Chapter 13

A NEW APPROACH TO BAIL LAW : AN OUTLINE

REFORM OF the existing bail law would require enactment of a comprehensive code to replace the existing law on the subject. The proposed code must reflect the basic philosophy, utility and guidance for grant and refusal of bail. In view of the emergence of certain issues under the human rights jurisprudence, specific mention of arrangements has become necessary about dealing the cases of minors, lunatics, and those detained for preventive purposes under special laws. Procedural lucidity and comprehensiveness are wanting in the existing statutory bail scheme. The reformation of bail law must, therefore, replace this vagueness and uncertainty by clarity and coherence. Matters relating to jurisdiciton, the successive stages necessary for availing of the freedom on bail, the extent and power of various courts in their hierarchical order to grant, refuse or cancel bail, the discretion to grant bail and prescribing the prohibitions in cases where bail ought not to be granted, must be well comprehended under the scheme.

Other areas in this venture would include rationalising the basis of classifying offences into bailable and non bailable ones. Bail with or without conditions, and the guidelines to be followed for purposes of imposing conditions together with the nature and purpose thereof are also to be spelled out. The modes and forms of release will have to be rationalised, explained and streamlined, so as to enable an accused to ask for a specific form of release commensurate with his capacity and circumstances of the case. The proposed code would thus remove all confusions in the provisions relating to procedure, enforcement and appeals.

Bail may be appropriately viewed as a presumption which seeks to favour the release of an arrested person. Consequently, this would require the defendant to rebut the prosecution presumption that he may be failing to appear before the court on the appointed day or that he would commit an offence or obstruct the course of jutice by interfering with witnesses or by tampering with the evidence. Any presumption in favour of bail would, however, terminate upon conviction of the accused.

Since the basic objective of bail is not to confine any one before conviction and also to ensure attendance of the accused in the court to stand his trial, the latter can reasonably be met by constituting the default of appearance as an offence punishable by imprisonment. The use of financial bonds from the defendants or the sureties can then be abolished. A mechanism based on voluntary participation of citizens or organisations in the trial process could be given legal recognition. Such citizen or organisation can take up the responsibility of presenting an accused who has been enlarged on bail.

Indulgence can be shown to the concept of bail as a matter of right in cases where the offence charged is of non-imprisonable nature or the alleged offender, when convicted, is entitled to non-custodial punishment.

However, conditions could be imposed in such cases and their breach may make the person liable to be arrested and put into custody.

Courts should be empowered to impose reasonable conditions but these may not be statutorily listed. However, it can be provided that the conditions must have a bearing to the object and purpose of bail, *viz.*, ensuring the presence of the accused on the appointed day and that he does not obstruct the course of justice.

Two important aspects of the bail process must be taken into consideration while formulating a new bail law. They are : (i) the police power to grant bail and (ii) the police power to arrest and seek remand. In case of the former, the law may specifically provide for the grant of police bail in cases of arrest under a warrant, unless the release is imprudent on grounds that may be recorded. This principle can be made applicable to summary offences as well. The right to be bailed in the above cases may be accompanied by a police right to ask for a surety. In the latter case, where initial police arrest is either illegal or without a warrant, police request for the grant of remand should be given consideration only on the basis of the guidelines which must be legislatively provided in the code.

A number of court decisions have already crystallised the factors which are relevant to assess risks involved in releasing arrested person on bail. These factors together with other necessary ones may be catalogued to set up discrenible criteria for use by the courts while exercising their discretion.

The procedure for bail hearing needs a specific treatment. The court may be empowered to conduct any bail hearing in private. It may also be empowered to receive such information or material as may be relevant despite the question of its admissibility under the rules of evidence.

Refusal to grant bail or where the court seeks to impose conditions on the grant of bail must be followed by reasoned orders. the reconsideration of bail on successive applications at various stages should be on merits, notwithstanding the refusal of bail at an earlier stage in any other court. Judicial review for modifying or revoking a bail order of the court of first instance has to find a significant place. The right of appeal against the bail order, both by the accused and state, should also be incorporated.

The existing law on sureties is rather unsatisfactory. It is a policy issue to decide if the law on the subject is to be inter-woven around any community-based organsiation like the *Manhattan Bail Project*. In any case, the law relating to sureties must take into account the capacity, integrity and the proximity of the surety (in relation to kinship, place of residence or work, *etc.*) as well as his suitability in terms of moral worthiness. In case of individual sureties, a procedure for verification of the antecedents, capacity and their suitability shall have to be provided for. This can be a check on the growth of a clandestine channel of professional sureties. The financial capacity of the person to stand as surety need not be given a place of

primacy. However, a surety should be under a duty to ensure attendance of the accused at the appointed time and place. On breach of a condition already agreed to by a surety, the accountability should be in terms of imposing a monetary fine on him.

The foregoing suggestions merely outline an approach so that the new law on bails, could be subjected to a methodical treatment. A separate legislation is urgently needed firstly, to remove the prevailing confusion and then to lay down a sound mechanism for smooth working of the bail system. It is indeed a major task to overhaul the existing law and practice of bail. Rationalism of the law of bails requires debate and thinking on the basic premises in favour of the grant of bail with risks appurtenant to it, as well as the determining of factors relevant to assessment of risks. The stage or stages where the presumption in favour of grant of bail should cease to operate also calls for consideration. The study on the nature of bail and the mode to procure it are to be prescribed. Statutory list of conditions to be imposed rob the efficacy of bail process. Instead the matter be left largely to judicial discretion to ensure the presence of the accused, as well as the smooth functioning of the course of justice in completing the trial. In any case the practice of requiring financial bonds from arrested persons need be abolished.

Incidental to the reformation of bail law, the police power and practice of arrest also need scrutiny and review. This power also needs prescribing of civil rights action through the use of civil and criminal proceedings by the person aggrieved or the state, alongwith instituting of effective departmental proceedings.

Another major area that calls for consideration is about the surety—an important component of the bail process. The subsituting of surety by newer ventures, as disclosed by the *Manhattan Bail Project* or by the hostel system for undertrials as obtains in some Scandinavian countries, can also be taken note of for purposes of experimentation in certain cases. The duration, variation and revocation of bail order also require elaboration particularly with a view to enable a prosecutor to apply for variation of the terms of conditions of bail granted, or where the breach of or likely breach of conditions become imminent to cause difficulties for those entrusted to assist the courts of justice, in the fulfillment of their obligations to speedy trial.

The law and practice relating to remand, police bail, successive bail applications on refusal of bail, detention release of juvenile, women, sick and old persons as well as host of related matters would necessarily call for discussion, debate and reformulation of the rules. The task is extensive. It is also vital for utilitarian and civilised functioning of the adminsitration of criminal justice.

In sum, the reformulation of bail law is not a mere revision of the law. It is a prelude to any commitment to reform the administration of criminal justice. This study has shown that the law of bails contained in the

Code of Criminal Procedure remains clouded in sundry legislative provisions as well as in a plethora of judicial precedents. Obscurity pervades both. The net result is that the law lacks cogency in its understanding and application. Without having a properly organsied base of rules through the use of doctrines and principles the aberrations in the law of bails would continue. Accordingly, the reform calls for garnering total efforts. Concerned agencies of state and the government cannot ignore it for long; but prior to the undertaking of any reform it is essential that the job of systematisation and analysis is completed. These are necessary prerequisites for any effort to draft a code. Therefore, an intense debate has to precede before the new law is codified with advantage even at the cost of impairing the "rule of law" as presently assured by the existing law.