INCONSISTENT AND UNCLEAR: THE SUPREME COURT OF INDIA ON BAIL

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This paper seeks to analyse the law in respect of bail and pre-trial detention in India, testing judicial precedent on the anvil of the presumption of innocence with specific reference to two contrasting decisions of the Supreme Court, earlier in Pappu Yadav v. Central Bureau of Investigation and more recently in the 2G case in Sanjay Chandra v. Central Bureau of Investigation. It focuses only on conditions of bail set forth in the Code of Criminal Procedure and does not look at special legislation. The paper concludes by suggesting measures for legislative and judicial reform to harmonise law relating to bail across India.

I. REVISITING THE PRESUMPTION OF INNOCENCE

The recent decision of the Supreme Court granting bail to the accused in the 2G case has generated a lot of interest and heated debate.[1] Nevertheless, to understand the true implications of the decision and how it affects bail jurisprudence in India, it is necessary to revisit the principles of presumption of innocence.

The principle of presumption of innocence represents far more than a rule of evidence.[2] It embodies freedom from arbitrary detention and serves as a bulwark against punishment before conviction. More importantly, it prevents the State from successfully employing its vast resources to cause greater damage to an un-convicted accused than he/she can inflict on society.[3]

While considering bail applications of the accused, courts are required to balance considerations of personal liberty with public interest. This paper argues however, that Indian Courts have applied inconsistent standards in connection with the law in respect of bail and have rarely, if ever, paused to consider the ramifications of their decisions on the right to be presumed

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1 Sanjay Chandra v. CBI, (2012) 1 SCC 40: (2011) 6 UJ 4077 (SC).

2 L.H. Tribe, *An Ounce of Detention: Preventive Justice in the World of John Mitchell*, 56(3) Virginia L.R. 371, 404 (1970); M. Zander, *Bail: A Re-appraisal,* 67 Criminal L.R. 25, 26 (1987).

3 A. Ashworth, *Four Threats to the Presumption of Innocence*, 10(4) Int'l J. of Evidence and Proof 241, 261 (2006).

innocent until proven guilty. Furthermore, this lack of a uniform precedent allows the individual outlook of particular judges to become the controlling factor in deciding bail petitions and has led to the often-unnecessary incarceration of 250,000 people, pending trial. As per the Ministry of Home Affairs today, this constitutes 66.4% of the total prison population.[4]

In theory, pre-trial detention or put another way– denial of bail– is permissible only for preventing the accused from absconding, committing further offences, tampering with evidence or influencing witnesses.[5] Imposing restraints in such cases, while inconsistent with the presumption of innocence, is justified by public policy considerations placing a premium on the sanctity of the judicial process.[6]

These exceptions must, however, be narrowly interpreted. Extended incarceration impedes effective assistance of counsel, thereby prejudicing the right to a fair trial. It simultaneously imposes a heavy financial burden on the State. Moreover, beyond the mental trauma of imprisonment, the 'deplorable'[7] conditions of Indian prisons and the socio-economic impact on the defendants' families; pre-trial detention, in principle, runs foul of the right not to be punished before judgment regarding guilt is pronounced by a competent court.

It is thus imperative to determine *when* the presumption of innocence comes into play, what overriding considerations justify departure from the "rule of respect for the accused's liberty"[8] and whether the administration of our criminal justice system and bail law is effective and fair in achieving these objectives.

A narrow formulation of the presumption views it as an evidentiary rule, requiring the State to prove its case beyond reasonable doubt. It has been adopted by certain High Courts which rejected its relevance while

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4 As of 2009, there were 2,50,204 under-trial prisoners in India, constituting 66.4% of the total inmates across all prisons. *See* National Crime Records Bureau, Ministry of Home Affairs, Government of India, *Prison Statistics India: Snapshots- 2009*, available at http://ncrb.nic.in/PSI2009/Snapshots-2009.pdf (Last visited on March 4, 2014).

5 State of Rajasthan v. Balchand, (1977) 4 SCC 308; Panchanan Mishra v. Digambar Mishra, (2005) 3 SCC 143. *See also* D. Galligan, *The Working Paper on Bail*, 38(1) MODERN L.R. 59, 60 (1975).

