REMAND DURING TRIAL AND ITS CONSTITUTIONAL VALIDITY

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ABSTRACT

In the Universal Declaration of Human Rights, the right to personal liberty is secured explicitly in Article 3 to 11 of which article 9 is noteworthy because it prohibits "arbitrary arrest and detention"; also noteworthy is article 8 which postulates existence of "effective remedy" in the national legal systems for violation of 'fundamental rights' guaranteed by the Constitution or by law. By article 28 human rights jurisprudence is united and internationalized. It provides that, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized". However, there are two circumstances in which an accused person can be remanded to custody. Section 167(2) of Cr.P.C permits the remand of an accused during the pendency of the investigation and Section 309(2) of Cr.P.C envisages the remand of the accused after taking cognizance of an offence or commencement of the trial. When the accused fails to furnish the personal bond or surety bonds after the order of bail has been passed in his favour then only the remand can be made under the Section 309 Cr.P.C. The Magistrate has no option but to act accordingly to the dictates of law. Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. When Article 21 is compared with the American doctrine of due process of law, which provides that no person shall be deprived of his life and liberty except by due process of law, this American doctrine stands like a pole-star for the protection of the fundamental right of the citizens as the liberty of no person can be violated or taken away without due process of law. In India prolonged detention pending trial of the earning member of a family is bound to result in the negation of the principles embodied in articles 38, 39 and 39A, namely, denial of economic justice, denial of "the right to an adequate means of livelihood" and failure of the state to "secure that the operation of the legal system promotes justice": the family starves and the defense of the accused is seriously impaired.

Keywords: *Acquisitorial system, curtail, detention, freedom, liberty, rights, violation*

INTRODUCTION

Part III of the constitution is described as the *magna carta* of India. It contains a long list of fundamental rights and its aim is that certain basic rights such as right to life, liberty and other different kinds of freedoms could not be violated in any conditions and no organ of the government should unnecessarily interfere with these rights. Americans incorporated bill of rights in their constitution and these rights are rightly placed in part III of our constitution. These rights are considered as fundamental because these rights are essential to protect the rights of the people against arbitrary interference by an authority whatsoever in this context the observations of Justice

Jackson in *West Virginia State Board of Education* v. *Barnet*[1] is pertinent. In this case he observed that the very purpose of bill of rights was to eliminate some subjects from the vicissitudes of political controversy and to keep them beyond the reach of authorities and to establish them as legal principles to be applied by courts. Thus, these rights are not subjected to political control or any other unnecessary interferences.

The Supreme Court has widened the horizon of Article 21 and restricted encroachment upon the rights enshrined under the Article. Thus, the fundamental right as a whole is placed beyond the reach of authorities through arbitrary power as observed by Justice Jackson. The Supreme Court while interpreting Article 21 held that even the prisoners are eligible to get the protection of fundamental rights since they are also human beings until hanged. The rights and liberty of an individual cannot be curtailed unnecessarily by the legislature and by the court while dealing with bail matters. Fundamental rights are available right from the stage of being a living person in a mother's womb until death. If this is being the law contained in Article 21 it cannot be curtailed due to the reason that a person's name is included in the FIR. If an accused is arrested his liberty is curtailed from that stage and their starts his right to release on bail under the provisions of Article 21 of the Constitution. Though it is not an absolute right his right cannot be curtailed arbitrarily. If an arrested person has fundamental rights like any other person how far the arrested persons liberty could be curtailed is a debatable question. Through various decisions the Apex Court held that certain situations and in certain offenses right to bail is a fundamental right but not in all circumstances, so the demarcation of these circumstances is worthwhile to answer the question is whether right to bail is a fundamental right?

In India we are following the acquisitorial system of criminal jurisprudence. The cardinal principle of this system is that an accused is presumed to be innocent until the contrary is proved. The rule of law still reigns supreme in India like British parliamentary democracy, where the omnipotence of law pervades the whole British constitutional system. In India sovereignty lies with the constitution which is the ultimate repository of power and authority as the three organs of the Government viz. Legislative, Executive and Judiciary owe their origin and powers from the constitution. So, on the face of this all-pervasive legal spirit in the constitution which champions the cause of individual freedom and liberty curiously enough, there is provision in the Cr.P.C under section 309(2) of the Cr.P.C, which has clothed courts the wide arrays of powers and unfettered jurisdiction to remand the accused during the pendency of the trial, for an indefinite period without limitation.

In a catena of cases we have seen that the accused is remanded to jail custody from time to time for a long period which ultimately ends in acquittal. This order of long detention in jail pending trial is repugnant to the letter and spirit of the constitution and it violates natural justice and hence violates Article 21 of the Constitution.

RIGHT TO BAIL UNDER THE ENGLISH LAW

In the early constitutional document, the Bill of Rights, it is noticed that there is a complaint made against "excessive bail" and also, amongst others, against "fines and forfeitures before any

[1] 319 US 624:87Led 1928

conviction and judgement, which among others, were described as utterly and directly contrary to the known laws and statutes and freedoms of the realm". So, it is necessary to see what were "known laws and statutes of freedoms" concerning bail. In early times the formal accusation was often, perhaps usually, the first step in procedure and the prisoner was not arrested until after he had been indicted.[2] He also asserts that "Right to be bailed in certain cases is as old as the law of England and itself".[3] The origin of the right could possibly be traced to the ancient common law writs – *De Homine Replegiando*, which was rooted in the ancient process of replevin, and the writ of *Mainprize*[4]. But the main foundation of the Bail Law was to be found in the statute of Westminster the First (3 Edw IC. 15) which specifically dealt with "which prisoners be "*main prizable"* and which not".[5] But the statute did not codify the law relating to bail; its main object was to guard against the corrupt practices of the Sheriffs. It is signified that the *Habeas corpus* Act 1679, which confirmed the power of superior courts to issue the writ to admit prisoners on bail also contained a sanction against "unduly delaying the writ". Indeed "the power of Superior courts to bail in all cases even high treason, has no history" and that it has existed unaltered from the earliest times[6]. In cases of treason, in 1848 a statute (11 and 12 vic. C 42) provided that no bail may be taken except by order of the secretary of state or the High court. On a few occasions, specific statues popularly called the *Habeas corpus* suspension Acts (of 39 and 40 Geo 3 C. 20) were enacted to suspend for specified period the power of courts to "bail or try" persons committed to prison under a warrant signed by a secretary of state for high treason, suspicion of treason or treasonable practices".

