PREFACE

The study on *Right to Bail* has been undertaken by the Indian Law Institute in view of the emerging significance of the bail law in the country. The Institute had earlier published a study on the subject, *Release on Bail : Law and Practice*. (1985) prepared by Prof. D.C. Pandey. Because of the gap of 15 years and a tremendous change in the world view, especially the growth in human rights jurisprudence, giving a wider connotation to the right to life and personal liberty, it became imperative to deal with the subject of bail afresh. After necessary reorientations, rewriting, re-empirical testing and much updating the study has resulted into a new book.

Bail is a very vital institution in criminal justice system. It carries a twin objective of enabling an accused to continue with his life activities and, at the same time, providing a mechanism to seek to ensure his presence on trial. It is not always just or advisable to confine the accused before conviction. Only the sovereign interest or threat to social order may necessitate such an action. Ordinarily detaching an individual from society adds to the problems rather than solving them. The option of jail is also a limited one. Generally the jails are overcrowded and mismanaged which is a burden very difficult to shoulder. The maintenance of the dependents of the jailed persons is another problem with multiple dimensions, including the possibility of their developing delinquent tendencies. Thus, jail does not always serve the social interest. The current problem of under-trials, too, is an outcome of a large number of indiscriminate arrests and the non-use of the option of bail in preference to jail.

The administration of bail, however, is not an easy task. It needs a well-founded system developed after taking a due note of the realities from which the idea of bail has been conceived. Prime possessions of an individual are his urges, secrets and the self. These are epitomized by his right to liberty and pursuit of happiness. A member of the society voluntarily surrenders a part of them to fill the cumulative store of collective rights which constitute the social interest. This, however, is not enough to balance the interests or create perfect harmony between individual and the society. Misadventure on either side is not a rare scene or a sparse accident. To a sharp eye that is the generality, not an exception. Thus a crimeless society or an infallible individual is unimaginable. Functionally, the conflict is contributory because it keeps the society vital and dynamic. For better results it must, of course, be properly refereed. An accused's arrest before conviction and the society's apprehensions of harm from an un-arrested suspect or his non-availability on trial are the most crucial questions to be seen in this perspective. The position of the accused needs a further consideration in view of advancements in human rights jurisprudence; more so when he is being victimized by some one else in the garb of advancement of social interest.

Structuring an effective bail mechanism, because of conflicting claims on many sides, is a herculean endeavour with myriad dimensions involving investiga-

tion of multiple premises and enormous human action. The phenomenon of conflict between the individual and the society has been transcending every effort aimed at a permanent resolution. Changing theories of justice and juristic formulations are an open admission of that unattainability. For the same reason, in the arena of criminal justice system the jurisprudence of bail has, even after a long history, remained half-hatched. Even the culmination of the usage of bail from the state of *lex non scripta* into *lex scripta* has not brought satisfaction. While the burden and the blame lies on the judge and the police man, the common man is floating in the whirlpool of distrust. The present work is an endeavour to take a note of all these issues.

The existing law on bail is inconsistent and unconvincing. The subject has received only an *ad hoc* treatment at the hands of the legislature. The nature and extent of the conditions which may be imposed by Courts on grant of bail have not been defined. Most agonizing is one's failure to trace out even a definition of "bail" in the whole set of provisions of law relating to bail. The practice of bail is highly characterized by the recurrence of extremism on the part of the law enforcement agencies as well as the advocates of liberty. The reason on the side of enforcers is a need for stringent legal action, frequent bail jumping and emergence of a clan of professional sureties. The opposite stance is supported by practice of prolonged investigations, delayed trials and torture. An unending debate, whether bail in bailable offences is a matter of right or a mere privilege conceded to an accused through the exercise of discretionary power, is continuing without a visible end in sight. The system of bail has almost become poromeric due to dissatisfactory classification of the offences, typifying them without any intelligible criteria into "bailable" and "non-bailable" offences. There are instances to show that after grant of bail an accused cannot be sure about his release. He may not be able to fulfil the conditions with which the bail is granted. Uncertainty in the modes and forms of release has not only created a confusing state of affairs but makes sometimes an accused salute an end for which he was never prepared. Anticipatory bail though a necessity is described by some, in the present statutory scheme, an anomaly. This is one more subject for reconsideration.

Criteria for exercise of judicial discretion and grant of bail with conditions invoke new perceptional quizzing in the light of conventional guidance and the constitutional authority. Need is being felt that the Law Commission must look into these matters and help the legislature come out with a candid policy and a calcified formulation for rebuilding a new bail mechanism.

The book has four parts dealing with different aspects of the subject. The first part dilates the conceptual base of the bail system and explains its evolutionary perspective with due reference to its roots in the Indian jurisprudence. Existing law on bail, its underlying policy, judicial approach and the functional aspects of the bail mechanism are also discussed here. This part also contains an evaluation of the existing bail mechanism and matters relating to personal liberty. Besides,

there is a separate chapter on anticipatory bail describing an expanded canvas of bail system. The second part of the book highlights the role of enforcers, their powers and responsibilities with an analytical view of their attitude towards the bail law and mechanism. Safety mechanisms available against abuse of police powers and unlawful arrest have also been brought to focus. Detailed discussions can be found here on the disciplining of police officers and unsatisfactory law on sureties with alternative suggestions. Views collected from the police personnel constitute an important part of the discussions. Part three of the book is a detailed review of the process of bail identifying its three phases : (a) arrest, (b) exercise of discretion and (c) determination of the mode of release. Attempt has been made to highlight the actual practices of delayed investigation and effects thereof, alongwith the responses of the Law Commission. With respect to the exercise of discretion, the matters of judicial conscience, judicial techniques, limits on use of discretion and grant of bail with conditions have been examined. An enumeration of the tests applied by courts in bail matters has also been given. Moreover, this part of the book gives an appraisal of the defects in forms and modes of release, fixation of bail amount and professional sureties. The assertions are supported by the empirical findings and the case law till date. The book ends with a concluding part giving precise evaluative account of the facts identifying major defects in the system and a proposal to rebuild a new cogent bail system.

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