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Leveraging Technology in the Grant of Bail: A Panacea or an Anathema?

Atish Chakraborty

Ph.D. Research Scholar and Academic Fellow at the University, The West Bengal National University of Juridical Sciences, Biddhannagar, Kolkata – 700106, West Bengal, India; atishchakraborty@nujs.edu

Abstract

The widespread growth and development of science and technology is a testament to its indispensability and acceptance in the modern era. With recent advancements in science and technology, technologies like Artificial Intelligence (hereinafter referred to as 'AI') are now capable of meeting a wide range of needs. The criminal justice system too has not been left untouched by such changes, and technologies like AI are gradually gaining momentum and are being used in practices like DNA analysis, gunshot detection, bail decisions, and tracking of defendants who have been released on bail. The present paper aims to delve into the use of technology in the grant of bail. The study encompasses the philosophical and constitutional basis for the grant of bail and the present position of India in this regard. Further, the paper also delves into the global best practices in this regard like the United States of America, the United Kingdom and New South Wales which have utilised AI for grant of bail because it promises faster justice dispensation. Finally, the paper through the comparative analysis of the practices aims to facilitate the ushering in of reforms in the existing criminal justice system of our country thereby upholding the reformative intent of the laws in India.

Keywords: *Artificial Intelligence, Bail, Criminal Justice System*

1.0 Introduction

Crime occupies and continues to be characterised as an omnipresent problem of every society and can be regarded as one of the foremost yet the most serious challenges to the existence of human beings. Ever since the advent of society, crimes too come into being. Since, an act is usually treated as a crime, it tends to vary from one society to the other. An act to be treated as a crime requires not only disobedience to the law but also it tends to act as a revolt not only against the society but also tends to pose an attack on the civilization (Gisbert, 1973 p. 204). The maintenance of law and order forms a quintessential requirement for any civilised society, and hence, any attempt that is made which tends to disturb this order of the society and the community can be treated as a crime.

It has been observed by sociologists that, crimes to an extent promote social solidarity among the people who constitute a society. Emile Durkheim, a well-known sociologist, aptly said that criminality is quintessentially present in every society with varying forms and degrees and such activities that society regards as a crime (Bhattacharyya, 2002 p. 196). This can only be checked by adopting a corrective measure which is either to inflict pain or a punishment thereby ensuring lesser chances of recidivism. Since the commission of crimes results in interference with the happiness of others and affects their well-being not as particular individuals but as a community at large, it becomes quintessential that the society takes due steps to curb crimes and this is effectively done by the criminal law regime as is prevalent to deal with such crimes. However, some crimes require a person who is accused or is alleged to have committed a

crime to be arrested. It is at this juncture, that bail tends to play an important role in ensuring the alleged offender's liberty can be restored unless he is proven guilty with minimal restrictions.

2. Concept of Bail

The term 'bail' is a derivative of the French term 'baillier' which means to deliver and the Latin term 'bajulare' which means to bear the burden (Bruinsma and Wesiburd, 2014 p. 2087-2089). The Wharton's Law Lexicon has regarded bail as a process of setting at liberty a person who is arrested or imprisoned, on security being taken for his appearance (Oppe, 1938 p. 106). The Black's Law Dictionary has defined bail as "a security such as cash or bond, especially security required by a court for the release of a prisoner who must appear at a future date" (Black, 1990 p. 47). Further, the Webster's Law Dictionary has defined bail as "a temporary release of a person in exchange for security given for the prisoner's appearance at a later hearing" (Webster, 1996 p. 88). Thus, it is certain from these definitions that bail connotes the process of procuring the release of an accused who is charged with a certain offence by ensuring his future attendance in the court for trial and compelling the accused to remain within the jurisdiction of the court [*Natturasu v. State*, 1998 Cri LJ 1762 (Mad.)].