6 U.N. Raifeartaigh, *Reconciling Bail Law with the Presumption of Innocence*, 17 OXFORD J. OF LEGAL STUDIES 1, 4 (1997).

7 Babu Singh v. State of Uttar Pradesh, (1978) 1 SCC 579, ¶ 18; Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, ¶ 12.

8 CC v. United Kingdom, CRIM. L.R. 228 (1999); SBC v United Kingdom, (2001) 34 EHRR 619, ¶ 22 as cited in A. Ashworth, *Case Comment: Bail: Human Rights - European Convention on Human Rights 1950, Art.5(3)*, CRIMINAL L. R. 63, 65 (2007).

deciding bail applications.[9] Conversely, a broader interpretation extends it to pre-trial processes to function as a shield against wrongful punishment. Due process protections here seek to safeguard the liberty of the accused, instead of primarily focussing on regulating prosecutor and police (mis)conduct.[10]

The Supreme Court has not ruled on the interpretation definitively.[11] Nonetheless, an espousal of the narrow interpretation will present a significant problem in India, where inexorable delays in the judicial process result in continued detention of the accused, pending trial. Given that the National Police Commission has reported that 60% of these arrests are "unnecessary or unjustified",[12] a fact recognized by the Supreme Court,[13] the prospect of spending extended periods of time in prison has resulted in guilty pleas being increasingly considered as the most expedient method of securing release.[14]

Unfortunately, despite securing the presumption of innocence after great effort, it lacks firm constitutional rooting in India,[15] where its applicability in respect of the law relating to bail has been understated. This is borne out by judicial decisions examined in the next section.

II. THE SUPREME COURT'S APPROACH

The early jurisprudence of the Indian Supreme Court recognized the importance of speedy trials and the constitutional guarantee of life and personal liberty enshrined in Article 21 of the Constitution.[16] Its liberal approach of 'bail, not jail'[17] weighed in favour of the presumption of innocence while balancing the need to protect society by incarcerating the accused. This inter-

[9] The Kerala High Court in State of Kerala v. P. Sugathan, S.I. of Police, (1987) 2 KLT 985, ¶ 3 stated that the presumption was "not a relevant consideration, for grant of bail" and that "pre-trial detention in itself is not an evil, nor opposed to the basic presumptions of innocence". This decision was cited in Pramod Issac v. State of Kerala, (2009) 3 KLT 121.

[10] S. Baradaran, *Restoring the Presumption of Innocence*, 72 Ohio State L.J. 724, 754 (2011); C. Hamilton, *Threats to the Presumption of Innocence in Irish Criminal Law: An Assessment*, 15(3) Int'l J. of Evidence and Proof 181,187-189 (2011); Raifeartaigh, *supra* note 6, 4.

[11] Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281, ¶ 8.

[12] Government of India, The Third Report of the National Police Commission 31 (1980).

[13] Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694, ¶ 126; Joginder Kumar v. State of Uttar Pradesh, (1994) 4 SCC 260, ¶ 12.

[14] P. Baxi, *Access to Justice and the Rule-of-(Good) Law: The Cunning of Judicial Reform in India*, 2(2) Indian J. Human Development 279, 291 (2008). *See also* R. Shrinivasan, *Boy Spends One Year in Jail for Stealing Rs. 200*, The Times of India July 29, 2011, available at http://articles.timesofindia.indiatimes.com/2011-07-29/india/29828371_1_judicial-custody-plea-tihar-jail (Last visited on March 4, 2014).

[15] In Noor Aga v. State of Punjab, (2008) 16 SCC 417, the Supreme Court ruled that the presumption of innocence was a human right and not a fundamental right to life and personal liberty enshrined under Article 21 of the Indian Constitution.

[16] Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 98; Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[17] State of Rajasthan v. Balchand, (1977) 4 SCC 308; Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240.

pretation was put to test by two cases of equal bench-strength discussed here. Subsequently, while deciding their bail petitions, the Court adopted contrasting approaches in considering factors such as the magnitude of the offence, status of the accused and ebbing public confidence in the administration of justice; thus contributing further to the inconsistency in applying bail law.

