreme Court that even 'statutory' bail under 167(2) of the Code of Criminal Procedure, 1973 is a fundamental right and comes under right to personal liberty provided under Article 21 of the Indian Constitution.

Judicial approach towards bail applications

Indian judiciary by way of judicial activism and interpretation has played an eminent role in refinement of different concepts related to penology. Judiciary has liberalised the concept of right to bail to a certain extent by way of judicial directives and guidelines in its various judgements. Along with that, Indian Supreme Court recognised the status of under-trial prisoners from the initial span of Indian independence in 1952^[24]. Accordingly, in *Lachmandas Kewalram Ahuja v. State of Bombay*^[25], it was decided that defendants convicted according to pre 1950 framework were in need of confirming their rights according to the fundamental guarantees of the newly framed Indian Constitution. Hereby, it was directed that the defendants are required to be retained in custody as "under-trial prisoners," till the new case is prepared by the state. Along with that, judiciary, mainly after post emergency period paved way for the jurisprudence of human rights in penology. In *Kamlapati Trivedi v. State of West Bengal*^[26], the apex court also outlined the technical framework of bail, as following: -

- a. A legal provision that has been refined as a result of distillation and interpretation;
- b. Technique synthesised for implementation in context to the application of two parallel concepts regarding human rights jurisprudence. Former one is "right of an accused to enjoy his personal freedom and latter one is public interest on which a person's release is conditioned on surety, to produce the accused person in the court to stand the trial."

Furthermore, different aspects related to the concept of bail were considerably liberalised, being specified hereunder: -

1. Release on bond without sureties;
2. Amount of bail bond;
3. Insisting on local surety to be avoided;
4. Stressing on number of sureties in different matter to be relaxed;
5. Bail shall be granted, based on logical conditions^[27].

1. Release on bond without sureties

Indian judiciary has interpreted the process of granting of bail. It has been clearly directed that conditions of furnishing of sureties in context to bail should be reasonable. In *R.D. Upadhyay v. State of Andhra Pradesh*

And Ors^[28], it was observed that cases in which under-trial prisoners are not able to provide sureties for bail, in such cases, prisoners shall be released on personal bond. Along with that, the trial court must keep regard to the conditions related to the particular case and amount of time period spent by under-trial prisoner in incarceration. Along with that, Supreme Court in *Moti Ram v. State of M.P.*^[29], clarified that right to bail covers twin pathways, as following: -

- a. Release on personal bond excluding surety;
- b. Release on bond including surety.

2. Amount of bail bond

Judiciary has clearly outlined that the bail bond amount should be reasonable, based on considering different factors related to a particular case. Level of charges and other whereabouts needs to be considered. Also, bail bond is required to be imposed, such that, it does not hamper, indirectly, the right of accessing of bail. In *Roop Narayan v. State of Rajasthan*^[30], Supreme Court held that excessive amount of conditions related to bail bond should not be imposed. Hereby, fine of strict form relating to Rs. one lakh, along with surety of Rs. one lakh and two bail bonds of Rs. fifty thousand each were held to be excessive and thus, hampered the process of granting bail indirectly.

3. Insisting on local surety to be avoided

It has been expressly made clear by the judiciary that only after considering logical reasons by the trial court, insisting on local surety should be considered. Local surety is not a necessary condition and differs on case to case basis. Apex court gave a benchmark decision in *Hussainara Khatoun v. Home Secretary, State of Bihar, Patna*^[31]. Hereby, different factors were listed regarding determination of the link of the accused within the community, instead of stressing on local surety for granting of bail, mentioned as hereunder:-

- a. Timeframe of residing in the community;
- b. Economic condition, status and background of the concerned under-trial prisoner;
- c. Family ties and relationship status to be considered;
- d. Reputation and character of the person to be determined;
- e. Previous criminal record to be traced;
- f. Identification of right thinking people, who would relatively come forward for credibility of the concerned individual;
- g. Different factors relating to the level of charges and possibility of criminal hampering the process of justice after bail being granted, needs to be kept into consideration;
- h. Any other factors in context to indication of wilful failure to appear on the mentioned time and date should be outlined.