So now the right to bail in England existed and still exists at common law apart from statutes but it has acquired the character of an "entrenched right" and it is not an ordinary right whether under statute or under common law. The statutes have from time to time qualified the right, by defining the extent of the right exercisable under different circumstances through the process of regulating the procedure of courts where the right was eventually exercised. The sanctions enacted against refusal of bail, and the fact that the Bill of Rights recognized that "excessive" bail made the right illusory and prohibited such exercise, made it incumbent on the judiciary to exercise judicially its powers in relation to bail. It is noteworthy that apart from the statutory sanctions, at common law, on proof of malice or improper motive, for refusal of bail the Judge could be sued in damages[7].

The Bail Act 1976

The "entrenched" character of the right to bail is reiterated in the enactment and is reflected in the phraseology of section 4 which deals with the "general" right to bail of accused person and others", and of the schedules which deal with the exceptions and the condition of bail. Indeed, the main purpose of the Act was according to Home Office working party Report, to create a statutory presumption in favour of bail[8]. This legislative enterprise undoubtedly reinforced the entrenched

[2]Sir James F. Stephen, *A History of Criminal Law of England*, p.217.
[3]*Ibid*. at p.233, Emphasis added
[4]*Ibid* at p.240
[5]*Ibid* at p.234
[6]*Ibid* at p. 243.
[7] See *Linford* v. *Fitzryo*, (1849) E.R. 1255.
[8]*See* Martin Wright*, "Bail: Recognition of the Need for Reform*". (1974) Crim. L.R. 457.

character of the ancient common law right by contemplating the situation in which "the defendants should not have to ask for bails and ……the courts should give reasons for refusal"[9]. But it is difficult to accept the claim that the legislative effort was directed at establishing a "Statutory test to be applied in rebutting the presumption in favour of bail[10] in as much as the statute did not alter or add to the well-established common law criteria for refusing bail namely, if the defendant would"

"(a) fail to surrender to custody, or

(b) commit an offence while on bail, or

(c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person."

But the statute explicitly concedes that it is not a complete code and therefore the application of common law provisions not expressly abrogated can still be invited. It is pertinent to note that it has not touched the "bail power" of the superior courts which has a complete common law cast.

Right to bail under Anglo-Indian Law

The English Criminal Law which is part of the common law of England is introduced and applied in the dependent countries including India but in different versions. This different version is due to the process of codification. One aspect of the process has not however received the attention it deserves, namely, whether the code was meant to exclude totally the application of common law, unlike in England. The Indian Code of Criminal Procedure defined the powers and procedures of courts in criminal matters but it is to be noted that the same Code also constituted the several subordinate criminal courts and not the High Courts. The latter owe their constitution to Royal charters and the Indian High Courts Act 1862 and therefore the power and jurisdiction of the superior courts inherent in their constitution remained intact. This position is accepted by the privy council in *Jairam Das* v. *Emperor*[11] and later by the Supreme Court in *Talab Hussein* v. *Madhukar Mondker*[12], in dealing with the scope of section 561A in which we find a legislative acceptance of the position as early as in 1923. However, the actual decision in the Privy Council case is open to question. Their Lordships referred to a provision of the early charters……

"……. and to have such jurisdiction and authority as our justices of our courts of Kings Beach have and may lawfully exercise…… as far as circumstances will admit".

Even though it is not spelled out in the judgement it appears that their Lordships decision was influenced by the qualifying clause "as far as circumstances will admit". It was held that High Courts in India had no jurisdiction and power to admit a prisoner on bail either during the pendency or after the disposal of his application for leave to appeal to Privy Council. Their Lordships did not analyse the provision to examine the true import of the qualifying clause. Similarly, their Lordship, it is submitted, wrongly endorsed in a summary manner two Indian decisions that the provisions of the Code on bail excluded existence of additional power and their opinion, we

[9]*Ibid.*
[10]Robin C.A White, *"The Bail Act: Will it make any difference".* (1977) Cri. L.R. 338.
[11] AIR 1945 P.C. 94.
[12] AIR 1958 SC 376.

submit, may be accepted as an inadvertent obiter only. Indeed, the Supreme Court did not, in *Talab Hussein* [13], feel inclined to endorse the dictum of the Privy Council.

In *Jairam Das*[14] *and Talab Hussein*[15] cases, the courts were not called upon to consider the question that in view of the provisions of section 43 of the charter act 1833, which was reproduced verbatim in section 22 of the Indian Councils Act 1861 (also in Section 65 of the Government of India Act (1915-19), whether the Indian Legislature could abrogate such common law rules as formed "part of the unwritten laws or constitution of the United Kingdom" or could make any law affecting the authority of parliament", the latter only having the legal and legislative competence to abrogate the law of the realm or common law. It is also noteworthy that the various re-enactments of the Indian Code contained no provision expressly excluding the application of any rule of common law and it is submitted that the bare statement that the Code purported to "consolidate and amend" the existing law relating to criminal procedure Code not achieve this result.

RIGHT TO BAIL AND THE INTERNATIONAL SYSTEM

Part IV of the Indian Constitution contains Article 51 of which clause (c) requires that "the state shall endeavor to foster respect for International Law and treaty obligations". In *Kesavananda Bharati* v. *State of Kerala*[16] and in *ADM Jabalpur* v.V. *Shukla*[17], Supreme Court did invoke article 51 and also referred to the observation of Lord Denning in *Corocraft Ltd.* v. *Pan American Airways*[18] to enforce compliance with the Universal Declaration of Human Rights.

In the Universal Declaration of Human Rights, the right to personal liberty is secured explicitly in Article 3-11 of which article 9 is noteworthy because it prohibits "arbitrary arrest and detention"; also noteworthy is article 8 which postulates existence of "effective remedy" in the national legal systems for violation of 'fundamental rights' guaranteed by the constitution or by law. By article 28 Human Rights jurisprudence is united and internationalized. It provides that, "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized". Accordingly, in 1966 came the International Covenant on Civil and Political Rights. Before that in 1950 the European Convention was signed in Rome which imposed a duty, under article 1 on the Signatory nations to extend the protection of the convention to "everyone within their jurisdiction". Thus, when the British dependencies in Africa achieved independence in the post-convention period, in the constitution, issued form West minister, came to be posted comprehensive bills of rights (known as "Nigerian" and "Neo-Nigerian") modeled on the convention.[19]

The right to bail is set out explicitly in article 5(3) of the European convention, article 9(3) of the international covenant. The provisions of the international covenant and the European

[13] AIR 1958 SC 376:958 Cri.LJ 701
[14] AIR 1945 PC 94:46 Cri.LJ 662
[15] AIR 1958 SC 376:958 Cri.LJ 701
[16] AIR 1973 SC 1461
[17] AIR 1976 SC 1207
[18] [1969] 1 All E.R, 80
[19] All States of Commonwealth Africa, except Ghana and Tanzania, had Bills of Rights in their independence Constitution although Malawi discarded the same in its Republican Constitution.