A. RAJESH RANJAN @ PAPPU YADAV V. C.B.I.

The case of *Pappu Yadav* v. *C.B.I.* (' Pappu Yadav'),[18] involved a former Member of Parliament being charged with conspiracy to murder his political rival in broad daylight. The Courts, both at trial and appellate levels, rejected ten bail applications of the accused even though he had been in prison for over *seven* years and the trial was far from completion.[19]

Placing a premium on the interest of society, despite the extended detention and delay in proceedings, the Supreme Court imposed 'reasonable restrictions' on the right to liberty observing that it would "be wholly inappropriate to grant bail when not only the investigation is over but even the trial is partly over, and the allegations against the appellant are serious".[20] Furthermore, it practically side-stepped the presumption of innocence by rejecting the contention that extended incarceration impeded the defence of the accused, noting that "if this argument is to be accepted, then logically in every case bail has to be granted".[21]

By using pre-trial detention as a punitive measure, without the benefit of due process afforded by a conviction or acquittal, the Supreme Court set the stage for a higher probability of unjustly incarcerating an innocent person based *primarily* on the gravity of the allegations. This is surprising since the Code of Criminal Procedure ('Cr.P.C') itself empowers the higher judiciary to grant bail in cases involving capital offences.[22] Although detention can be authorized on grounds of *prima facie* case, serious nature of charges and prediction of future dangerousness, relevant and sufficient evidence should be presented to sustain such pre-trial incarceration.

Nevertheless, in Pappu Yadav, the Supreme Court ignored the fact that the prosecution had completed presenting its evidence and therefore, there

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[18] Rajesh Ranjan Yadav @Pappu Yadav v. CBI, (2007) 1 SCC 70. *See* Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav, (2004) 7 SCC 528; Kalyan Chandra Sarkar v. Rajesh Ranjan @Pappu Yadav, (2005) 2 SCC 42; Rajesh Ranjan Yadav @Pappu Yadav v. CBI, (2008) 1 SCC 667: 2008 Cri LJ 1033 (SC) (For other Supreme Court decisions on bail concerning the accused).

[19] Rajesh Ranjan Yadav @Pappu Yadav v. C.B.I., (2008) 1 SCC 667 : 2008 Cri LJ 1033 (SC), ¶ 1.

[20] Rajesh Ranjan Yadav @Pappu Yadav v. C.B.I., (2007) 1 SCC 70.

[21] *Id.*, ¶ 13.

[22] § 439 of the Cr.P.C. deals with the "Special Powers of the High Court or Sessions Court regarding Bail" and vests them with the power to grant bail in such cases.

was no possibility of influencing witnesses or tampering with the evidence on record. It also disregarded the ten year delay in concluding the trial and the line of judicial precedents awarding bail in such cases.[23] In fact, the Supreme Court ousted the jurisdiction of the subordinate courts, contrary to statutory intent, directing the accused to present all future bail applications to itself "in the event any occasion arises".[24] The denial of bail, presumably to prevent the accused from being released by the High Court, which had earlier granted bail, reflects the Supreme Court's pre-judgement in this regard.

In the process, only limited recognition was given to the consequences of incarceration, the deprivation of liberty and its impact on the defence put on at trial. In the 2G scam, the Supreme Court attempted to set this right.

B. SANJAY CHANDRA V. C.B.I.

The '2G scam' entailed the fraudulent allocation of 2G bandwidth spectrum to private entities in the telecom sector causing the exchequer an estimated loss of Rs. 30,000 crores.[25] Allegations of large scale corruption and collusion resulted in the arrest of the former telecom minister, high-ranking bureaucrats and top-level corporate executives.

In May 2011, the Delhi High Court in *Sanjay Chandra* v. *C.B.I.*, authorized their pre-trial detention even though the investigation was complete and there were no substantiated allegations of intimidation or tampering with the documentary evidence.[26] In the process, it eroded the most fundamental tenet of criminal law: the presumption of innocence. This eventually resulted in the continued incarceration of the accused for six months despite them not having been indicted for the offences charged, i.e. despite formal charges not having been framed under the Cr.P.C.