4. Stressing on number of sureties in different matters to be relaxed

Judiciary by way of judicial pronouncement has laid stress on liberalisation of bail conditions based on logical factors. It has been outlined that condition of furnishing of no of sureties while granting bail is not in alignment with the refined bail jurisprudence. It is not beneficial for under-trial prisoners. Top court in *Girish Gandhi v. State of Uttar Pradesh & Others*^[32] directed that two sureties are requisite enough for granting bail, with respect to thirteen separate

cases being lodged against the concerned under-trial prisoner. It was observed that production of vast number of sureties for different matter is an unreasonable condition while granting bail and is in violation to the Article 21 of the Indian Constitution. Such irrelevant conditions ultimately result into indirect refusal of granting bail to the concerned under-trial prisoner. Bail is to be granted while considering conditions and facts of a particular case N^[33].

5. Bail should be granted based on logical grounds

It has been constantly impressed upon by the judiciary that bail must be based on relevant factors. Baseless and onerous conditions should not be imposed while granting bail to the individual by the trial court. The apex court in *Munish Bhasin & others v. State (Govt. Of N.C.T. OF Delhi)*^[34] made clear that onerous and illogical conditions must not be imposed while granting of bail. It was held that the condition imposed regarding paying of maintenance of rupees twelve thousand five hundred monthly to the wife in context to granting of bail under Section 498A of Indian Penal Code, 1860 is not in alignment and thereby, should be set aside. Thereafter, in *Sumit Mehta v. State (N.C.T.) of Delhi*^[35], term 'any condition' while granting of bail, was interpreted. Hereby, it was held that the term 'any condition' does not empowers the trial court to imply 'baseless conditions' to be imposed on granting bail. Conditions regarding right to bail are required to be 'reasonable and logical'. Furthermore, in *Dataram v. State of Uttar Pradesh*^[36], it was observed that strict conditions need not be imposed while granting bail, as irrelevant conditions would turn bail into an illusionary penological provision. In *Aparna Bhatt v. State of Madhya Pradesh*^[37], order of Madhya Pradesh High Court was set aside by the top court. The condition of tying rakhi to the victim by the under-trial individual was found to be illogical, by its very nature. It was clarified by the court that personal contact between the victim and the accused should be avoided, while the accused person is on bail. Along with that, it was outlined that remarks stereotyping an individual must be avoided while granting of bail by the trial court. Thereafter, in *Sheikh Javed Iqbal @ Ashfaq Ansari @ Javed Ansari v. State of Uttar Pradesh*^[38], court observed that mainly objective of bail is regarding ensuring the presence of the accused for the process of trial. Bail itself shall not be withheld as a punishment. It was expressed that on trial getting extended, it is not an option for the prosecution regarding opposing of bail in context to an under-trial on the basis that charges being framed are of serious nature.

Challenges in the legal process of bail vis-a-vis under-trial prisoners

Under-trial prisoners form the major part of the prisoner population within Indian prisons. Hereby, large number of under-trial prisoner population is leading to several problems within working of Indian prison system. Objective behind imprisonment of under-trial prisoners could be listed, as hereunder:-

- a. To prevent the alleged offender from committing further harm;
- b. To assure smooth investigation process;
- c. To ensure that offender does not hamper the process of justice and is available at the fixed timeframe;
- d. To protect the witness and victims of crime from any type of further harm from the alleged offender;
- e. To establish a sense of security within the society;

- f. To protect the offender from the aggression of the society in heinous crimes and accordingly punish the under-trial according to due process of law^[39].

However, there is an alarming overpopulation of under-trial prisoners within Indian prisons. Lack of refined bail system India is one of the major reasons leading to substantial increase in under-trial prisoner population within Indian prisons. Noticeably, provisions regarding bail are suffering from various flaws, resulting into violation of rights of under-trial prisoners and pressure on the Indian prison system. Henceforth, there are different challenges in the granting of process of bail, mentioned as hereunder:-

- a. Lack of logical approach towards the amount of bail bond;
- b. Demand for number of sureties for getting bail in a number of cases;
- c. Reluctance of courts in granting bail;
- d. Lack of implementation of liberalised approach by lower courts while dealing with matters related to bail;
- e. Lack of substantive legal aid.