Convention concerning personal liberty are in *pari materia*: the "Nigerian" and "Neo-Nigerian" Bill of Rights are also on the same lines. The right to bail under article 5(3) and article 9 (3) mentioned about is included in article 21(3) of the constitution of Nigeria (1963). But in each case a single criterion has been laid down for the exercise of discretion in bail matters, namely the accused shall appear for trial and execution of the judgement when pronounced.

The right to bail now got recognition in the International Human Right jurisprudence. It is pertinent to note that even in the USSR there obtains a recognition of the principle that "custody as preventive measure" is permissible when there are sufficient grounds to believe that the suspect "will hide from investigation and justice" there are specific provisions probability pre-trial custody beyond the specified period and for production of the arrested person before the prosecutor within forty-eight hours who orders release of the person if he is not inclined to "confirm the detention"[20].

It is high time to appreciate that with the incorporation of the Bill of Rights the founding fathers served the object of upgrading the pre-constitution rights and bring some new rights in the same category. Historically in the Bill of Rights they saw the fulfillment of an aspiration of the freedom struggle.[21] In *Kesavanda Bharati* v. *State of Kerala*[22] the Supreme Court felt that there was a compelling necessity to distill the essence of the constitution which the judges called "the basic framework" and in which they have included the doctrine of the "rule of law"; a concept which is not easy to define but it will be difficult to dispute that the concept does not include the right to bail.

In *Hassainara Khatoon* v. *Home Secretary, State of Bihar*[23], Justice P. N. Bhagwati expressed the view about "our highly unsatisfactory bail system and noted that the system operates harshly against the poor". He took note of article 3 of the European Convention on Human Rights and also observed that "the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties".

STATUTORY PROVISIONS PERMIT DETENTION

There are two circumstances in which an accused person can be remanded to custody. Section 167(2) of Cr.P.C permits the remand of an accused during the pendency of the investigation and Section 309(2) of Cr.P.C envisages the remand of the accused after taking cognizance of an offence or commencement of the trial. Section 167(2) of the Cr.P.C provides that the Magistrate to whom an accused person is forwarded, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as the Magistrate thinks fit, for a term not exceeding 15 days in the whole. "In 1978 there was an amendment by which further period of thirty days to the investigating agency was allowed to close up the police investigation in heinous offences of a complicated nature"

[20] See Z. Szirman (Ed.), Soviet Criminal Law, General Part; and Basic Principles of Criminal Procedure Code of the USSR and the Union Republics.

[21] The demand for a "Bill of Rights" was voiced by the Indian National Congress as early as 1918 and was later reiterated in 1928 in the Report of the All-parties conference in the following terms: "……. Our first care should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal under any circumstances."
See: *D.D. Basu: Commentory on the Constitution of India 5th Edn. Vol. 1*, p.129

[22] AIR 1973 SC 1461

[23] AIR 1979 SC 1360

When analyzing section 167(2) in details it is pertinent to give emphasis to the proviso to section 167(2). It provides a directive to the investigating agency to complete the investigation within 90 days, where it relates to an offence punishable with death, imprisonment for life or imprisonment for a term not less than 10 years and a period of 60 days where it relates to other offences. The mandate of law laid down under section 167 of the Cr.P.C is that on the expiry of the said period of 90 days or 60 days as the case may be, the accused person shall be released on bail, if he is prepared to and does furnish bail. Thus, a statutory right accrues in favour of the accused for his release on bail, where the investigation of the case is not complete within the period of limitation as prescribed under the law. This position is settled by the decision of the Supreme Court in Md. *Sharafuddin Khan* v. *State of Bihar*[24]. Now it is worthwhile to note that the law has not prescribed any maximum period of remand of an accused and has not fixed any time limit so far as the trial of an offender is concerned, for which section 309(2) of Cr. PC is relevant. It says that:

"if the court after taking cognizance of an offence or commencement of trial, finds it necessary or advisable to postpone the commencement of or adjourn, any enquiry or trial, it may from time to time for reasons to be recorded as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody."

On perusal of section 167(2) and section 309(2) of the Cr.P.C it is clear that the powers of the investigating officer circumscribed by law. But such a law has not been given to the court under the statute which has arbitrary powers to remand an accused during trial for an indefinite period, as no time limit has been fixed for conclusion of the trial, save and except the language that "trial shall be held as expeditiously as possible". So, this unfettered power of the court to remand an accused for an indefinite period violates fair trial envisaged under Article 21 of the constitution and the universal rules of natural justice.

If the power conferred on the court under section 309(2) violates Article 21 of the constitution, it indirectly prevents the right of an accused which is closely connected with remand and custody when there is no explanation to the remand. The moment when an accused is remanded to custody he hankers for freedom. Bail is the only method through which his freedom can be restored. So, the remand in custody under Section 309(2) of Cr.P.C for an indefinite period violates the constitutional right of bail to an accused person. Now it is pertinent to analyse the constitutional validity of section 309(2) and section 167(2) of Cr. P.C.

As per section 436 and 437 of Cr.P.C which deals with bail in bailable and non-bailable offense respectively the nature of the right appears certain common element. When comparing the provision with English Bail Act 1976 which deals with the "general right to bail of accused persons and others" with exceptions and conditions of bail. The extent of the right in both jurisdictions is regulated on the basis of the gravity of the offence alleged to have committed by the accused. In bailable offence there is no hard and fast rule and the court has no discretion since section 436 which deals with bail in bailable offence says that the accused "*shall*" be released on bail. But non-bailable offence the word "may be" issued and hence court has a discretion in granting bail.

It is quite unfortunate that though the element of discretion is given to the courts by adding the word "may" in non-bailable offences there is no statutory criteria which directs this discretion.

[24] (1988) 1 Cri.LR 436

So, the Indian courts have followed the common law criteria in the exercise of their discretion in bail matters. Generally, the Indian Courts refused bail in non-bailable offences when they are satisfied that there is likelihood of the accused absconding or of his tampering with the evidence. So, if the court does not believe that there exists likelihood of absconding or tampering with the evidence bail can be given.

In the case of non-bailable offence "he may be released on bail unless" there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life but in 1974 the applicability of the last-mentioned qualifying clause has been limited to a court other than a High Court or court of sessions.

In the exercise of their discretion in bail matters the Indian Courts have followed the common law criteria in the absence of statutory directions, unlike the English Bail Act 1976, although the later has, as we have seen, accorded statutory recognition to the same criteria. The Indian courts have generally refused bail in a non-bailable case when they are satisfied that there is a likelihood of the accused absconding or of his tampering with the evidence.