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[23] Kashmira Singh v. State of Punjab, (1977) 4 SCC 291, ¶ 2; Vivek Kumar v. State of Uttar Pradesh, (2000) 9 SCC 443, ¶ 2; Ashok Dhingra v. NCT of Delhi, (2000) 9 SCC 533; Babu Singh v. State of Uttar Pradesh, (1978) 1 SCC 579, ¶¶ 24, 25.

[24] Rajesh Ranjan Yadav @ Pappu Yadav v. C.B.I., Review Petition (Crl.) No. 9/2007 in Criminal Appeal No. 1172/2006 decided by the Supreme Court of India on April 27, 2007.

[25] As per the charge sheet filed by the CBI in the 2G spectrum case (Sanjay Chandra v. CBI, (2012) 1 SCC 40: (2011) 6 UJ 4077 (SC)). However, there are varying estimates as to the loss. While the CAG estimated the loss to be Rs. 1.76 lakh crores, the telecom minister Mr. Kapil Sibal claimed 'zero loss' and the Telecom Regulatory Authority of India estimated that the government earned a profit between Rs. 3,000 crores to Rs. 7,000 crores. *See* Mahapatra, Dhananjay, *2G loss? Govt Gained Over Rs 3,000 crore: TRAI*, Times of India September 7, 2011, available athttp://articles.timesofindia.indiatimes.com/2011-09-07/india/30122800_1_spectrum-trai-2g (Last visited on April 10, 2013).

[26] Sanjay Chandra v. C.B.I., Bail Application No. 508/2011 decided by the High Court of Delhi on May 23, 2011, ¶¶ 36, 37.

While rejecting their bail applications, the High Court observed that being an economic offence involving billions of dollars, the "allegations [were] itself sufficient to deny bail". Moreover, despite cooperating during investigation, the Court stated that their past actions "cannot be a guarantee that during trial, they will not interfere with the judicial process".[27]

The High Court, therefore, made many observations on the merits of the allegations against the accused, effectively commenting on their guilt prior to judgment and departing from the settled dictum of 'bail, not jail'.[28] Additionally, it set dangerous precedent by focussing on the 'impact on society'[29] and adopting a utilitarian premise to justify detention since this could potentially facilitate denial of bail applications based on considerations of 'public interest'. Finally, by shifting the burden onto the accused to demonstrate their innocence at the pre-trial stage, while assuring the Court of their continuing cooperation, their right to be presumed innocent until proven guilty was rendered nugatory.

However, the Supreme Court granted bail to the accused in November, 2011 in *Sanjay Chandra* v. *C.B.I.* ('Sanjay Chandra'), recognizing that the right to life and personal liberty was the "most basic of all fundamental rights".[30] The Court reversed the High Court's order by taking cognizance of the completion of investigation, prospective delay in concluding the trial and the six month incarceration, stating that the "right to bail is not to be denied merely because of the sentiments of the community against the accused".[31]

The Supreme Court's liberal reading of bail laws in Sanjay Chandra signals a return to the original construction applying the presumption of innocence. However, this is in contrast with the narrow formulation espoused in Pappu Yadav where Article 21 was reasonably restricted, taking "into consideration other facts and circumstances, such as the interest of the society",[32] regardless of the accused spending seven years in incarceration. Interestingly however, the Supreme Court in Sanjay Chandra did refer to Pappu Yadav[33] al-

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27 *Id*., ¶¶ 33, 37.

28 Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240.

29 Sanjay Chandra v. C.B.I., Bail Application No. 508/2011 decided by the High Court of Delhi on May 23, 2011, ¶¶ 36, 37.

30 State of Kerala v. Raneef, (2011) 1 SCC 784, ¶ 15.

31 Sanjay Chandra v. CBI, (2012) 1 SCC 40: 2011(6) UJ 4077 (SC), ¶ 25.

32 Rajesh Ranjan Yadav @Pappu Yadav v. C.B.I., (2007) 1 SCC 70, ¶ 11.

33 In ¶ 15 of the decision of the Supreme Court, it repeats the following observations made in Kalyan Chandra Sarkar v. Rajesh Ranjan, (2005) 2 SCC 42 to state:

> "But even persons accused of non- bailable offences are entitled to bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied by reasons to be recorded that in spite of the existence of prima facie case, there is need to release such accused on bail, where fact situations require it to do so".

though only on the issue of the necessity of establishing a *prima facie* case. In fact, this practice is reflected in many bail cases, wherein courts selectively cite only those parts of previous decisions, which either state the general principles governing bail law (and then proceed to apply the very same principles in completely inconsistent and contrasting ways) or those which support their holding. This incompatibility and inconsistency requires a reconsideration of the role of the Supreme Court and reform in bail law.