Bail is a term that is used in the legal parlance. It can be said to have been a term that has acclaimed usage by "both lawmen and laymen" (Verma, 2000 p.3) and is one of the most vital institutions of our criminal justice system. In India, the system of bail was regulated by the Code of Criminal Procedure, 1973 until recently when it was replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 which took effect from July 01, 2024. The law relating to bail recognises bail for bailable offences which means that it is an offence which is shown as bailable in the first schedule [The Code of Criminal Procedure, 1973,§2(a), No. 2, Acts of Parliament, 1973 (India) and The Bharatiya Nagarik Suraksha Sanhita, 2023,§2 (1) (a), No. 46, Acts of Parliament, 2023 (India)]. The offences for which such bail is granted are usually crimes for which punishment is less than three years. In such cases, as prescribed by the law, the accused can avail bail as a matter of right which is not only absolute but also indefeasible (*Rasiklal v. Kishore Khanchand Wadhwani*, AIR 2009 SC 1341). Secondly, we have bail for non-bailable offences which is used to refer to any other offence which is not a bailable offence (*Seema Singh v. Central Bureau of Investigation,* (2018) 16 SCC 10). In such cases, the offence in question is grievous and thus, the punishment too is usually for more than three years. Hence, while it is not a ground for squarely denying the accused to be released on bail (*Seema Singh v. Central Bureau of Investigation,* (2018) 16 SCC 10), it is for the courts to exercise the discretionary power afforded to them with great care and caution while balancing the valuable right of liberty of an accused and the interest of the society at large (*Mansab Ali v. Irsan*, AIR 2003 SC 707).

3.0 Philosophical and Constitutional Basis of Grant of Bail in India

The system of bail in India tries to ensure that since it can often be unjust to imprison a person before the court order for conviction. In India, the criminal justice system treats an accused person as innocent unless proven otherwise beyond the reasonable shadow of a doubt (Pillai, 2014 p.348). Hence, in India, it was regarded for a fairly long period that bail is the rule and jail is an exception (*State of Rajasthan v. Balchand*, AIR 1977 SC 2447).

Moreover, India has a constitutionally controlled criminal justice system, the need always is to balance between the liberty of the accused and the collective interests of the society and threats to the existing social order (*SS Mhetre v. State of Maharashtra*, (2011) 1 SCC 694). The process of bail thus helps in safeguarding the liberty of the accused as well as prevents the person from undergoing privatization and thereby turning them into a hardened criminal.

Further, in recent years, we find a catena of judgments that recognises the right to speedy trial as a Fundamental Right under Article 21 of the Indian Constitution. This right is provided to ensure that the accused persons are not made to languish in prisons before they are proven to be guilty beyond reasonable doubt as is required under our criminal justice system (*Sanjay Chandra v. CBI*, (2012) 1 SCC 40). Hence, the judiciary has lately recognised that delay in the completion of the trial can also be treated to be a ground for grant of bail (*Sanjay Chandra v. CBI*, (2012) 1 SCC 40). Despite the adoption of such an approach, we find that at times, the adjudicators fail to keep this balance

and instead tend to opt for a discretionary approach based on the facts and circumstances of the case at hand.

4.0 Grant of Bail under Special Laws in India

The enactment of special laws like the Income Tax Act, 1961, Customs Act, 1962 Benami Transactions (Prohibition) Act, 1988, Securities and Exchange Board of India Act, 1992, Foreign Exchange Management Act, 1999 and Prevention of Money Laundering Act, 2002, has witnessed a paradigm shift in terms of the decisions as to grant of bail. These laws have brought about changes concerning the presumption of guilt as well as the evidentiary requirement and burden of proof in such cases thereby restricting the grant of bail significantly (*Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1).

But, the Supreme Court in *Dataram Singh's* case (*Dataram Singh v. State of Uttar Pradesh*, (2018) 3 SCC 22) has gone on to categorically observe that a humane approach is required to be adopted by the judges while dealing with an application for remanding a suspect or an accused person to police custody or judicial custody. This needs to be observed to ensure the dignity of the accused person is upheld irrespective of how poor that person might be. Further, this also needs to be taken into consideration since there is overcrowding in prisons which often leads to social and other problems as pointed out by the Supreme Court in *In Re-Inhuman Conditions in 1382 prisons (In Re-Inhuman Conditions in 1382 prisons*, (2016) 10 SCC 17).