However, the recent enactment anticipated its English counterpart by providing in section 437(3) and (6) that the court might impose any condition to ensure that the prisoner shall not commit an offence while he is on bail. The latest enactment has introduced another innovation in section 438 by empowering both the High Court and the court of sessions to grant anticipatory bail. The proviso apparently embodies an extended recognition of the common law maxim that any restraint on the liberty of the person is prima facie illegal and of the cognate rule that there could be no detention without indictment. Indeed, the investment of a residuary jurisdiction in the superior courts in bail matters, as seen in section 498 of the old Code and section 439 of the new Code was also inspired by common law.

RIGHT TO BAIL AND SECTION 167(2) OF CR. P.C

The right to bail under section 167(2) proviso (a) thereto is absolute. It is a legislative command and not a court's discretion, as observed in *Rajnikant Jivanlal Patel* v. *Intelligence Officer, Narcotic Control Bureau*[25]. If the investigating agency fails to file charge-sheet before the expiry of 90 or 60 days as the case may be, the accused in custody should be released on bail. Again, in *Hitender Vishnu Thakur and others*v. *State of Maharashtra*[26] court held that the Magistrate has no power to remand a person beyond the stipulated period. He must pass an order of bail and communicate the same to the accused to furnish the requisite bail bond. The order of bail which is passed in default of the prosecution agency for not filing the charge sheet within the prescribed period of 90 / 60 days is the absolute right of the accused. It is legislative command and not the courts discretion. Also held that the Magistrate has no power to remand a person beyond the stipulated period of 90/60 days.

When the accused fails to furnish the personal bond or surety bonds after the order of bail has been passed in his favour then only the remand can be made under the Section 309 Cr.P.C. The Magistrate has no option but to act accordingly to the dictates of law. Unless the Magistrate passes an order for bail and provides opportunity to the accused to furnish bail bonds he has no

[25] AIR 1990 SC 71
[26] 1994 (4) SCC 602

jurisdiction to pass an order of remand. The same view was taken in *Raghubir Singh* v. *State of Bihar*[27], in this caseit was held that the accused has a right to be released on bail if the charge-sheet is not filed within the prescribed period. As also held an order for release on bail is not defeated by lapse of time the filing of the charge-sheet or by remand to custody under section 309(2).

In *Vishwanath Ram* v. *State*[28], charge-sheet for offences under Section 121, 121-A, 384/216 IPC having been filed on 90th day from date of first remand of the petitioner, Chief Judicial Magistrate however refusing to take cognizance for want of sanction, remand of the accused without taking cognizance was held to be illegal, it being not permissible under section 309(2) of the Code, the petitioner was directed to be released on bail.

The question as to the right of the accused be released on bail under Section 167(2) of the Code came before the court in *Shardubhai Laxmanbai Pancholi and Another* v. *State of Gujarat*[29]. In order to appreciate this question, the provisions as contained in section 167, 170, 190, 209 and 309 to the new Code were perused. Section 167 and 170 deals with "Information to the Police and their power of Investigation". Section 190 deals with the conditions requisite for invitation of proceedings. Section 209 relates to commencement of proceedings before the Magistrate and Section 309 deals with general provisions as to inquiries and trials.

According to the Division Bench in the case of *Umedsinh Vakatmaldi* v. *State of Gujarat*[30], under the deeming provisions provided in proviso to section 167 of the new Code, every person released on bail under the provisions of Section 167(2) shall be deemed to be released under the provisions of Chapter XXXIII for the purpose of that chapter. The effect of these deeming provisions according to the Division Bench, is that if an accused person is released on bail as per the provisions of the section 167(2) (a), the bail order continues even after the charge-sheet is filed; but it is open to the prosecution to make an application for the cancellation of bail under the provisions of sub-section (5) of section 437 of the Code.

The decision came up for consideration in the case of *Babubhai Parshottamdas Patel* v. *State of Gujarat*[31] in which the question was whether the accused who was entitled to be released on bail under proviso (a) to Section 167(2) of the new Code in view of the fact that the charge-sheet was filed more than 90 days after the arrest of the accused. It was felt that the question in *Babubhai's* case required consideration by a full bench and hence referred to it. The full bench after referring to the decisions of the Apex court in *Natber Parida* v. *State of Orissa*[32] and *Bashir* v. *State of Haryana*[33], observed that on the expiry of the period of 90 days the accused person has to be released on bail and every person released on bail under section 167(2) shall be deemed to be released under chapter XXXIII for the purpose of that Chapter. The Supreme Court in the two cases clearly indicated that the deeming fiction is for the purpose of enabling the prosecution to apply to the court and empowering the court to cancel the bail and to take the concerned accused in custody if the requirements of section 437 (a) are met.

[27] AIR 1987 SC 149
[28] 2000(3) crimes 164(pat),
[29] 1990 (3) Crimes 480
[30] (1975) 16 Guj. LR 572
[31] (1981) GLR 1232
[32] AIR 1975 SC 1465
[33]AIR 1978 SC 55

Now it is clear that if it is not possible to complete the investigation within a period of ninety days, even in serious and of hastily type of crimes, the accused will be entitled to be released on bail. Any reference to the provisions relating to bail occurring in section 167(2) proviso is whereby with a view to enable the prosecution to apply that the person released on bail under section 167(2) proviso (a) be taken back to custody. The only custody which is spoken on in section 309 of the new code is jail custody but if it is not possible to complete the investigation within a period of 60 days or 90 days the accused will be entitled to be released on bail provided of course that he is prepared to and does furnish bail and cannot be kept in detention beyond the period of 90 days, under clause (i) of Paragraph (a) of the proviso to section 167(2).

The High court in *State of U.P.* v. *Lakshmi Brahman*[34], held that on the expiry of 60 days from the date of arrest his further detention does not become *ipsofacto* illegal or void, but if the charge-sheet is not submitted within the period of 60 days, then notwithstanding anything to the contrary in Section 437(1) the accused would be entitled to an order for being released on bail, if he is prepared to and does furnish bail. The Supreme Court affirmed this conclusion of the High Court and upheld the view of the High court that as the respondents did not apply for bail on the expiry of 60 days from the date of their arrest, their continued detention would not be illegal or without the authority of law. The Supreme Court also approved the view of the High court to the effect that jurisdiction to grant bail in case investigation is not completed within prescribed time limit as incorporated in proviso (a) to section 167(2) as it then stood, vests in the Magistrate if the accused applies and is prepared to furnish bail. The Supreme Court observed that section 167 envisages a stage when a suspect is arrested and the investigation is not completed within the prescribed period. The investigation would come to an end the moment charge-sheet is submitted as required under section 170 unless the magistrate directs further investigation. So, section 167 has application only at the stage when the investigation is not completed within the prescribed period.