III. REVIEWING THE ROLE OF THE SUPREME COURT

Although the Supreme Court in Sanjay Chandra recognizes the importance of pre-trial rights, giving "more than verbal respect"[34] to the presumption of innocence, it does not engage with its scope and import. Nor does it clarify how the presumption is accommodated in the Indian legal system, which permits preventive detention and strict liability for certain criminal offences in the interest of national security and public order.

Nonetheless, before critiquing the Supreme Court's conflicting decisions, a larger institutional question regarding its role in deciding bail applications needs to be addressed. The Cr.P.C. does not envisage the Supreme Court considering bail petitions, even though it specifically recognizes these powers for the lower courts *vide* § 437 and the Sessions Court and High Court *vide* § 439.

The Supreme Court passes bail orders by virtue of Article 136 of the Indian Constitution allowing special leave to appeal lower Court decisions. Even so, this is a discretionary remedy to be exercised only in 'exceptional cases',[35] involving a substantial question of law with contradictory precedents or in instances of "atrocious miscarriage of justices". In fact, even the Supreme Court recognizes that the "High Court should normally be the final arbiter" in cases involving grant or refusal of bail[36] and it should not interfere for every error of law or fact in challenge.

Consequently, to address the undesirability arising out of High Courts selectively applying principles from the Supreme Court's growing body of bail jurisprudence; it should hesitate before interfering in bail matters. It should primarily intervene in cases of inconsistent decision-making by High Court judges and aim to reiterate the *principles* governing bail applications, rather than applying the principles to the facts of the case.

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[34] Sanjay Chandra v. CBI, (2012) 1 SCC 40, 21: (2011) 6 UJ 4077 (SC), ¶ 14.

[35] Mathai @ Joby v. George, (2010) 4 SCC 358, ¶ 8; Chandra Singh v. State of Rajasthan, (2003) 6 SCC 545, ¶ 46; Kunhayammed v. State of Kerala, (2000) 6 SCC 359.

[36] Bihar Legal Support Society v. Chief Justice of India, (1986) 4 SCC 767, ¶ 3.

IV. SUGGESTIONS AND CONCLUSION: A JUDICIAL RECONSIDERATION

A possible first step to remedy this situation could be a legislative reconsideration of existing bail provisions. This would entail an amendment of the existing law by incorporating additional safeguards and expressly laying down its policy against unnecessary detention and excessive bail, whether in the Cr.P.C. itself or in the "Statement of Objects and Reasons" of the Amending Act. As explained earlier, the problem with bail jurisprudence in India is not so much the absence of rules, or even clearly defined rules.[37] It is with the courts not paying sufficient heed to both the text and purpose of the law and previous judgments of the Supreme Court. Clarifying the objectives of bail through an Explanatory Note or Statement of Objects and Reasons will thus, help set a benchmark, which is easy for judges to follow. In this context, it would be instructive to analyse the American standard under the Bail Reform Act requiring "clear and convincing" evidence that the accused had violated stipulated bail conditions.[38] Although limited to cases of revocation of bail, and not applicable to police arrests,[39] the American standard and its use in case law provides an interesting alternative to the standard of proof applicable.[40]

Consequently, in the articulation of their orders on bail, judges must relate reasons such as nature of crime or severity of charges to their assessment of the accused's potential for interfering with the judicial process, and should not act on perceived public interest. Even otherwise, the law should be interpreted to require courts to regularly determine whether the reasons advanced by the State for *continued* incarceration are justified, especially if the trial is prolonged.[41] This will resolve questions pertaining to their institutional competence to deny bail by presuming guilt based on a prediction of

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[37] Thus, it is evidently clear from the text of §§ 437 and 439 of the Cr.P.C (which has been reiterated in various judicial decisions) that three factors need to be considered while deciding a bail application: the likelihood of the accused absconding or committing further offences or tampering with evidence/ influencing witnesses.