While, it is trite law that bail is a matter of discretion in non-bailable offences (*Pillai,* 2014 p. 300). However, it permits judicial discretion even in such cases. Even in the exercise of such discretion, it has to be done within the judicial boundaries and principles of fair, just and equitable procedure which is inherent under Article 21 of the Indian Constitution (*Gudikanti Naraisimhulu v. Public Prosecutor, High Court of A.P.*, AIR 1978 SC 429). In India, no discretion is unfettered and they are checked by reasonable restrictions hence courts too need to act within the statutory command and not deviate from it (*Rashmi Rekha Thatoi v. State of Orissa*, (2012) 5 SCC 690). But, time and again it has been found that judicial discretion has been applied differently by different courts thereby making the bail jurisprudence inconsistent and confusing.

5.0 Leveraging Technology in the Grant of Bail

The advent of modern-day advanced technology in the form of Artificial Intelligence is going to have a consequential role in the day-to-day functioning of society. With such technology becoming more and more indispensable, the Law Commission of India (hereinafter 'Law Commission') too has recognised the potential that such technology is capable of bringing about thereby ushering in a reform in the criminal justice system in general and the bail system in particular. In its 268th report, the Law Commission has recommended the need for introducing a new technology like a central intelligence database and electronic tagging. This will enable all information about the FIR and the like details about an offender to remain available in the technical architecture of the Crime and Criminal Tracking Network and Systems (CCTNS) scheme could be improved adapted and utilised through existing information on the criminal as well as existing criminal history (Law Commission of India, *Amendments to the Criminal Procedure Code, 1973 -Provisions Relating to Bail*). The report has recommended the use of ICT tools like electronic tagging, electronic monitoring, improvisation and adaptation of the Crime and Criminal Tracking Network and Systems (CCTNS) (Law Commission of India, *Amendments to the Criminal Procedure Code, 1973 -Provisions Relating to Bail*).

6.0 Grant of Bail and Technology: A Comparative Study of the Global Models

The use of technology in the grant of bail as a discourse has gained currency in recent years with such models being explored in different countries of the world. While countries such as the United States have been a forerunner in this regard, in recent years other countries too have been taking recourse to leveraging technology in their criminal justice system especially to assist the courts in the grant of bail. Most countries have been found to leverage such technology through the use of actuarial, algorithmic, machine learning and artificial intelligence-

driven tools and have been benefitting from the potential that such technology has been able to provide (McKay, 2019 p. 22-39). For purposes of assisting courts in granting bail, supervised machine learning has been gaining momentum through a predictive model (Doshi, 2022 p. 2). These models usually use aspects like the likelihood of the accused person either failing to appear before the court subsequently or committing another crime when they are released on bail.

The forerunner of such initiatives was the United States and this movement began with the enacting of the Bail Reforms Act, 1984 and the introduction of a Public Safety Assessment (PSA) tool which helps in decision-making through predictions as to whether the accused has been granted bail has chances of absconding and/or displaying the characteristics of recidivism. This is done through the use of data points like the age of the accused, the nature of the crime and prior criminal history. The data generated by the said tool is then fed into a Decision Making Framework, which then assigns the accused person a risk level based on the score given by the tool and the present offence for which the person is accused. In the event, that the person is a repeat offender or has absconded previously when released on pretrial for two or more offences then the framework issues a no-release recommendation irrespective of the tool's score. This system has been utilised in more than 1.5 million cases and has been credited with cutting down crime and reducing the pretrial jail population by about 16% (Hunter, 2020 p. 778). Further, a study conducted in New York City by the National Bureau of Economic Research found that leveraging an algorithm for taking pre-trial decisions, it was observed that the leveraging of AI would go a long way in outperforming the track records of judges in such cases (*Human Decisions and Machine Predictions, Working Paper)*. This is evidenced by the fact that given the police arrest a large number of people in a year in New York, the judges most essentially consider public safety risk and flight risk and hence if algorithms can be trained they too could perform similarly. However, in this study, it was found that while some judges despite the two-fold criteria released some risky defendants the AI not only had a constant 18.8% release rate but also, helped keep the crime rate constant while jailing 24.5% lesser number of people thereby outperforming the fluctuating track-records of judges (*Human Decisions and Machine Predictions, Working Paper)*.