The stage of investigation during which section 167 applies comes to an end on submission of the charge-sheet by the police and the court taking cognizance of the offences under section 190 of the new Code. Once the investigation is complete by submission of charge-sheet, there is commencement of inquiry. If the Magistrate is holding the inquiry section 309 would enable the Magistrate to remand the accused to custody till inquiry to be made is complete. It is pertinent to note that the Supreme Court did not uphold the order of the High Court releasing the appellants on bail on the ground that they had absolute right to be released on bail on account of failure on the part of the police to submit the charge sheet within the prescribed time limit. Facts disclosed in the case clearly showed that the police had not submitted the charge-sheet within time limit prescribed by provision (a) to section 167(2) of the new Code.

It is an important aspect to be noted that even if the accused had absolute right to be released on bail, it was not absolute in the sense that it could be availed of at any stage of investigation inquiry or trial. So, this right is available only at the stage of investigation. The right which is conferred on the accused is notwithstanding anything contained in Section 437(1). It is in that section the right to be released on bail is absolute. But it does not mean that this right extends even up to the stage of final order of the court. The bail so granted could be cancelled.

[34] AIR 1983 SC 439

The command of the legislature in proviso (a) to Section 167(2) does not travel beyond the stage of investigation because that section refers to investigation stage only and hence the right under section 167(2) is not absolute.

COMPUTATION OF THE PERIOD OF 90 DAYS OR 60 DAYS

Regarding the computation of the period of 90 days or 60 days there exists conflicts of judicial decisions. One view is that it is from the date of arrest and the other view is that it is from the date on which the accused is remanded to custody. The Division Bench of Orissa[35] and Rajasthan High Court[36] have expressed the view that this period of 60 days or 90 days as the case may be is to be calculated from the date of arrest under section 57 of Cr.P.C but Delhi[37], Punjab and Haryana[38] and Himachal Pradesh High Courts[39] have expressed the view that in computing the total period of 60 days or 90 days referred to in proviso(a) to section 167(2) Cr.P.C the period of detention by police under section 57, Cr.P.C is to be excluded and the period is to be computed from the date on which Magistrate orders the detention either in Police or Jail custody and the accused being produced before him on the expiry of the period of 24 hours in police custody. This conflict of opinion between the various decisions of different High Courts is now set at rest by the Supreme Court in *Choganti Satyanaryana* v. *State of M. P*[40], where in it is observed that:

"The words used in proviso (a) to section 167(2) are "no Magistrate shall authorize the detention of the accused person in custody", under this paragraph "for a total period exceeding i.e. 90 days or 60 days". Detention can be authorized by the Magistrate only from the time the order of remand is passed. The earlier period when the accused is in custody of a police officer in exercise of his powers under section 57 cannot constitute detention pursuant to an authorization issued by the Magistrate. It, therefore, stands to reason that the total period of 90 days or 60 days can begin to run only from the date of order of remand".

The Supreme Court in *State of M.P.* v. *Rustam*[41] clarified the above decision by observing that the date of remand shall be the date from which the period of 90 or 60 days shall be computed but the date on which the accused was remanded to custody should be excluded and the date on which the challan is filed should be included. In this case the accused was remanded to judicial custody on 3rd September 1993, the period of 90 days shall be computed from 4th September 1993 and when the challan was submitted on 2nd December 1993, it must be held that the period of 90 days had not expired when the challan was filed. Thus, the Supreme Court modifies the view and declares that the date of remand should be excluded to compute the period.

[35] *Fakira Naik* v. *State of Orissa* 1983 Cri. LJ 1363: 55 Cut LT 327
[36] *Indira Devi* v. *State of Rajasthan* 1979 Raj. Crc. 91
[37] *A. L. Chowla* v. *Murari* 1977 Cr. LJ. 212 (Del); *Tarsen Kumar* v. *State* 1975 Cr. LJ. 1303.
[38] *Jayasingh* v. *State of Haryana* 1980 Cr. LJ. 1229: 83 Punj. LR. 25
[39] *Batnaram* v. *State ofH.P.* 1980 Cr. LJ. 748: ILR (1980) HP. 41
[40] AIR 1986 SC 2130: 1986 (2) Crimes 678 (SC)
[41] 1995 Supp (3) SCC 221: 1995 SCC (CR) 838.

CONSTITUTIONAL VALIDITY OF SECTION 309(2) OF CR.P.C

Article 21 of the constitution provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. When Article 21 is compared with the American doctrine of due process of law, which provides that no person shall be deprived of his life and liberty except by due process of law, this American doctrine stands like a pole-star for the protection of the fundamental right of the citizens as the liberty of no person can be violated or taken away without due process of law. In the famous case of *Marbury* v. *Madison*[42] Chief Justice John Marshall gave a landmark verdict of the power of the Judiciary to declare the act of the legislature as ultra virus. Justice Marshall upheld this power of the judiciary from the famous clause of "due process of law".

According to Daniel Webster, the meaning of due process of law is that "every citizen shall hold his life, liberty, property and immunities for the protection of general laws which govern the society". The word "due" means "what is just and proper". So, in exercise of its power of judicial review, the American Supreme Court can challenge an Act if either its procedure is defective or the substance contains in it is against the rule of natural law and natural justice. Therefore, in America the power of judicial review is broad and which embraces all aspects both substantive and procedural, rights while examining the vires of a piece of legislation which infringes or takes away the life and liberty of a citizen. In this background it is heartening to note that to safeguard the liberty of the citizen and to put a check on the trial of offence for any length of time under warrant procedure, there is specific provision in the Cr.P.C in section 437(6) and (7) which runs as:

"S. 437(6) If in any case triable by a Magistrate the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate to otherwise directs.

S. 437 (7) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused; if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgement delivered".

Section 167(5) of the Cr.P.C provides that "if any case triable by a Magistrate as a summons case, the investigation is not completed within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping the further investigation into the offence, unless the officer making the investigation satisfies the Magistrate for special reason and the in the interest of justice, the continuation beyond the period of six months is necessary."

While analyzing the above-mentioned provisions such as section 437(6), (7) and section 167(5) of the Cr.P.C accused persons are kept in prison for a long period as under trial prisoners even beyond the maximum period prescribed by the section of law and there are cases where the

[42] (1803) 2 Law Ed. 60

accused is also acquitted. Now it may be submitted that the period spend in prison as under trial prisoners cannot be compensated in terms of money by way of compensation. Therefore, may be in view of this disquieting state of affairs the joint committee of parliament felt the necessity of making a provision in the new Cr.P.C 1973 to set off the period of detention undergone by the accused against the sentence of imprisonment and consequently this new provision would certainly go a long way to mitigate the evil. So, Sections 428 of Cr.P.C protects and safeguard the freedom of a convict of long-term incarceration. But the detention of an under-trial prisoner in jail for a period longer than what they would have been sentenced, if convicted is illegal and violation of Article 21 of the constitution. If so Section 309(3) of Cr.P.C which permits unfettered power to remand the accused during the pendency of the trial for an indefinite period violates the fundamental right under Article 21 of the constitution.