Furthermore, complexity in granting bail or denial in bail to under-trial prisoners, generally results into following implications:-

1. Increase in under-trial prisoners population resulting into prison overcrowding;
2. Ever increasing occupancy rate in prisons, exceeding beyond the official capacity;
3. Violation of human and constitutional rights of under-trial prisoners;
4. Prolonged incarceration leading to violation of basic principle of penology, i.e. "innocent until proven guilty";
5. Impoverished under-trial offenders are not able to get bail due to financial deterrent;
6. Some under-trial prisoners convert into hardened criminals due to failure of the criminal justice system and violation of cardinal principle of penology, stating that "under-trial, convicts and hardened offenders should be kept separately for minimisation of negative influence;
7. Denial of bail leads to prolonged unreasonable incarceration of economically weak under-trial prisoners, thus resulting into further financial crisis to the family of such prisoner;
8. There is an increase in pressure on resources of justice delivery mechanism. Otherwise, such resources could be used for betterment of conditions of prisons^[40].

Conclusion & Suggestions

Henceforth, it is elucidated that bail may or may not be granted by a judge, based on gravity of charge, type of accusation and evidence supporting it. Along with that, age, timeframe of accused already being served in incarceration, possibility absconding of applicant and hampering the process of justice, if released on bail are required to be considered. Judiciary, by way of judicial activism, in the limelight of fundamental rights has considerably liberalised the concept of bail. Such judicial interpretation in context to bail is in accordance with the human rights jurisprudence in 21st century, to a certain extent.

It could be inferred that there are many existing legislative drawbacks in the present bail system in India. There is a dire need for its modification with an objective of transformation of Indian prison jurisprudence for benefit of under-trial

prisoners. There needs to be a liberalised approach in granting of bail by the concerned authorities, so that burden on judiciary, police and prison administration is reduced to a certain extent. However, bail bond in case of granting bail is required to be an amount in balance with the economic condition of the accused person. It must be with regard to Article 14 and 15 of Indian Constitution. There shall be logical expansion regarding the offences that are bailable. Bail hostels are needed to be created in context to individuals that are first time offenders and have committed offences of less serious nature. Moreover, particular definition of bail is required to be inserted in the Bharatiya Nagarik Suraksha Sanhita, 2023, in a well clarified manner. New categories of offences are to be created, such as triable by any magistrate. Hereby, it is necessary to streamline process of granting bail so that swift deliver of justice is initiated at the base of trial process. Accordingly, lower and upper cap needs to be fixed regarding amount of bail bond in case of poor and rich offenders, separately. "Support to Poor Prisoners Scheme" of 2023 regarding providing financial assistance for submission of bond amount to under-trial upto a sum of 40,000 and convict prisoners upto a sum of 25,000 must be implemented effectively in a relevant time by the concerned government. There is a need for separate and elaborate bail Act in Indian perspective, keeping in limelight the different conditions in a developing country, such as India. Alongside, modernisation of bail system could act as a tool in order to reduce the constantly increasing under-trial prisoner population in Indian prisons. A time bound approach is required regarding granting and denial of bail in accordance with the new classification of offences under the Bharatiya Nagarik Suraksha Sanhita, 2023. The concept of bail is required to be imposed in such a manner, so that, it does not violate the basic principle of jurisprudence, that is "innocent until proven guilty". As far as, framework regarding granting of bail is concerned, strengthening of subordinate judiciary has to be focused upon, as they are having the primary incharge of granting bail in numerous cases. Judicial decisions of lower courts required to be delinked from the purview of annual appraisal being done by the high courts, so that lower courts implement practice of the provision of bail in a liberalised approach, without any indirect pressure. Along with that, in the era of digitisation, technology and software of different kinds could play an important role in smooth and time bound functioning of the bail granting system. Lastly, it could be established that, there is an utmost need of modernised bail system, in Indian context in accordance with the rights provided to under-trial prisoners, under Article 21 of the Indian Constitution.

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