

## PREFACE

The EXISTING system of bails in India can aptly be described as a big "cobweb". It is a web encompassing the issues of personal liberty, public concern, community interests and the interests of justice. Each of these so entrapped find themselves in collision and are easily broken once they are in it. Being a cobweb the system of bail has the added peculiarity of obscuring completely the policy and purpose for which the institution of bail operates.

The legislative wisdom as well as the judicial mind have suffered from this cloud of obscurity. Schematisation, except for some sundry legislative provisions on bail, is an absconder from the legal code. Judicial decisions could not have contributed much towards amplifying the cogency of the scheme as there was none. The interpretation of words, clauses or provisions in isolation might have had the effect of disposing of a case but it has not contributed towards an elaboration of the jurisprudence of bail.

Of late, the jurisprudence of bail has been canvassed in a few Supreme Court decisions. But these pronouncements dealt largely with the malpractices of law enforcing agencies which affected human rights. Not much can be gained substantially from these decisions by way of precedential authority to understand the mechanism of bail or the concepts thereof. The totality of the judicial exercise on the Indian law of bails does indicate that the entire system of bail law and its practice in the law courts is inextricably enmeshed in the cobwebs of mindless rules of practice.

Initially, this study commenced as an investigation for the National Police Commission on behalf of the Bureau of Police Research and Development, Ministry of Home Affairs, Government of India. The findings of the investigation were submitted and were perhaps made use of by the concerned agencies. Some of the findings are also incorporated in this essay.

The preliminary investigation made regarding the working of the bail system revealed much more than was sought to be discovered. Primarily, the aim was to find out the lacunae in the law and also to ascertain the gaps in the working of the system which could be filled up by administrative and other means. However, a further probe into the subject of bail left the enquiry with a singular conclusion that the principles, practices and provisions of law on bail suffer from obscurity and any attempt to portray a cogent picture of the system is futile. A revelation of the lack of systematisation, incoherence and *ad hoc* treatment of the law by the legislature and the courts is the net result of the efforts.

Approaches to the issue of release on bail have been of an *ad hoc* nature. The emphasis has either been on the aspect of personal freedom generated by the malpractices of law enforcement agencies, or

influenced by the viewpoint of stringent law enforcement because of the increased incidence of bail-jumping particularly by the proclaimed offenders who have been getting release through the good offices of clandestine agencies of professional sureties which are now entrenched as vital peripherals of the administration of criminal justice. Both these approaches have let the main issues of the bail system go astray, and the subsidiary issues of human rights and public concern have stolen the limelight in the jurisprudence of bail.

'Bail' has no definition under the Indian codes. Nor are the modes of obtaining bail clearly stated. The controversy continues to veer around the question whether bail is a matter of right or a mere privilege conceded to an accused through the exercise of discretionary power. The grant of bail with conditions in bailable offences are typified the same way as the conditional bail in non-bailable cases. The need and importance of a surety as well as his role, responsibility and liability are the subject-matters of conflicting decisions handed down by the various High Courts. There are many such issues that underlie the system of bail that have remained unattended to by the Law Commission or the legislature. The court decisions have not been able to set out any intelligible criteria. Perhaps the judiciary cannot do anything unless the legislature comes out with a designed policy with a comprehensive formulation to install an effective bail component in the mechanism of bail in the criminal judicial administration.

In this study an attempt has been made to evaluate critically and ratiocinate the law and institution of bail as it exists today. Its operational aspect has been empirically observed in Delhi courts. The study has been divided into four parts. Broadly speaking these parts relate to (I) conceptual bases of bail together with legal and functional aspects of bail; (II) the role and responsibilities of law enforcement agency in the system of bail; (III) the constituents of bail; and (IV) concluding remarks containing evaluation, observations and suggestions.

Part I gives an overall introductory view of the bail system, its history as well as the conceptual basis and functional aspects of the system today. Three chapters have been devoted to deal with the foregoing themes. In the first chapter the roots of the institution of bail in Indian jurisprudence have been traced in brief. The evolutionary process of bail till the passing of the 1973 code has been critically discussed which substantiates the hypothesis that no conceptual treatment has been given by the modern law to the subject of bail.

This is followed by a discussion on the constituents of the bail concept. It shows that bail has a meaningful relevance as a component in administration of the criminal justice system. It aims at achieving the ends of individual freedom and the community security. It accomplishes the judicial responsibility to try an accused who has been brought before it. This part concludes with an evaluation of the legal and functional

aspects of bail and the bail system only to show that the institution needs complete refurbishing and provides pointers to consider about having a Bail Reforms Act.

Part II deals with the law enforcement agency. The police power to make an arrest brings the mechanism of bail into action. It, thus, plays the initial role in the system of bail. The powers of arrest and detention encroach upon the individual freedom in a democratic social order, hence the police role is to be demarcated in the discharge of responsibilities.

An empirical sample study has also been included in this part to assess the awareness and understanding the issues that underlie the criminal judicial administration by the police. This sample study also aims at evaluating the police attitudes in relation to its obligation towards individual freedom in the democratic set up. An attempt to evaluate the level of its awareness and understanding of the manifold issues arising out of pre-trial release of offenders has also been made. Since policing of the system cannot be dispensed with, nor can the police powers be fettered with such restraints as may reduce their efficacy, it is necessary that safety mechanism against the misuse and the abuse of police powers be reinforced and devised further. These aspects of the problem are dealt with in this part.

The thematic approach of the third part of the study is that in order to play its full role, the process of bail has to pass through three phases. The initial phase commences with the arrest of an accused. It is followed by another phase which calls for exercise of discretionary powers of judicial nature for consideration of the matter for the release on bail. Accordingly, the established principles of law governing the various matters relating to bail as enunciated through various court decisions have been collected and discussed.

Finally, in order to make the release effective a mode of release has to be prescribed. The mode of release has to take note of the fact that it does not put unreasonable restrictions on securing the freedom of the accused, and also that the mode is so devised so as to ensure the presence of the accused before the court for trial. Thus the purpose of bail is served if these constituents of bail are coordinated with each other. A critical study of all the above issues form the subject matter of this part.

Part IV is in the nature of concluding remarks. The concluding remarks bring to the fore the hypothesis that the law of bail installs an incomplete and also an outdated system of bail mechanism in the administration of criminal justice. Some leads are available about the purpose of bail and related matters but the leads get lost in obscurity as a result of the vast unspoken vagueness that prevades the entire concept and mechanism of bail in the code. In the course of this study field studies were also undertaken with a view to having an objective understanding of the working of the bail system. Relevant information and data are incorpo-

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rated in this study at different places for empirical evaluation of one or the other aspect of the bail system.

The fulfilling of preconditions of bail reform would be necessary for giving shape to any suggested outline of bail reform. These preconditions are, the need of proper functioning of police power, devices for controlling the police power, speedy trial and the availability of sound legal aid and services in the legal system. These issues have been touched upon in the concluding part of the study. An outline for a newer approach to bail has also been included.

However, reforms in the bail system demand urgent action. In-depth studies of the manifold issues, underlying the system of bail will have to be undertaken before the reform measures are considered and acted upon. Attempt has been made to identify important issues concerning bail. An outline for working on a tentative draft proposal on a new bail law has also been suggested. Perhaps a Bail Commission on the lines of Justice A.N. Mulla's famous Jail Commission is warranted to review the law on the subject and suggest reforms. A comprehensive Bail Act is an urgent need as it may be able to provide solutions to many of the ills which have resultantly grown out of the vague law and an incomplete system of bails. Until the call to have comprehensive Bail Act is attended to, the Indian bail system will continue to remain in cobweb.

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