As per section 437(6) if the trial of a non-bailable offence is not concluded within sixty days such person if in custody during such period shall be released on bail again under clause (7) of Section 437 after the conclusion of trial but before the judgement if the court has reason to believe that the accused person has not committed the offence he shall be released on bail when the whole of such period he is in custody. So under these two sub-sections the power of court is limited to extend the period of remand.

It is submitted that the above-mentioned beneficial provision is limited to trial of non-bailable offences only not available in the case of trial exclusively by the Sessions Court. There is no stipulated period or time limit fixed for conclusion of trial of sessions cases and hence the under-trial prisoners accused of such offence languish in jail custody for years together. Again, if the accused is not able to secure bail on merits, there is no alternative provision or remedy for him to have bail if the trial is not complete within a fixed period of limitation. The Supreme Court in a landmark decision in *Hussainara Khatun* v. *State of Bihar*[43] has held that speedy trial is a part of fundamental right to life and liberty, as the detention of under-trial prisoners in jail for period longer than what they would have been sentenced, if convicted, is illegal and in violation of Article 21 of the constitution. In this case Justice P. N. Bhagavati observed that a procedure prescribed by law for depriving a person of his liberty cannot be, reasonable, fair or just, unless that procedure ensures a speedy trial for determination of the guilt of such person. No procedure which does not ensure reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21. So speedy trial is an integral part of fundamental right to life and liberty enshrined in Article 21.

The Supreme Court while protecting the rights of a condemned prisoner awaiting execution of a death sentence passed on him, has held that the referred trials and confirmation cases are dealt with speedily by High Courts and are never kept pending longer than two or three months[44]. The Supreme Court also observed that the delay exceeding two years in execution of a sentence of death violate Article 21 and demand the quashing of the sentence of death[45]. Having due regard to the natural justice, the Supreme Court has protected the right of the condemned

[43] AIR 1979 SC 1360: 1979 Cri. LJ. 1036
[44] *Javed Ahmed* v. *State of Maharasthra,* AIR 1985 SC 231: 1984 Cri. L.J 1909
[45] Ib*Ibid*

prisoner under Article 21 of the constitution and accordingly quashed the sentence of death and substituted in its place, the sentence of imprisonment for life.

The Supreme Court while examining the power of the President of the Republic to pardon the condemned prisoner Kehar Singh, on whom death penalty was imposed, went a step further while examining the scope and ambit of Article 21 of the constitution concerning life and personal liberty of a prisoner waiting to go to gallows observed[46].

"*To any civilized society, there can be no attributes more important than the life and personal liberty of its members that is evident from the paramount position given by the courts to Article 21 of the constitution. These twin attributes enjoy a fundamental ascendancy over all other attributes of the political and social order and consequently, the Legislature, the Executive and Judiciary are more sensitive to them than to the other attributes of daily existence. The deprivation of personal liberty and the threat of the deprivation of life by the action of the state is in most civilized societies regarded seriously and recourse, either under express constitutional provision or through legislative enactment is provided to the judicial organ. But, the fallibility of human judgement being undeniable even in the most trained mind, a mind resourced by a harvest of experience, it has been considered appropriate that in the matter of life and personal liberty, the protection should be extended by entrusting power further to some high authority to scrutinize the validity of the threatened denial of life or the threatened or contained denial of personal liberty".*

While examining different decisions of the Supreme Court it is evident that the trend of judicial pronouncement are not in favour of detention of a person in jail for an indefinite period. In *Aslam Ahmed Zahir Ahmed Shaik* v. *Union of India*[47], The Superintendent of Central Prison carelessly ignored and kept in cold storage the unattended representation of the detentions for seven days, the delay has not been explained in spite of the opportunity to explain the same. Court held that such an avoidable and unexplained delay results in rendering continued detention of the petitioner illegal and constitutionally impermissible.

It is now pivotal to analyse the dissenting judgement of Justice H. R. Khanna in the famous*Habeas corpus* case[48]. Their Lordships observed:

"Law of Preventive Detention, of detention without trial is an anathema to all those who love personal liberty. Such a law makes deep inroads into basic human freedom, which we all cherish and which occupy prime position among the higher values of life. It is therefore, not surprising that those who have an abiding faith in the rule of law and sanctity of personal liberty do not easily reconcile themselves with a law under which persons can be detained for long periods without trial. The proper forum for bringing to book those alleged to be guilty of the infraction of law and commission of crime, according to them, is the court of law where the correctness of the allegations can be gone into in the light of the evidence adduced of the trial. The vesting of power of detention without trial in the executive, they assert, has the effect of making the same authority both the prosecutor as well as the judge and is bound to result in arbitrariness".

Now it is in this juncture the decision of Supreme Court in *A. K. Gopalan's* case[49] requires much stress and to be analysed. In this case court held that the expression procedure established

[46]*Keher Singh* v. *Union of India*, AIR 1989 SC 653: 1989 Cri. LJ. 941.
[47] 1989 Cri.L.J. 1447: AIR 1989 SC 1403
[48]*A. D. M. Jabalpur* v. *Shivakanta Sukla*, AIR 1976 SC 1207: 1976 Cr. L.J. 945.
[49]*A. K. Gopalan* v. *Union of India*, AIR 1950 SC 27:51 Cri. L.J. 1383.

by law must mean procedure prescribed by the law of the state. But in *Maneka Gandhi's* case[50] the Supreme Court overruled *Gopalan's* case and held that the language procedure established by law as enshrined in Article 21 does not mean any procedure laid down by statute, but it means a just, fair and reasonable procedure.

The word law in Article 21 does not speak of any law, but the law which is right, just and fair and not arbitrary, fanciful or oppressive. Thus, in *Maneka Gandhi's* case the scope of Article 21 has been widened, which was previously limited to Executive action, but after this decision Article 21 gives protection not only against executive action or action of the state, it also gives protection against legislation. The decision of the Supreme Court shows that it has tried to amplify the concept of natural justice and has infused this concept while interpreting statutes affecting the liberty of the citizens. So the spirit of 'due process' has been adopted by the Supreme Court for interpretation of Article 21 of the constitution although not adopted the same in its form.