[38] § 3148 of the Bail Reform Act of 1984, 18 U.S.C. § 3148(b) states that if a condition of release is violated, the government may move for a revocation of the release order and that the judicial officer shall enter an order of revocation and detention if, after a hearing, the judicial officer finds that there is... "clear and convincing evidence that the person has violated any other condition of his release".

[39] However, *see* United States v. Chimurenga, 760 F. 2d 400, 405-06 (2d Cir.1985), cited with approval in United States v. John Gotti, 794 F. 2d 773 where the Court held that in the context of an initial detention hearing held at a defendant's first appearance before a judicial officer, the government must prove the facts underlying danger to the community or to any other person by clear and convincing evidence.

[40] *See* United States v. Salerno107 S. Ct. 2095 (1987); United States v. John Gotti, 794 F. 2d 773 (2d Cir 1986); United States v. Mauricio Londono-Villa, 898 F. 2d 328.

[41] Jablonski v. Poland, (2003) 36 EHRR 455; Kalashnikov v Russia, (2003) 36 EHRR 34; Scott v. Spain, (1997) 24 EHRR 391 as cited in A. Ashworth & M. Strange, *Criminal Law and Human Rights*, 2 EUROPEAN HUMAN RIGHTS L.R. 121, 127 (2004). *See also* B. Mohan, *Presumed Innocent? Convention Rights and Bail in Scotland*, SCOTTISH CRIMINAL L. 881, 884 (2009).

the accused's *future* acts, while simultaneously preserving their discretion. The prosecution too, must bear the burden of proving that public interest considerations outweigh the presumption of innocence and right to civil liberties. After all, if an accused has cooperated during investigation and regularly attended trial, how can the Court *assume* that he/she will not continue doing so and what proof can they adduce to rebut this adverse presumption?

Subsequently, if the accused is acquitted, the law should provide for compensation for wrongful detention, deprivation of liberty, reputational sanctions and associated costs. This is especially necessary in cases of serious offences where even an acquittal might not undo the public censure and stigmatization caused by the severity of the charge.[42] A similar policy, adopted *vide* Article 5(5) of the European Convention of Human Rights[43] has been successful in deterring the State from side-stepping its obligations and encouraging excessive detentions, and has reinforced the importance of safeguarding the presumption of innocence regardless of the gravity of allegations. After all, the State should take responsibility for any deprivation of liberty before formalized conviction, especially if this deprivation is justified on grounds of public interest or order.[44] Although we do not have an equivalent provision in our law, especially since the jurisprudence in India does not focus on the "deprivation of liberty" of the accused or the "lawfulness of detention", the Cr.P.C. clearly recognizes the principle of compensating an accused for a wrongful arrest *vide* § 358. Unfortunately, it also sets a maximum limit of Rs. 1,000 which may be awarded to the accused. Thus, studying the jurisprudence of the European Court of Human Rights can be instructive in re-thinking our principles of compensation and the possible need to amend § 358, Cr.P.C. and removing a mandatory maximum amount.

The Supreme Court in Sanjay Chandra has tried to give effect to the presumption of innocence and has taken crucial first steps in that direction.

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[42] Ashworth, *supra* note 3.

[43] Art. 5(3) to (5) of the ECHR state:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an *enforceable right to compensation*." (Emphasis supplied).

[44] A. Ashworth, *Case Comment- Human rights: Article 5(3) - Length of Time Spent on Remand in Custody*, [2011] Criminal L. R. 148, 149 (discussing O'Dowd v. United Kingdom, (7390/07) Unreported September 21, 2010 (ECHR)); A. Ashworth, *Case Comment- Human Rights: Article 5(3)-Right to Liberty-Refusal of Bail*, [2008] Criminal L. R. 476, 477 (discussing Gault v. United Kingdom, (1271/05): (2008) 46 EHRR 48 (ECHR)).

Nevertheless, it must now follow through by reclaiming the presumption and giving effect to the implied substantive due process component in Article 21. In this way the judiciary, along with the legislature (to some extent), have important roles to play in recasting bail law in India in a manner that would protect personal liberty.