Similar systems have also been developed in Colorado who started the Colorado Pretrial Assessment Tools (CPAT) is an empirically derived pretrial risk assessment instrument that has been leveraged in Colorado and is used for assessing the defendant's risk of failing to appear in court or being rearrested while being released on pre-trial (*Colorado PreTrial Assessment Tool Manual)*. The tool usually takes into account factors like the criminal history of the accused, current charges and risk to public safety. Further, the Virginia Pretrial Risk Assessment Instrument (VPRAI) on the other hand is leveraged to understand the status of the accused at the time of arrest (*Virginia Pretrial Risk Assessment Instrument (VPRAI) Manual*). It examines whether the accused has any criminal history, history of failure to appear, employment, any current and pending charges, history of violent convictions, active community criminal justice supervision and history of drug abuse. Hence, this instrument is aimed at primarily examining an accused after arrest and before presentation for the first court appearance. Thus, it is preferred that this instrument be completed soon after the arrest since it increases the likelihood of capturing the most accurate information relating to the accused at the time when he is arrested. This instrument can also be used to determine the level of supervision for those accused persons who are placed on pretrial supervision.

Additionally, in New South Wales, a tool called the Bail Assistant is being developed which will enable the judicial officer to consider all the conditions and concerns regarding the bail, assist them in making a decision and then recording of the decision (Bathburst, 2021 p.2). It is designed to utilise data from past bail decisions to make predictions about the probable outcomes. In addition to these, New South Wales has also begun leveraging actuarial techniques through algorithms which help in analysing large data sets about criminal offending rates and thereby create a determination as to the level of offending that is associated with a particular group and using such correlations, one can intend to predict the past, present or future criminal behaviour of an individual especially when they re-offend.

In the United Kingdom, the Harm Assessment Risk Tool (HART) was developed as a result of a collaboration between the University of Cambridge and Durham Constabulary (*Durham Constabulary Experiments With Predictive Policing*). This was developed to create a consistent decision-making framework as well as find

mechanisms which could help in reducing future harm and recidivism. This model divides risk groups into three categories. The first category which is regarded as the 'High Risk Group' refers to those whom the model regards as likely to commit new serious offences in the next two years. The second category is regarded as the 'Moderate Risk Group' and it refers to those whom the model regards as likely to commit crimes but of a non-serious nature. Finally, the third category is regarded as the 'Low-Risk Group' and it refers to those whom the model regards as unlikely to commit new offences in the next two years. This model was created using approximately 1,04,000 cases and was trained using the random forest model of machine learning (Oswald, 2018 p. 224). This model relies on 34 different predictors and most of these focus on the offender's history of criminal behaviour (Oswald, 2018 p. 225). Some of the common indicators for its decision-making include age, gender, place of residence including postal code, and existing reports of police regarding the accused (Oswald, 2018 p. 228).

7.0 Conclusion

Through this paper, the existing system of bail in India has been analysed while bringing out various shortcomings in the process. Through the paper, an attempt has been made to analyse how technology could act as an aid to the criminal justice system and contribute to reforming it for the better. The same has also been reflected by the global perspective where such models have been leveraged in their respective bail systems. Thus, it can be concluded that we are now at a crossroads wherein we can devise a definitive framework especially to cater to the system of bail in our country by harnessing this new and emerging technology in our country. Taking such measures will not only minimise the prison population in our country but also go a long way towards ensuring the key objective of the system of bail is not lost while making the criminal justice system more robust and efficient. This will also help in upholding the vision of our criminal justice system which believes in reforming an accused and bringing back to social life rather than turning them into hardened criminals.

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