When interpreting section 309(2) of Cr.P.C it is pertinent to analyse the expression "procedure established by law", to analyse whether it conforms the broad matrix of Article 21 of the Constitution. In *State of Kerala* v. *Thankan Chandran*[51], it was held that the word 'Procedure' means fair and reasonable procedure with civilized norms, which is not merely some semblance of a procedure, it must be procedure free from arbitrariness, unfairness or unreasonableness. The principle of reasonableness is an essential element of equality and non-arbitrariness pervades Article 14 and procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14, which must be right, just and fair, otherwise it would be no procedure at all and the requirement of Article 21 will not be satisfied.

The phrase 'personal liberty' used in Article 21, the Supreme Court has given a broad and liberal interpretation in *Francis Caralie Mullin* v. *Union Territory of Delhi*[52] and held that the words 'personal liberty' would include a right to socialize with members of the family and friends subject, of course, to any valid prison regulations. If any right to have interviews with members of the family and friends is arbitrary or unreasonable, it would be liable to be struck down as being violative of Article 14 and 21. The Supreme Court in this case moved a step forward and held that the right to life protected in Article 21 of the constitution is not confined merely to right to physical existence, but also include within its broad matrix, the right to use of every faculty or limb through which life is enjoyed as well as the right to live with basic human dignity.

The court observed that no one can be deprived of his right to live with basic human dignity except by a reasonable, fair and just procedure prescribed by law. Indeed, no procedure which deprives a person of his right to live with basic human dignity can possibly be reasonable, fair and just. So the state Government cannot by law or otherwise deprive any person of the right to live with basic human dignity. Such a law and action of the state which encroaches up on human dignity is not permitted under Article 21 of the constitution. The Supreme Court also in *Remembrance of Legal Affairs, West Bengal* v. *S. Bhowmick*[53] held that a procedure which is reasonable, harsh and prejudicial to the accused cannot be in consonance with Article 21 of the constitution.

[50]1978 AIR 597, 1978 SCR (2) 621
[51] (1983) 2 Crimes 34
[52] AIR 1981 SC 746: 1981 Cri. L.J. 306
[53] AIR 1981 SC 917: 1981 Cri. L.J. 341

When the accused was detained in jail without trial for one year from the date of his commitment to the Court of Session the Andhra Pradesh High Court directed the release of the accused on bail[54]. It is held that the difficulty of the court to try the case should not be detrimental to the interest of the accused resulting in violation of the fundamental rights of the speedy trial given to him under Article 21 of the constitution. The Supreme Court in *Deen Dayal* v. *Union of India*[55] held that "in cases arising under Article 21 of the constitution if it appears that a person is being deprived of his life or has been deprived of his personal liberty, the burden rests on the state to establish the constitutional validity of the impugned law.

The burden includes the obligation to prove that the impugned proceeding is not harsh, cruel or degrading. The burden does not lie on the petitioner to prove that the procedure prescribed by the impugned provision for taking of life is unjust, unfair or unreasonable. Therefore, as soon as it is shown that the Act invades a right guaranteed by Article 21 it is necessary to enquire whether the state has proved that the person has been deprived of his life or personal liberty according to procedure established by law, that is to say, by a procedure which is just fair and reasonable.

An under-trial prisoners right to be released on bail under the proviso to section 167(2) has been reiterated by the Orissa High Court in *Mangal Hemrum* v. *State of Orissa*[56] and the anxiety to safeguard the liberty of the under-trial prisoner can be understood from the following words of Justice R.C. Patnaik in this case;

"Give me liberty or give me death" thundered Patrik Henry, more than two hundred years ago, in the Virginia convention". In this context, it is the same concern for liberty and the right to speedy trial which is available to an under-trial prisoner by the force of Article 21 which has found its best expression in a full bench decision of Patna High Court in *Anurag* v. *State*[57] and held that:

"…… If Article 21 and the right to speedy public trial is not merely a twinkling star in the high heavens to be worshipped and rendered vociferous tip-service only but indeed is an actually meaningful protective provision, then a fortiori expeditions hearing to substantive appeals against convictions, is fairly and squarely within the mandate of the said Article"

The Supreme Court in *Kashmira Singh* v. *State of Punjab*[58] while considering the matter of release on bail of an appellant convicted under section 302 of the IPC who spent about four and a half years in jail during the pendency of his appeal observed that:-

…….. it would indeed be a travesty of justice to keep a person in jail for a period of five or six years of an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person:

"We have admitted your appeal because we think you have a prima facie case, but unfortunately we have no time to hear your appeal for quite a few years and therefore, until we hear your appeal you must remain in jail, even though you may be innocent?"

What confidence would such administration of justice inspire in the mind of the public?"

[54] *Thirmuri Bhaskara Reddy* v. *State of Andhra Pradesh*, (1983) Andh WR 110
[55] AIR 1983 SC 1155: 1983 Cri. L.J. 1602.
[56] 1982 Cri. LJ 687
[57] AIR 1987 Patna 274: 1987 Cri. L.J. 2037.
[58] AIR 1977 SC 2147: 1977 Cri. L.J. 1746.

The deprivation of liberty and the question of bail or jail" was decided by the Supreme Court in *Narasimhalu* v. *Public Prosecutor*[59] and justice Krishna Iyer has observed that:

"…… personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognized under Article 21that the crucial 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 …… after all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law' ……."

A close perusal of all the decisions referred above it can be understood that the view of the Supreme Court is for fixing a time limit within which the trial would conclude, including the hearing of appeal by the convicts. In a landmark judgement the Supreme Court in *Hussainara Khatoon's* case[60] observed that even a delay of one year in the commencement of the trial was bad. In *Kadra Pahadiya* v. *State of Bihar*[61] the Supreme Court took a view those sessions trials should end within one year. So the significance and sweep of Article 21 make the deprivation of liberty, a matter of great concern and permissible only when law authorizing it is reasonable, even-headed and geared to the goals of community good and the state necessity spelt out in Article 21.

It is unquestionably true that the recent decisions and interpretations of our apex court is favourable to the personal liberty of the accused persons. If so in absence of any provision under section 309(2) of Cr.P.C regarding conclusion of trial within a fixed period, the remand of the accused to jail custody for an uncertain and indefinite period is in contravention of the letter and spirit of Article 21 of the constitution. So this section in the Cr.P.C is arbitrary and requires an amendment.

It is submitted that all the above-mentioned discussions and case study reveals the limitations to give a blanket answer to the question whether Right to Bail is a constitutional Right. Since the sovereignty lies with the constitution and the three organs of the Government, viz. Legislature, Executive and Judiciary owe their origin and powers from the constitution personal liberty cannot be infringed for a long time because personal liberty is considered and accepted as a fundamental right under Article 21 of the constitution. But in unavoidable circumstances it can be curtailed for a limited period under a procedure which is just fair and reasonable.

RIGHT TO BAIL AND THE REPUBLICAN CONSTITUTION

Although the American colonies made a unilateral declaration of independence in 1776 in the declaration it was asserted that the rights to "life and liberty" were inalienable rights "of all men and that their struggle was to secure the restoration of the ancient liberties of the Englishmen of which they were deprived by the despotic Stuart regime. Accordingly, we find that the right to bail was constitutionally entrenched in explicit terms in the Bill of Rights[62] in addition to the guarantee that no person shall be "deprived of life, liberty or property without due process of

[59] AIR 1978 SC 429: 1978 Cri. L. J. 502.
[60] AIR 1979 SC 1360: 1979 Cri. L. J. 1036.
[61] AIR 1981 SC 939: 1981 Cri. L.J. 481.
[62] See Eighth Amendment, 1791.

law"[63] and that the privilege of the writ of *habeas corpus* shall not be suspended, unless when in case of rebellion or invasion the public safety may require it.

The Bill of Rights do not expressly speak of the Right to Bail but of the remedy of the nature of *habeas corpus* while guaranteeing that "No person shall be deprived of his personal liberty save in accordance with law"[64]. In the constitution of Eire in a pronounced influence of the current thoughts of the new age is to be found in the substance and in the phraseology of the "fundamental Rights" and the "Directive Principles of Social Policy". There can be little doubt that the modern Irish thinking found favour with the modern constitution makers of India although they did not follow their Irish counterpart in so far as the right to jury trial was concerned which is to be found constitutionally entrenched in both the American and Irish Constitutions. It is noteworthy, that confusion obtaining in America in the interpretation of the expressly stated "due process" clause and made concrete enumeration of some of the rights of the accused available at common law. In India the process was carried further and in preference to the Irish phraseology ("in accordance with law") the language of Japanese constitution was used in Article 21 (according to procedures established by law)[65].

CONSTITUTIONAL PROVISIONS

(i) A general view:

It is submitted that although the right to bail does not appear in explicit terms either in Article 21 which deals with "protection of life and personal liberty" or in Article 22 which deals with "Protection against arrest and detention in certain cases, the provisions of these articles embody the right by implication. Two more important provisions of the Indian Constitution are noteworthy: Article 372 preserves the rights accrued under the un-abrogated rules of common law; the remedy of *habeas corpus* is named in articles 32 and 226, albeit with modification ("writ in the nature of"). As we have seen at common law the right to bail is an "entrenched" right and that through the remedy of habeas corpus also the right is still enforced in England. We have also seen that the statutory cast of the right (in the successive enactments of the Code of Criminal Procedure) has retained some of the important common law characteristics, including the "entrenched" character. Indeed, as we have seen, the 1974 Code has reinforced the right significantly. It is possible that the current trend in the international human rights jurisprudence has provided inspiration for this enterprise.

We have already stated earlier that the right to bail is a corollary of the principle that any restrain on the liberty of the person is prima facie illegal and we submit that this is also the gist of article 21. In *A.D.M, Jabalpur* v. *Shivakant Shukla*[66], the Supreme Court has held, while construing article 21, that it includes the common law right to personal liberty. The court also held that the term 'law' in article 21 meant enacted law and not natural law reiterating the opinion expressed in the early case of *A. K. Gopalan* v. *State of Madras*[67]. This question however is not relevant to our

[63] See, Fifth Amendment, 1791.
[64] The Constitution of Eire, Section 40(4)
[65] Per Kania. C.J., in *A. K. Gopalan* v. *State of Madras*, AIR 1950 SC 27 at Para 19
[66] AIR 1976 SC 1207:1976 Cr. LJ 1945
[67] AIR 1950 SC 27

enquiry. The right to bail is covered by the first part of article 21; the second part ("except according to procedure established by law") embodies the measure of amplitude of the right to personal liberty. It is to be conceded that "law" can regulate the right to personal liberty and its ancillary right, the right to bail, but an enacted law is not a pre-requisite for the exercise of either right. The view that personal liberty is a gift of the law is a negation of the afore-mentioned principle which is a manifestation of a pre-constitution right embraced by the first part of Article 21.

(ii) Power of arrest, Trial and Article 22:

We have noted that in common law mere accusation did not render a person liable to arrest; it merely gave the state the right to try the offender or in other words, it activates the state to perform its duty of maintaining law and order to protect the society against the deviant behavior of any individual. Social anthropologists would like to say that this position obtains in all civilized societies; the situation might be different in "primitive" societies lacking a central authority and organized governments where the victim might be permitted by the society to seek redress in "self-help unless the society, according to the degree of evolution of political organisation, chooses to impose some kind of social sanction".

Blackstone defined arrest as "apprehending or restraining one's person, in order to the forthcoming to answer in alleged or suspected crime". In his "Institutes" Coke asserted that the King cannot detain the meanest of his subjects at his mere will and pleasure but only by indictment and presentment or by a writ from a court or by a lawful warrant. Indeed, power of arrest is a serious invasion of personal liberty; the power must have the sanction of law. The wide amplitude of the power was regulated at common law in various manners; among others by subjecting it to the requirement of "reasonable cause of suspicion" (of the arrestor that the accused had committed the crime). This criterion has stood the test of time and has found place in the statutory form of the power first in India and later in England also.

However, the rule in the Christie case, which has a wider import and universal application, finds place in the first part of article 22 and also in section 50 of the 1974 Code. Indeed, section 50 not only requires the person arrested to be informed of grounds of arrest but also of the right to bail and thereby establishing in clear terms the nexus between the two rights which is not spelt out, but is implicit, in the provisions of Article 22. The mandate of clause (2) of Article 22 custodial restraint without judicial interposition beyond twenty-four hours supplements and gives effect to the provision of the first part of Article 21 and embodies, by implications, the right to bail.

CONCLUSION

Right to bail flows from the Directive Principles of State Policy embodied in Part IV having regard to the fact that more than half of the total population of India lives below poverty line and there is still a long way to go for a "Welfare state" providing social-security measures (as obtaining in the western states, e.g. U.K, USA etc.) to come into being in India. The hardship accruing from a protracted trial is mitigated to a great extent by social security benefits given to the citizens in other countries. In India prolonged detention pending trial of the earning member of a family is bound to result in the negation of the principles embodied in articles 38, 39 and 39A

of the Constitution, namely, denial of economic justice, denial of "the right to an adequate means of livelihood" and failure of the state to "ensure that the operation of the legal system promotes justice": the family starves and the defense of the accused is seriously impaired. So it is high time to think of a bail system which ensures justice to all accused including those who are unable to find sureties in time.